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FOREIGN INVESTMENT ALERT

TELECOM DEALS WITH RUSSIA IN THE SANCTIONS ERA

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Foreign Investment Alert[1]

"Negotiable Hostilities: Doing Telecom Deals with Russia in the Sanctions Era"

I. Overview

In a recent interview,[2] French President Emmanuel Macron recommended eventual rapprochement with Russia to his European Union ("EU") peers, a policy he believes necessary for the Continent's long term survival. Reaching it could take a decade, said President Macron, but failing to do so would be a "huge mistake."

We agree. It is an ancient maxim that free trade among nations promotes peace.[3] Since March, 2014,[4] investment transactions between Russia and western nations have been overshadowed by these economic and financial sanctions, originally imposed by U.S. and EU governments in response to the hostilities among Russia, the Crimea, and the Ukraine. In a continuing escalation, Russia has responded with countersanctions while, among other action, the U.S. has tightened regulations on foreign investment through the Foreign Investment Risk Review Modernization Act of 2018.[5] The détente envisioned by the French President would no doubt spur cross-border investment, but the "sanctions" regime would for now continue.

So if Europe were to eventually resume traditional commercial dealings with Russia, would the U.S. do likewise? Perhaps. But doing business with would-be Russian investors in the current geopolitical climate is not easy and, even if Macron's realpolitik is accepted, the sanctions' era will not end for some time.

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[1] While accurate to the best of our knowledge, this discussion is for tutorial purposes only, is neither a legal opinion nor legal advice. Please contact us if you have any questions regarding this disclaimer.
[2] The Economist, Nov. 9 – 15, 2019, pp. 18-20.
[3] See generally, D. Griswold, "Peace on Earth, Free Trade for Men," Commentary, Dec. 31, 1998, Cato Institute, Washington, D.C., https://www.cato.org/publications/commentary/peace-earth-free-trade-men.
[4] https://www.rferl.org/a/russia-sanctions-timeline/29477179.html.
[5] This legislation ("FIRRMA") has expanded the scope and jurisdiction of the Committee on Foreign Investment in the U.S. (CFIUS) in review of foreign investment transactions raising national security concerns.

Ironically, these hurdles come at a time when investment opportunities in European and U.S. telecommunications markets, notably those associated with new wireless technology known as "5-G," are expected to explode, reaching, by some accounts, as much as $325 Billion worldwide by 2025.[6] Much of that investment will flow to the U.S., the global leader, according to the Federal Communications Commission ("FCC"),[7] in 5-G development. Foreign investment in these opportunities is certainly possible, the pending merger of T-Mobile / Sprint (respectively owned by German and Japanese companies) being a recent example.

That brings us to the topic of this alert: whether Russian investment in U.S. wireless and other telecom markets in the current geopolitical hostile climate is doable. As discussed in our Firm publication, *Investment in Wireless Infrastructure*[8] – with limitations and under a carefully crafted transactional structure - we believe that it is. The hostilities aside, cross-border investment deals with Russia are still negotiable. This alert also serves as an introduction to our webinar on this topic, sponsored by Thomson Reuters, *"Negotiable Hostilities: Doing Telecom Deals with Russia in the Sanctions Era"* available soon.[9] The webinar includes a detailed review of the following topics:

1. Foreign ownership restrictions on foreign investment in U.S. telecommunications and wireless infrastructure: FCC entry, radio licensing, and other regulations.

2. Expanded investment scrutiny on foreign investment under statutory amendments to CFIUS (FIRRMA regulations) as well as the Foreign Agency Registration Act (FARA): implications for Russian investment transactions.

3. Sanctions and countersanctions; cross-border money transfer regulations under the Financial Crimes Enforcement Network (FINCEN), money transmitter laws under U.S. state laws and foreign jurisdictions.

4. "What is permitted; what is not;" navigating foreign ownership restrictions on U.S. telecom assets deal points, investment protection, and deal structures – including the importance of securing "no action" confirmation from U.S. regulators.

5. Round-table discussion on investment opportunities, geopolitical considerations, and takeaways for Russian investors and their counsel (both in the U.S. and abroad).

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[6] https://www.forbes.com/sites/patrickmoorhead/2018/02/22/5g-set-to-massively-boost-it-infrastructure-spending-of-326b-by-2025/#7a6007f02805.

[7] https://docs.fcc.gov/public/attachments/DOC-356317A1.pdf (Remarks of FCC Commissioner Brendan Carr at the Mobile World Congress – Barcelona, February 25, 2019).

[8] The entire publication is available upon request at nbilodeau@wstelecomlaw.com.

[9] The webinar, *"Negotiating Hostilities Doing Telecom Deals with Russia in the Sanctions Era,"* is sponsored by Thomson Reuters and moderated by Walt Sapronov, Esq. and Paul Kouroupas (Sapronov & Associates, P.C.). Speakers include Daniel B. Pickard, Esq. (Wiley Rein, LLP), James Kevin Wholey, Esq. (Phillips Lytle, LLP), Alla Naglis, Esq. (King & Spalding), and Maxim Khlopotin, Esq. (Sapronov & Associates, P.C.).

In preparation and as background "reading material" for the webinar, here is a brief overview of U.S. domestic regulatory barriers to foreign investment in telecommunications and wireless infrastructure.

Meanwhile, we also take this opportunity to announce the opening of our new office in Moscow, Russia, as of the beginning of 2020. Please do not hesitate to contact us if you have questions or wish additional details.

II. Foreign Investment Opportunities in U.S. Telecommunications and Wireless Infrastructure

The anticipated development of wireless fifth generation ("5-G") infrastructure is a priority for telecommunications carriers, equipment manufacturers, and other wireless technology vendors, as well as for policymakers and regulators. As 5-G technology evolves, there is expected to be increased demand for cell sites to support the infrastructure needed to carry wireless signals.

This infrastructure generally consists of radios, radio spectrum, fiber, roof tops, towers, poles (and pole attachment rights), data centers, and network facilities – all located on public and private property. Public property owners are typically municipalities that own public right-of-way that house utility poles and conduit for fiber-optic telephone lines. Private property owners are typically landlords that enter into long term leases, easements or other contracts with telecommunications carriers for use of their property for placement of the carrier's towers, radios, antennas, and other wireless devices.

The build-out of 5-G networks is expected to require huge investment – by some estimates, $225 Billion between 2019 and 2025. These include strategic investments in telecommunications carriers and other operators, wireless and wireline, as well as financial investments in 5-G infrastructure. Opportunities also may arise in merger and acquisition ("M&A") transactions, as well as in debt and equity financing for 5-G and other network buildouts. Such financing arrangements include vendor financing, loan syndication, high-yield debt and, of course, traditional venture capital and other "start-up" funding.

III. Regulatory Complications

A hurdle facing telecom investors is the complex U.S. regulatory environment, with federal, state and local authorities exercising overlapping jurisdiction over wireline and wireless telecommunications. Regulatory approval is often required not just for carrier M&A, but in the case of telecom investors, for control transfers, assignments, debt incurrence, securities issuances, and foreclosure remedies - all potentially applicable to telecom investment deals.

Control transfer regulations are especially noteworthy. Regulatory approvals may be required, for example, for exercise of default remedies in financing transactions secured by regulated assets. Security interests in some types of collateral (*e.g.*, FCC radio licenses) are prohibited altogether. Some state regulations may require prior approval for issuance of debt or equity securities by regulated entities or prohibit encumbrance of state entry certification. State or local regulations in some jurisdictions may restrict the assignment of cable or telecom franchise agreements or of access rights to pole attachments, rights of way, or other infrastructure.

Such regulations can complicate or delay investment transactions, at times requiring prior transactional approval from the FCC or state regulators, use of special purpose entities to hold spectrum licenses, or reduced lender deal protection.

For example, applicable law generally permits an investor to take a security interests in proceeds of an FCC license sale but not the license itself; but whether the lender could perfect its interest in proceeds of a satellite (C-Band) license is unclear.[10] Further, in some states, assignment restrictions on access or use of regulated infrastructure (or third party landlord consents for colocation rights) may preclude the grant or perfection of security interest in a telecom borrower's collateral under a credit facility. Finance transactions involving such regulated assets may thus require a "no consent required" or similar opinion as closing deliverable (an often unanticipated exercise requiring last minute negotiations).[11] Control transfer regulations may also complicate inter-creditor or subordinated debt transactions with involving regulated borrowers or issuers: for instance, in some jurisdictions, the issuance of subordinated, unsecured debt perhaps may not require regulatory approval, whereas senior secured or bank debt might – at least in the exercise of foreclosure remedies.

Here is a brief sketch of domestic control transfer regulations required for investment in U.S. telecommunications or wireless carriers.

1. <u>Generally</u>. Federal entry and exit regulations under the Federal Telecommunications Act are codified at 47 U.S.C. §214 and enforced by the FCC. Entry regulations apply to both strategic investors[12] (*e.g.*, in a merger or acquisition) and financial investors in any telecommunications carrier (where the investment results in a control transfer). Approval is required for control of both domestic and international ("International 214") services, with the latter applying to any telecommunications facility capable of international transmission. Where uncontroversial, eligible for streamlined processing with automatic approval upon 14 days' public notice. Broadband services (Internet access) services are currently treated as unregulated "information services," an FCC decision made under Republican Chairman Pai's leadership (so-called

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[10] See https://www.fiercewireless.com/wireless/dish-should-be-able-to-keep-proceeds-if-it-sells-spectrum-licenses-analyst.

[11] *See generally*, C. E.C. Paris, DRAFTING FOR CORPORATE FINANCE, Second Edition (2014), Practicing law Institute, Section 9.9 (Opinions) (keeping in mind that the protection given by the opinion is a right to sue the opinion giver). *See also*, J.C. Quale, B.D. Weimer, "Legal Opinions in Corporate Transactions Affected by FCC Regulation", Federal Communications Law Journal May 1999, Volume 51, Number 3.

[12] A discussion of the complex regulatory requirements for telecommunications mergers and acquisitions is beyond the scope of this brief outline. *See generally*, H. Chatzinoff, H. Saferstein, W. Sapronov, <u>Telecommunications Deals, M&A, Regulatory and Financing Issues</u>, New York, Practicing Law Institute, 1999 (available at https://www.worldcat.org/title/telecommunications-deals-m-a-regulatory-financing-issues/oclc/742572796?referer=di&ht=edition).

"Internet Freedom Order") that is pending en banc review in the D.C. Circuit Court of Appeals.[13]

2. Wireless Licenses. Investment in a wireless carrier generally requires FCC approval under "Title III" of the Communications Act. Approval is required for both wireless license assignment and direct or indirect control (*e.g.*, through stock purchase) of a wireless "licensee." Grant of a security interest in a wireless license, as indicated, is prohibited or unenforceable. Control transfers typically follow a purchase or acquisition (de jure) or, in some circumstances, can be inadvertent and fact driven (de facto) based on indicia recognized by case law.[14] To avoid the uncertainty of de facto control transfers, wireless control transferees can make use of the FCC's spectrum leasing rules, essentially perfecting a leasehold interest in the licensee's spectrum under a spectrum manager or de facto transfer lease).

3. State Public Utility Commissions. To varying degrees, exercise jurisdiction over control transfers, certificate transfers, and (occasionally) stock and debt issuances by regulated telecommunications companies. Under the Federal Telecommunications Act,[15] state telecommunications entry barriers are largely preempted – as is state entry or rate regulation of wireless (commercial mobile services) services - but other state utility regulations are not. Control transfer approvals vary by state, some requiring a hearing, others mere notice.

   Many states have deregulated broadband service. State approvals for wireless financing transactions (*e.g.*, loan covenants, security instruments) vary by state. Finally, following the D.C. Circuit's partial remand of the FCC's Internet Freedom Order, some states are adopting their own "net neutrality" regulations – thereby expanding the regulatory review required for broadband investment.

4. Local Franchise, Zoning and Siting Regulations. Various municipal or local authorities regulate use of public rights-of-way and pole attachment (for example, for deployment of fiber optic cable) by, for example, cable companies and telecommunications carriers (CLECs) through franchise authority. Typically, this takes the form of a franchise agreement (offering requiring an ordinance or other local approval) with fees customarily assessed at 3-5 percent of revenues for cable or telecommunications franchises respectively. Following the FCC's video reform regulations, many states have adopted state-wide franchises, thus simplifying the

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[13] *Mozilla Corporation v. Federal Communications Commission, et al.*, No. 18-1051 (D.C. Cir.) (Oct. 1, 2019) (reversing in part the Obama Administration's "Net Neutrality" Rules). For a detailed review of the net neutrality controversy, see Thomson Reuters webinar, "Overview of the Restoring Internet Freedom Order," available at http://westlegaledcenter.com/program_guide/course_detail.jsf?videoCourseId=100204569&ADMIN_PREVIEW=true.

[14] *See e.g.*, Applications for Microwave Transfers to Teleprompter Approved with Warning; Non-broadcast and General Action Report No. 1142, Public Notice (by the Commission en banc), 12 FCC 2d 559, 559–60 (1963) subsequent history omitted).

[15] 47 U.S.C. §253(a) (broadly prohibiting state or local statutes, regulations or legal requirements from prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service); 47 U.S.C. § 332(c)(3).

process and obviating the need to seek franchise approval from each municipality. Franchisee control transfer requirements (and related assignment prohibitions) – whether for financing or otherwise – will be determined by the language of the franchise agreement. Local entry barriers to deployment of wireless and other broadband infrastructure is a controversial issue, made complicated by a recent FCC preemption order seeking to preempt local entry barriers to broadband deployment.[16] Litigation over zoning regulations that impede with wireless siting, antenna placement or pole attachments by wireless providers is commonplace – and zoning authorities can be aggressive in varying degrees among different localities.

IV. FCC and State Foreign Ownership Regulations

For foreign telecom investors, there are still more hurdles, including foreign ownership restrictions on radio spectrum, U.S. homeland security requirements, cross-border privacy rules, and Congressional oversight, such as the Committee on Foreign Investment in the U.S. ("CFIUS"). In some foreign jurisdictions, especially in Russia, Eastern Europe, and the Middle East, the current geopolitical climate exacerbates these concerns.

1. FCC Regulation – Foreign Ownership or Control Transfer. Russian investors seeking control transfer authority over FCC regulated carriers can expect to undergo expanded "International 214" (47 U.S.C. § 214) scrutiny on foreign ownership of common carrier facilities. The review will almost certainly not be "streamlined" under the 14 day notice period but will undergo multi-agency ("Team Telecom") review. This expanded review includes that of the FCC, Justice Department (DOJ), the Department of Homeland Security, and the FBI.

There are statutory prohibitions on direct or indirect foreign ownership of wireless spectrum (47 USC §310(d)): that of a licensee may not exceed 20%. The FCC has statutory authority to limit foreign ownership of a licensee's direct or indirect owners to 25% if doing so is in the public interest.

2. State and Local Entry Regulation of Foreign Telecoms Ownership. As indicated, state entry regulation of telecommunications carrier (foreign or otherwise) is largely preempted and many foreign carriers operate in the U.S. through domestic affiliates. States do retain "police powers," local rights-of-way authority, and other authority finance regulations vary by state. That said, economic investment (again, whether foreign or otherwise) – especially in rural areas – is often encouraged.

V. Other Foreign Ownership Barriers to U.S. Telecom Investments

Finally, there are a host of other foreign ownership barriers to foreign investment in U.S. infrastructure. Russian investors can expect to see full scrutiny here including:

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[16] *In re: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, etc.*, Third Report and Order and Declaratory Ruling, WC Docket Nos. 17-84, 17-79 (Rel. Aug. 3, 2018).

1. Expanded investment scrutiny on foreign investment under statutory amendments to CFIUS (FIRRMA regulations);
2. Foreign Agency Registration Act (FARA);
3. Cross-border money transfer regulations; both federal – Financial Crimes Enforcement Network (FINCEN) regulations (including “knowing your customer” (KYC) and state money transmitter laws.

Importantly, failure to comply with these regulations can trigger draconian penalties. There are ways, however, to secure governmental confirmation regarding such compliance, a very important topic that will be discussed during our webinar.

Please do not hesitate to contact us if you have any questions, or would like further information.