

Communications Law

March 15, 2012

Government Announces Liberalisation of Foreign Investment Restrictions for Smaller Telecoms, Auction Rules for 700 MHz Spectrum

Introduction

Two years after first holding out the possibility of loosening the restrictions on foreign investment in telecommunications companies (the “Restrictions”), on Wednesday March 14, 2012 Stephen Harper’s Conservative government announced that it will amend legislation to lift the Restrictions for smaller companies.

Changes to the Restrictions were announced in connection with upcoming auctions of radio spectrum, under the rubric of providing Canadian families “with more choices at low prices for wireless services.” The Honourable Christian Paradis, Minister of Industry, announced a package of major regulatory changes to the Canadian telecommunications market:

- The Telecommunications Act will be amended to lift foreign investment restrictions for telecom companies that hold less than a 10-percent share of the total Canadian telecommunications market.
- Auction of attractive spectrum in the 700 MHz range is set to take place in the first half of 2013 and will include a spectrum cap, as well as specific measures to see that rural Canadians will have access to the same advanced services as others, in a timely manner. A portion of this spectrum will also be reserved for public safety users such as police and firefighters.
- In order to slow the proliferation of cell-phone towers, the existing policy on roaming and tower sharing will be extended.
- A spectrum cap will also be applied to the upcoming auction of spectrum in the 2500 MHz range.

Policy a Long Time in the Making

Pressure has been mounting for years to liberalise Canada’s telecommunications ownership regime, which places limits on foreign investment in facilities-based “telecommunications common carriers”, including traditional telephone companies, wireless providers and cable companies. The Restrictions currently require carriers to be Canadian owned and controlled, restrict foreign investors to a 46.7% direct and indirect voting interest, and limit non-Canadians’ ability to exercise “control in fact”. Canada’s rules had come under particularly heavy scrutiny since the Canadian Radio-television and Telecommunications Commission, the Government and the Courts came to conflicting conclusions regarding the status of Wind Mobile, a mobile new entrant.

Following the 2010 Speech from the Throne, the government liberalised ownership of Canadian satellites and consulted on a number of potential measures to lift the Restrictions more broadly. Stakeholders were divided on which of the government’s three options – raising the limit to a 49% voting interest, lifting the restrictions for only smaller players and full liberalisation – should be adopted. Predictably, given the consolidation and convergence that has overtaken the telecommunications and broadcasting industries both internationally and domestically, questions were also raised about lifting the Restrictions for telecom carriers while leaving them in place for broadcasting distribution undertakings such as cable television and the telcos’ IPTV businesses.

The Known and the Unknown

Ultimately, the government delayed its decision regarding the Restrictions so that it could announce it in tandem with its decisions regarding the rules for the much awaited 700 MHz auction. However, in contrast to the rules for the upcoming 700 MHz auction, which are set out in a detailed policy document, the specifics of the announced liberalisation of the Restrictions were left for another day. Here’s what we do know, what we don’t yet know and what we can infer from the government’s announcement:

We do know that existing restrictions will only be lifted for smaller players – those with less than a 10% share of the total telecommunications market. We don’t yet

Goodmans^{LLP} Update

know precisely how that will be measured, however, including such details as whether the total market will include the wireless, wireline and Internet access services.

We do know that the Restrictions are not being lifted for broadcasting distributors. This means that a converged communications entity would have to restructure in order to take advantage of the increased access to capital available to its telecommunications arm. We can presume that the change is not restricted to wireless carriers, as the options discussed in the consultation were never limited to lifting the Restrictions for wireless carriers only and the announcement doesn't appear to be limited to wireless, either.

We do know that an entity that qualifies for liberalisation will not lose that status if it grows beyond the 10% threshold, unless that growth is by way of mergers and acquisitions. We do not know what the precise mechanics of that calculation will be, however, including how or whether two entities that each qualify as at the date of the amendments coming into force will be permitted to merge notwithstanding that the merged entity may have a market share above the threshold.

We don't know the precise timing of the amendments to the Telecommunications Act, but can surmise that the government will bring them into effect prior to the 700 MHz auction, which it has announced for the first half of 2013.

We do know that the acquisition of control by a non-Canadian of a telecom company will be subject to the Investment Canada Act; what remains to be seen, however, is how the government of the day will perceive the "net benefit to Canada" or any national security concern associated with a particular transaction.

Conclusion

Many of the details of the liberalisation of the Restrictions are as yet unknown. The biggest question remains how the government's policy, so long in the making, will actually impact the industry and consumers at the current stage of the market's development. We will continue to inform you of developments in this critical sector. Please contact any member of the Goodmans Communications Law Group to discuss the implications of these developments.

Michael Koch mkoch@goodmans.ca	416.597.5156
Robert Malcolmson rmalcolmson@goodmans.ca	416.597.6286
Monique McAlister mmcalister@goodmans.ca	416.597.4255
Peter Ruby pruby@goodmans.ca	416.597.4184