

IP/IT LIFE SCIENCE REPORT 2011: CONNECTING ALL THE BITS (AND BYTES)

Posted on 04/07/2011



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The concerns of clients in the technology, media and telecoms (TMT) sectors as well as those across the life sciences are no different to those in the wider economy, say lawyers. There is no immunity from the downturn although certain areas of business activity are proving more resilient.

Las preocupaciones de los clientes en los sectores TMT y Sanitario son similares a las de las empresas de otros sectores. Para los despachos, ningún área de práctica es inmune a la crisis, aunque estos sectores han resultado ser más resistentes para los despachos ya que requieren un conocimiento jurídico más especializado por lo que su contribución es muy valorada.

These are however sectors in which law firms are able to build strong niches, as clients place increasing reliance on specific understanding of their own business goals and regulatory concerns. But with the convergence of technologies and platforms now the norm, regulators' attempts to legislate for it are bringing new legal challenges for businesses and law firms alike.

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in the TMT and intellectual property (IP) arenas clients have proved to be relatively resilient," says Hugo Écija, Founding Partner of Madrid-based Ecija.

Technology-led businesses are trying to innovate their way out of the downturn, say lawyers, and law firms across Spain and Portugal report consistent demand as a result of ongoing structural and legislative changes.

"In Portugal we see relative stability among the major technology and telecoms players but smaller companies are more volatile. Regulation and litigation are still stable but with the potential to grow," says Ana Teresa Pulido, Partner in the TMT practice at PLMJ in Lisbon.

The economic environment has also made clients more aware of the need to strategically manage their IP assets and to realise intangible value, say lawyers.

"Companies continue to see IP as a valuable asset that needs to be protected and enforced, but many are now focusing this protection on their core products and have more limited budgets to devote to it," says Jordi Llevat, Head of IP and IT at Cuatrecasas Gonçalves Pereira.

In recent years the World Intellectual Property Organization (WIPO) has registered a general decline in applications for international patents and brands for the first time in 30 years. Nonetheless, lawyers report that companies are placing a greater emphasis on cross-border as opposed to mere national protections.

"In the IP arena, the main pressures law firm practices face are not so much the consequence of the economic environment but more the result of the possibilities offered to rights owners to adopt transnational protection, such as the Community Trademark (CTM), Community Design and the proposed European Patent," says César Bessa Monteiro Sr, Partner with pbbr in Lisbon.



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Network growth

But across the TMT and pharmaceuticals sectors companies continue to invest in developing their infrastructures and product pipelines, say lawyers. Many are capital intensive industries and this requires significant forward planning.

In Portugal, major investments have continued to be made in expanding fibre-optic networks to

provide “superfast” broadband and sophisticated pay-TV offers. The allocation of further broadband wireless access spectrum (Wimax) and the auction of LTE (Long Term Evolution) and other “4G” mobile spectrum is expected in the autumn.

“The implementation of specific projects, including the roll-out of Wimax networks continues to encourage new investment and a certain amount of dynamism in the sector,” says Octávio Castelo Paulo, Head of the Corporate and TMT practice at Rebelo de Sousa & Advogados Associados (SRS Advogados).

The consequence of this activity is that in spite of the difficult economic climate, there has been no decrease in investment in the telecoms sector in Portugal. “But there are concerns about a reduction in consumer spending and the impact this may have on mobile and pay TV operators,” says João de Macedo Vitorino, name Partner at Macedo Vitorino & Associados.

The Memorandum that sets out the EU, ECB and IMF terms of the €78bn financial assistance package for Portugal places emphasis on further liberalisation and more effective regulation of the telecoms and media sectors, which will continue to impact the market, adds TMT specialist Luis Neto Galvão at SRS Advogados.

As an “added-value” sector TMT continues therefore to bring plenty of new opportunities for law firms, say lawyers. In the media sector, the demand to be informed and entertained remains unchanged, and increasingly across new distribution platforms.

Niche firms like Suárez de la Dehesa Abogados in Madrid are already well established, while others like Hernández-Echevarría have a growing profile.

“Those in the internet sector, for example, have suffered the crisis much less because it continues to

present new business opportunities, not only for TMT companies, but also for content providers," says Pedro Alemán, Founding Partner of another Madrid boutique, Pedro Alemán Abogados.

Legislative catch-up

Alongside structural and infrastructure changes a continued major driver of legal demand is legislative change, say some. Nonetheless the legislature and regulators continue to play "catch up" with new technologies, services and product capabilities.

Lawyers in Portugal report no substantial developments in IP legislation, which was last updated in 2008 although, in the TMT arena, April saw the publication of a new law (8/2011) transposing the EU's Audiovisual Media Services Directive, updating the Television Law, the Advertising Code and the law on radio and television public service broadcasting.

One significant area of ongoing administrative litigation has been in the pharmaceutical field, notes Pulido at PLMJ. "It would be great if the possible revision of the Transparency Directive would help to put an end to 'patent linkage' in Portugal."

This refers to the practice of linking market approval for generic medicines to the patent status of the original "innovative" product. "The issue is a live one because the relative paralysis of Portugal's courts is prompting some companies to seek new remedies to overcome ongoing patent protection barriers and, in effect, to gain market approval via the Administrative rather than Patent Courts," says Ana Falcão Afonso at Vieira de Almeida.

In Spain, the legislators have been significantly more active, say lawyers there. Although it did not meet the deadline for the transposition of the e-privacy "Cookie" Directive (Directive 2009/136/EC), plans are in place to amend domestic legislation (Portugal has been given extra time to implement the Directive given its ongoing financial and political issues).

One area of legislative change that will prompt greater activity and clarity is Spain's new Gambling Bill bringing comprehensive regulation of the sector for the first time. We finally have clarification around online gaming and advertising issues, with the first new licences being issued by the regulator, says some.

Also significant is the so-called "Ley Sinde" or "download" law which foresees the creation of a dedicated IP Commission responsible for prosecuting online copyright infringement. "Its practical consequences remain unclear but ISPs and online content providers need to carefully follow its implementation," says Pedro Alemán.

Such changes therefore represent both challenges and opportunities for companies with a strong online focus, believes Blanca Escribano at TMT and media focused UK law firm Olswang, which opened in Madrid last September. "The convergence of content platforms, and of new technologies encouraging greater multimedia use and downloads, means that companies are expanding their offerings; but they need to ensure they have the necessary structures and regulatory protections in place to do so."

The transposition of EU rules and the impact of European rulings are also hugely significant in the technology and life sciences arenas, not only in terms of adjudicating issues but also affecting competitiveness, say lawyers. A judgment by the European Court of Justice (ECJ) last October (SGAE v. Padawan) declared that the Spanish system of compensation for private copying is not in accordance with EU Law.

The movement towards a common European Patent System may be opposed by the Spanish Government, among others, for language reasons but lawyers note that they cannot reject such developments because they challenge accepted practice.

"The issues our clients face have increasingly little respect for national borders and many now are look to pre-empt cross-border risks," says Juan Manuel Rodríguez Cárcamo, Counsel with Pérez-Llorca in Madrid. Beatriz Díaz de Escauriazas, IP

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specialist at Bird & Bird agrees. "Clients want what is best for them and that resolve their business problems they are not interested in how such developments affect lawyers' practices!" Others however question the practical impact of greater EU-wide protection. "I don't believe that we will see fundamental changes. Clients are not going to stop seeking national protections or to litigate in individual markets. In the pharmaceutical sector, for example, each country brings its own opportunities," says Eduardo Castillo, Partner with Gómez-Acebo & Pombo in Madrid.

Regulatory understanding

The convergence of media and telecoms and other platforms and the bundling of content services do not only however present challenges to businesses they also present recurring issues for regulators, say lawyers in both Spain and Portugal.

"The regional and national regulators are not aware of the real needs of clients' business sectors. This is a problem that the Portuguese Government has to solve," says Leonor Chastre, Head of IP at Abreu Advogados.

Portugal's disparate regulatory bodies may seek to avoid overlapping responsibility, but companies are now increasingly willing to challenge regulatory and marketing authorisation rulings before the courts.

"We have seen some high profile judgments that have been heavily critical of the regulators' positions," says Vasco Stilwell d'Andrade, Counsel with Morais Leitão, Galvão Teles, Soares da Silva & Associados.

The issue in Spain is compounded by the overlapping remits of regional and national regulatory bodies. But while areas such as online gaming may now be better regulated, bringing greater clarity to both operators and users, other areas remain in limbo. "Specifically, the social media sector has emerged as a new phenomenon generating a significant number of issues," says Álvaro Écija, co-Founding Partner of Ecija.

Judicial review

The challenges that surround social networks are however connected to rising concerns over data protection, say some. "Businesses increasingly depend on the continuous use of ICT in practically all sectors and this has entailed a sharp growth in the collection, use and retention of personal data," says Ainhoa Veiga, Partner with Araoz & Rueda in Madrid.

Spain's Data Protection laws may be among the most stringent in Europe, and presents competitive barriers say some, but new issues continue to emerge, including geolocation and navigation information collected from mobile devices. "Social networking sites are receiving more and more claims from Spanish users, for identity theft, disclosure of personal information by third parties and the publication of offensive and defamatory information on public profiles," says Judit Barnola, IP and IT specialist with Osborne Clarke in Barcelona.



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The ability of the courts to understand specific business models and to resolve issues with sufficient clarity is also an area of concern. "In our opinion there may be enough regulatory coordination but we still wish for more decisive and ambitious legislation in general and a faster

reaction from courts," says Anna Viladàs Jené, Partner with Roca Junyent in Barcelona.

Some report that companies are increasingly willing to explore alternative dispute resolution mechanisms or to sidestep the courts altogether. "We see more litigation but clients are not going to court just for the sake of it. They are well aware of the costs involved and so we are also seeing a greater use of pre-claim analysis and inevitably a readiness to negotiate," says Cárcamo at Pérez-Llorca.

The potential for delay, particularly in the Madrid courts, is also prompting clients to pursue actions outside the capital, note some. "We have had instances where it has been difficult to explain to

international clients some of the specificities of the Spanish system. And in some respects clients are justifiably afraid of becoming drawn into litigation and finding themselves in judicial limbo," says Marta Delgado, Counsel at Jones Day in Madrid.

In Portugal, the issue is even more acute. A dedicated IP arbitration forum ARBITRARE has been in operation since 2009 although many question its effectiveness. "Developments that we see as positive measures are the possibility to present applications for international brands through the online services of the IP Portuguese Institute," explains Rita Ferreira, Lawyer with Raposo Bernardo in Lisbon.

Plans are however near completion for a dedicated Portuguese IP Court, a process that has been ongoing since 2008. "The creation of an IP Court may represent an improvement in the enforcement of IP rights if adequately implemented, however, the choice of Santarém, 90km away from Lisbon, as its location has raised criticism and concern," says Bessa Monteiro of pbbr.

In spite of the strength of the domestic legislation inefficiency in the court system reduces rights holders' legal protection and installs a sense of impunity for infringers, says Manuel Lopes Rocha at PLMJ. "The creation of specialised courts is an important step but other instruments, such as a more agile objective ruling system, should definitely be implemented as well as ensuring stronger protections for fundamental rights in order to encourage more solid economic foundations."

As well as in the life sciences sector, litigation is increasingly used as a strategic tool by TMT clients, say lawyers. "What is clearly evident in the media sector, in a sense paradoxically, is that the downturn in advertising revenues seems to be making companies more aggressive towards the restrictive practices by competitors," says Rui Simões, Partner with Lisbon's Sérvulo.

Firms' challenge remains therefore to keep up with their clients as they both evolve and innovate. In order to help clients understand the full value or opportunities available lawyers need therefore to offer more than reactive advice. "We have to engage in a process of 'legal engineering' to give something that may be vague or intangible a structure that can then be protected and commercialised," says João Paulo Miranda de Sousa, Head of IP at Garrigues.

Medical expertise

A sector in which law firms are increasingly looking to develop and demonstrate deep expertise is life sciences.

"Firms who operate in area are not and cannot be immune to the situation which clients are undergoing," says Jordi Faus, Partner at Faus & Moliner, one of Barcelona's leading industry regulatory firms alongside Jausàs.

Pharmaceutical companies may be less affected by economic trends but the prevailing austerity measures of the Spanish and Portuguese Governments is having an impact – as reduced health budgets favour cheaper generic drugs and treatments. Players are therefore becoming much more aggressive in protecting market shares and ensuring patent exclusivity, say lawyers.

"Intellectual property litigation, especially patent litigation, has not only increased but has become more sophisticated," says José Massaguer, Partner with Uría Menéndez in Madrid. "Only those lawyers with sufficient know-how, a thorough and technical understanding of the case law, as well as practical experience are in a position to meet these high standards."

According to fellow Partner Ingrid Pi: "In the current scenario lawyers not only need the finest legal background but they also require extensive knowledge of other related fields, such as regulatory, in order to design complex client-specific strategies to protect the clients' interests under any circumstances."

Despite the size of the consumer market In Portugal, contentious issues have also become more sensitive. "Portugal was once considered a minor territory by many pharma companies but a number of adverse judicial decisions, and the ability of competitors to leverage the results elsewhere into the EU, has meant that when it comes to strategic issues companies are now more willing to fight," says Ana Falcão Afonso at Vieira de Almeida.

The Health sector is among those experiencing budgetary cuts as the Government seeks to better manage its finances budget, says Cesar Sá Esteves, Partner with SRS Advogados. "During 2010 State reimbursed medicinal products have been compelled to decrease their prices twice, while in March 2011 the Government also suspended the annual prices revision."

The reform Memorandum presented by the EU, ECB and IMF also states that the price of the first generic products introduced in the market must decrease so that it corresponds to 60 percent of the price of the reference "brand" medicine, presently 65 percent – cuts that will negatively affect clients and create instability to their business, adds fellow Partner Ana Menéres.

Nonetheless, the reform measures are not all negative, she insists. "The Government also has to set an ambitious timetable to clear all payment arrears. If this measure is effectively implemented it will be very positive. Presently public Hospitals owe the pharmaceutical industry more than €1bn."