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COMMENTARY

EU's Accelerated M&A Activity in Telecom and Tech Sectors Prompts Regulatory Questions

M&A activity in the telecommunications and technology sectors is running at levels not seen since the dot-com bubble of the late 1990s. Much of the optimism stems from the rise of new communications services, such as, amongst others, Communications as a Service ("CaaS"), Voice over IP ("VoIP"), Virtual Private Networks ("VPN"), cloud computing, audio and video conferencing, Over the Top ("OTT") and Content Delivery Network ("CDN") services. The common feature of these services is the transmission of data to and from the customer and the service provider. This gives rise to the question of whether these new services are subject to telecommunications regulations, and if so, the regulatory requirements with which providers must comply.

Regulations vary from country to country, despite attempts by various international institutions—such as the International Telecommunications Union—to develop common regulatory standards. Broadly, common telecommunications regulatory issues include the following:

- Licensing or registration obligations;
- Radio spectrum holdings conditions;
- Administrative charges (including licensing or annual fees);
- Contract transparency (including tariffs, dispute resolution and termination rights);
- Traffic management requirements;
- Disabilities requirements;
- IP address assignment conditions;
- Security and interception; and
- Reselling conditions.

Historically, these restrictions applied only to public switched telephone network-based operators ("PSTN"), not to web-based services providers. However, technologies are converging, regulations are fast-changing, and the lines are increasingly blurred. Certain telecommunications regulations may apply to varying degrees to new communication services providers too, regardless of whether the underlying technology used to provide such services is PSTN or web based. For example, in the EU, any service consisting of the "conveyance of signals over an electronic communications network" would fall within the jurisdiction of the national regulatory authority of the EU Member States, regardless of who owns the underlying network.

Unlike some other regulatory systems (e.g. the US) which distinguish between wireline and wireless service, or telecommunications and information services, the EU definition of "electronic communications

network" is all encompassing and designed to capture virtually all transmission networks, regardless of the service or application running over them. In certain countries, even the provision of communications services within the same corporate entity, as opposed to the public, or reselling other providers' communications services, might trigger certain telecommunications regulatory compliance obligations.

The good news is that the basic level of regulation in most countries is relatively light, so many services providers are likely to be already compliant with the applicable regulatory requirements in their normal course of business. However, things could get more difficult following a merger or an acquisition: the combination of two previously unregulated (or partially regulated) businesses might bring the merged entity's business under the scope of telecommunications regulations or extend the scope of the applicable regulatory requirements. M&A deals are also more likely to catch the eye of national regulators, prompting questions.

What is key to any deal lawyer or integration manager is to have close at hand a record of the compliance decisions which the target or merged entity has made in the countries where it operates or intends to operate. In particular, for each country, they will need to be aware of:

- the type of service(s) provided (i.e. whether it entails the handling of signal transmission to the public or closed groups);
- the type of arrangements with local telecommunications providers (from leased lines to special access rights);
- the relevant telecommunications regulations (from licensing to tariff transparency obligations, from security to interception requirements);
- sanctions for noncompliance;
- the level of risk for noncompliance;
- the lowest common denominator for all of the applicable compliance obligations, assuming that a uniform global approach to compliance is preferable to a localized approach, which might potentially lead to monitoring and implementation problems; and
- a list of practical steps to mitigate the risks of non-compliance.

So, while regulators across the world are grappling with the challenge of how to regulate internet-based versus PSTN-based services, new communications services providers, and their advisers, should be aware of the legal risks and how to minimize them, not only during pre-merger due diligence but also at the post-merger integration stage. In order to protect your investment, it pays to understand the regulatory environment.

Lawyer Contacts

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