



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

www.aija.org

Sector specific M&A on the rise
Valbella, Switzerland 22.01.2018



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

Tech M&A – the challenges of inter alia the cloud, SaaS, IoT, M2M





INTRODUCTION

ASSOCIATION OF
JUNIOR LAWYERS

Jérôme DEBRAS

Attorney at the Paris Bar

Solicitor of the Supreme Court (England & Wales)

JDLAW

12 rue du Faubourg Saint-Honoré
F-75008 Paris, FRANCE

Tel: + 33 (0) 1 84 79 43 99

debras@jdlaw.fr





INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

Gian-Andrea Caprez, LL.M.
VISCHER AG
Switzerland
gcaprez@vischer.com / +41 58 211 34 27





INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS



Christian Sauer

Partner

Franklin, France

T. +33 (0)1 45 02 79 00

csauer@franklin-paris.com



www.aija.org



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS



Joni Painilainen
PricewaterhouseCoopers Oy, Finland
joni.painilainen@fi.pwc.com
+358 400 866 070



www.aija.org



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

Overview on Tech M&A

Gian-Andrea Caprez, LL.M.
VISCHER AG, Zurich



www.aija.org

1. Introduction

- Tech isn't just for tech companies anymore. Nearly every industry has been affected by digital and mobile technology
 - Approx. 70% of all tech deals in 2016 involved buyers from outside the tech sector
- High tech deals represented almost 30% of the total USD 2.5 trillion M&A transactions in 2016
- Broad buyer universe (including corporate venture funds)
- Different fields with different legal issues
 - IoT / Big Data / SaaS
 - Robotics / Artificial Intelligence
 - Software / Telecom / Gaming / Telemedicine

1. Introduction

- Why do technology buyers buy?
 - Acquire a key technology without the R&D investment and time to market
→ close innovation gaps
 - Eliminate a competitor or acquire control of a competing technology
 - Hire scarce talent and know how (human capital)
 - Access to data (e.g. consumer data, user data)
- What do they actually target to buy?
 - «Hard» intellectual property rights (= protected by registered rights such as e.g. patents & trademarks)
 - Human Capital → know how

2. Deal Structure

- Deal structure for tech deals
 - Share Deal
 - Technology and other assets (e.g. IP rights) transfer automatically
 - Automatic transfer of important agreements (e.g. with customers and licencees) (but: CoC-clauses) and employees
 - Asset Deal
 - Cherry picking possible, i.e. acquisition of specific assets only
- Purchase price mechanism for tech deals
 - Earn out or other deferred payment mechanism if parties cannot agree on valuation
- Alternative to M&A deal: License / technology transfer

3. Due Dilligence

- Key assets in most tech deals
 - IP / Know how (not only registered IP rights, but also know how and innovative business ideas, such as processes, automatization etc.)
 - Data
- IP / Know how
 - Ownership of IP rights / valid license to use IP rights
 - Has IP / know how been validly transferred from employees/consultants?
 - CoC clauses in license agreements? Restrictions of use in license agreements?
 - Protection of business secrets / know how?
 - Non-compete and confidentiality clauses in employment agreements?
 - Infringements of IP rights

3. Due Dilligence

- IP / know how (cont'd)
 - Funding of technology by public entity (e.g. university): implications?
- In case of confidential IP / know how:
 - Consider a clean team approach for DD
- Software
 - Use of open source software: If target software includes open source software components, the entire software of the target may be subject to free user rights («copyleft»)
 - Open Source Diligence may be necessary

3. Due Dilligence

- Data Privacy
 - Particularly relevant in Big Data, SaaS and cloud computing deals and in any industry/business that collects data
 - Enforcement is increasing / Reputational risk of breach can be severe
 - Key DD issues
 - What type of sensitive information does the target have? Who has the right to use the data?
 - Compliance with data privacy laws?
 - Data transfers abroad?
 - Does the target have essential policies? Are they complied with?
 - Ongoing procedures with authorities?

4. Retention of Key Employees

- Human Capital / Knowhow as key factor (not only the «hard» IP rights)
- Retention measures:
 - Salary increase
 - Retention bonus
 - Equity participation (shares/options) / equity rollover
- Consider entering into new employment agreements with key employees
 - IP assignment clause
 - Non-compete / non-solicitation / confidentiality obligations

5. Heavily Negotiated Tech M&A Deal Points

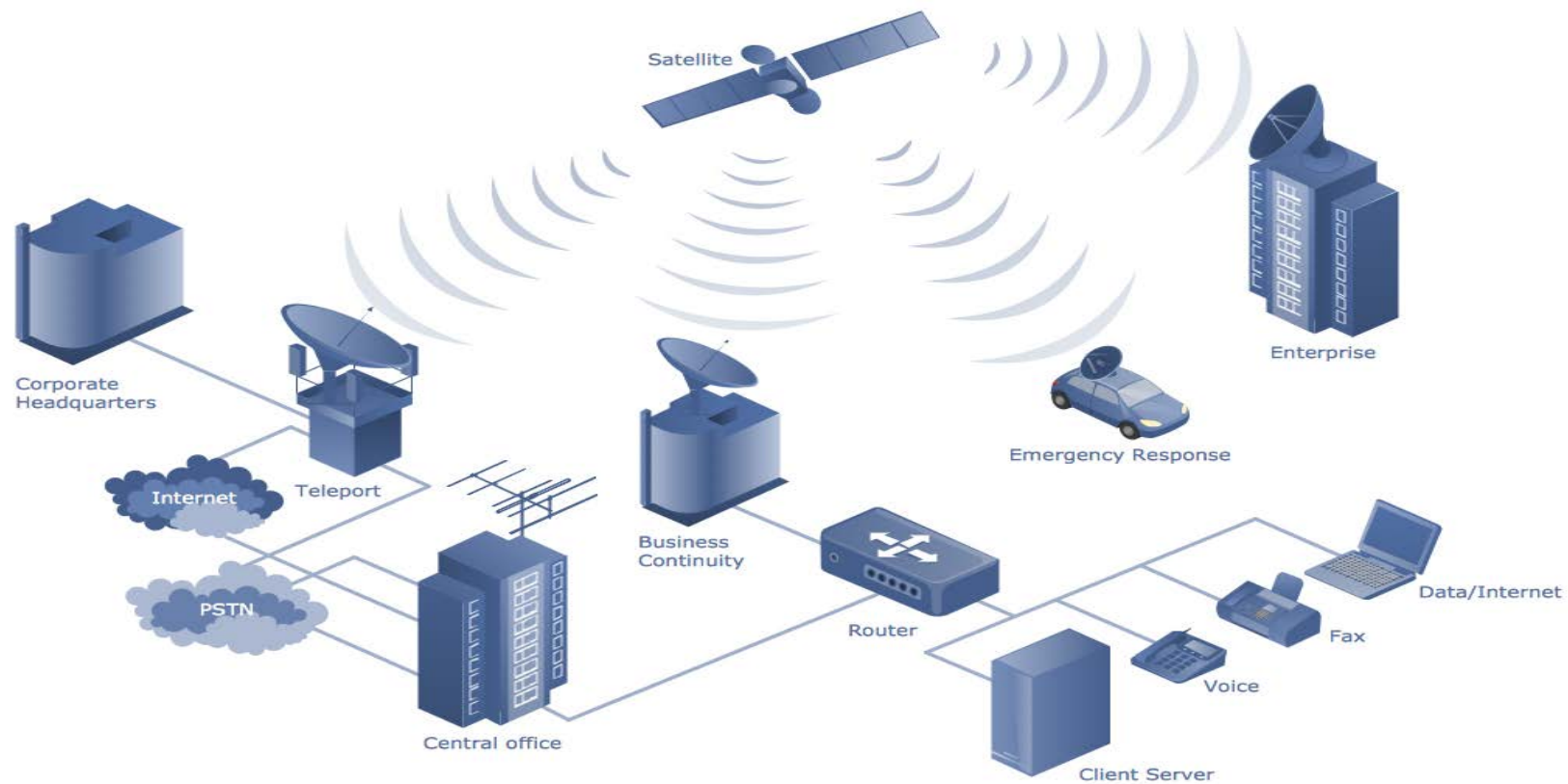
- Reps/warranties
 - Knowledge qualifiers in IP reps (e.g. re infringement of IP rights)
 - Statute of limitations in IP reps (fundamental rep?)
- Indemnities for high risk areas / disclosed risks (e.g. data privacy, cyber security)
- Earnout provisions
 - Details of calculation of earnout (e.g. which positions are relevant for EBITDA)
 - Restricted actions of buyer during earnout period
- Non-Compete Clauses
 - Duration / Geographic scope

Telecom: a highly regulated sector

- Operator status: by prior declaration
 - (i) operating an electronic communications network or providing electronic communications services and
 - (ii) open to the public
- Status grants specific rights and obligations:

<u>Rights</u>	<u>Obligations</u>
<ul style="list-style-type: none">• Network installation: rights of way and asements	<ul style="list-style-type: none">• Call termination, number portability, emergency numbers
<ul style="list-style-type: none">• Re other operators: local loop access and interconnection	<ul style="list-style-type: none">• Coverage/ quality obligations
<ul style="list-style-type: none">• Rare ressources: frequencies and numbering rights	<ul style="list-style-type: none">• Fees and taxes

From space to undersea



Telecom: a highly regulated sector

- Regulated assets and contracts / specific agreements:
 - Frequencies
 - Antennas re emissions
 - Certain telecom servers require prior regulatory approval
 - Regulated inter-operator agreements and catalogue requirements
 - Network installation / occupancy rights and rights of way
 - Public networks operated by private operators
 - Long term leases / IRU agreements / submarine cables / satellite
 - Infrastructure or frequency sharing/hosting with other operators
 - Virtual operators
- High Capex (network installation and upgrade) and Opex (maintenance and customer service)
- Plus: Distribution chain (shops and online), IT licenses ...

Telecom sector: transactional points

1. Due diligence:

- Status and compliance (operator, frequencies etc.)
- Regulated agreements
- Transferability of assets (rights, sites, infrastructures, equipment) and agreements (network agreements)
- Revenues: B2B / B2C / whole-sale – post-paid / pre-paid
- Costs: network deployment, operation (including leased capacities) and maintenance – long term undertakings?

Telecom sector: transactional points

2. Covenants:

- Capex undertakings
- Frequency auctions
- Continued compliance
- No modification of offers

3. Specific representation and warranties:

- Compliance: operator and frequencies (including fees), personal data
- Network and equipment, IT system
- Validity/ disclosure of major client, network and supplier contracts
- Number of subscribers / churn
- Average revenue per subscriber

Telecom sector: transactional points

4. Conditions precedent:

➤ Regulatory approval

- In France, no prior approval from Telecom Regulator (*ARCEP*) required in the event of a change of control
- Transfer of frequencies requires regulatory approval (*ARCEP*)
- Antitrust
- Other: media, foreign investment...

➤ Third party consent:

- Public entities re rights of ways, preemptive rights on sites, operation of public networks
- Other operators, site lessors, network operators, major clients and suppliers

Telecom sector: transactional points

5. Transfer mechanics:

- Asset deal requires precise transfer planning re network architecture (uninstall / install)
- SIM cards exchange / frequencies
- IT/ subscriber data
- Transitional services: from seller and from seller's group suppliers (maintain or terminate)

6. Indemnities:

- Breach of R&W
- Specific indemnities: loss of network, frequencies, subscriber base...

Telecom sector: transactional points

7. Ancillary activities to watch out for:

- Media content (TV, VoD)
- Cloud storage
- Online-banking and payment tools
- ...



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

M&A in the games industry in Finland

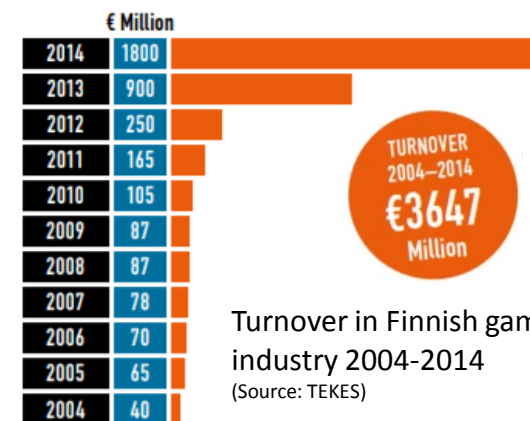
Joni Painilainen
Partner, M&A Legal
PwC Finland



www.aija.org

Overview of the games industry in Finland

- Global industry: 90% of players non-Finnish
- Lucrative but volatile industry
- Video and mobile games still the core business but new technologies offer new opportunities
- Recent transactions
 - M&A: Sale of 84% in Supercell to Tencent (China) for USD 8.6 billion (2016)
 - IPO: Rovio Entertainment, Nasdaq Helsinki (2017), IPO market cap EUR 900 million
 - IPO: Remedy Entertainment, First North Helsinki (2017), IPO m. cap EUR 64 million
 - IPO: Next Games, First North Helsinki (2017), IPO market cap EUR 140 million



(Source: Supercell)

Legal considerations of games transactions



(Source: Rovio Entertainment)



(Source: Remedy Entertainment)



(Source: Next Games)

- Games are very IP-intensive
 - Source code a literary work → copyright
 - Names, characters etc. → trademark
- Key employees critical to business
 - In LDD phase make sure
 1. IP of the target is sufficiently protected
 2. IP of the target is transferred from employees and third parties to the target
 3. key employees are properly incentivised
 - In drafting phase aim for
 - extensive R&W by the seller
 - support from seller in case any IP needs to be transferred or registered post-closing