

A VIEW FROM NEW YORK: LAW WITHOUT BORDERS

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In an age of new technology, with the development of transnational providers and services, we need to rethink the way we have typically regulated telecoms markets. Telephony today can be achieved through a variety of technologies, including fibre optics, wireless technologies, and perhaps most importantly, from internet technologies (ie, voice over internet protocol - VOIP).

Los avances tecnológicos, con nuevos operadores y servicios transnacionales, conllevan la necesidad de repensar sobre cómo tratar los aspectos de la competencia de las concentraciones en el sector de las telecomunicaciones. El enfoque de las autoridades reguladoras en Estados Unidos de América permite las concentraciones entre dichas empresas, las cuales eran impensables por restringir sustancialmente la competencia, y considera que contribuyen a la existencia de un mercado más fuerte y con ventajas para los consumidores. La situación futura de la competencia en el mercado puede depender de que las autoridades valoren correctamente las nuevas tecnologías de modo que sólo intervengan cuando sea necesario.

The result of these changes will be an increase in the number of alternative telephony networks competing with current providers. Such rapid change requires new approaches to the analysis of the likely competitive impact of a telecommunications merger. The traditional distinctions and analysis of competitors by product and geographic market are becoming less relevant.

Surviving the US Regulatory Process

Under current US regulation, navigating the myriad of merger reviews is an expensive and time-consuming process. It is not unusual for the approval process for large telecom transactions to take a year to complete. Reviews may be required by multiple federal, state, local, and foreign authorities, and these bodies may apply different standards (which are also not always well-defined) and burdens of proof.

In addition, all telephony transactions are subject to federal review by the U.S. Department of Justice and most are also subject to Federal Communications Commission review at the federal level. Add to this reviews by state public utilities commissions (PUCs), and possibly by the State Attorney Generals at the state level, and the complexity of these transactions becomes apparent. In cablerelated transactions, local franchising authorities must also approve the transfer of control of the franchises. In transactions involving foreign assets or operations, foreign competition approvals, for example from the EU, may also be required.

Will Transatlantic Transactions Follow?

We are hoping for a new approach in the US. Mergers among major incumbent telecommunications providers which would formerly have been unthinkable as substantially lessening competition may now be seen as improving the ability of providers to compete. The completion of a number of current transactions will, therefore, help reshape the structure of the US telecommunications industry and the services provided by allowing wider sources of competition which benefit consumers. In a speech entitled Competition and the End of Geography given last year, Assistant Attorney General R. Hewitt Pate made reference to how the rapid changes in the competitive landscape may affect antitrust enforcement in telecommunications. This raises the question of whether the next wave of telecommunications transactions will transcend national or even continental boundaries. It will be interesting to see if transatlantic telecommunications transactions will follow the U.S.-centric transactions we have witnessed and whether European regulators will be receptive to taking a broader view of market definition and market trends.

In addition to competition and regulatory reviews, such transatlantic transactions could potentially raise interesting noncompetition issues, such as foreign ownership limitations, state ownership complications, the potential for national champions/state aid factors, as well as anti-takeover provisions, such as golden shares. From a competition standpoint, however, such transactions could further transform the industry and promote competition between the traditional telecommunications providers and the new technology offerings.

The future state of market competition and the availability of new services may depend on officials in both the U.S. and Europe accurately assessing the new technological and marketplace and only intervening in transactions when it is required to ensure increased competition in the long term.

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