

### KEY CONSIDERATIONS

- 1 Consider privacy and data protection issues when developing or applying Covid-19-App
- 2 Check possible antitrust problems when collaborating with competitors or offering free minutes or extended capacity to customers
- 3 Prepare facts-based justifications for managing congested networks
- 4 Consider increased opportunities for M&A and network sharing agreements
- 5 Possible adaptation of telecommunications specific regulation
- 6 Heightened FDI scrutiny (cf. DE, FR etc.) and possible measures against non-EU providers of critical infrastructure

### 1 Consider privacy and data protection issues when developing or applying Covid-19-App

There are widespread plans in Europe to introduce a “Covid19-tracing” App in order to identify possibly infected persons through the use of communication technology like Bluetooth Low Energy.

Telecommunications companies could be involved in these plans through the technical set-up and by the collection and storage of data as well as their communication to other users or to health authorities.

This can raise complex issues with regard to the respect of EU or national provisions on data protection or privacy.

In its guidelines on the use of location data and contact tracing apps the European Data Protection Board (EDPB) underlines that such schemes need to be part of a comprehensive public health strategy, should be of a voluntary nature, use the least amount of data possible, and should not trace individual movements, but rather use proximity information of users.<sup>1</sup>

Therefore, contact tracing apps should not collect location data (as well as other unnecessary data such as messages and call logs) from telecommunications companies.

European solutions which are being developed, such as the PEPP-PT technology<sup>2</sup> aim at providing ready-to-use, well-tested and validated modules and tools. PEPP-PT mechanisms support storage approaches that are either decentralized (where contact information is stored on users’ mobile phones) or centralized (where contact information is stored on a central server to which health authorities have access).

The decentralized approach is relatively unproblematic and appears more in line with the minimization principle.<sup>3</sup>

For a centralized storage or other forms of passing on contact data, under the GDPR telecommunications companies should ensure the presence of users’ consent, legal compulsion or overriding public interest, and the adoption of adequate security measures, such as encryption techniques to protect data exchanges between the application and the central server.

In situations of doubt legal advice should be requested.

<sup>1</sup> [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_guidelines\\_20200420\\_contact\\_tracing\\_covid\\_with\\_annex\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf).

<sup>2</sup> <https://www.pepp-pt.org/>

<sup>3</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0417%2808%29>

### 2

#### Check possible antitrust problems when collaborating with competitors or offering free minutes or extended capacity to customers

- Cooperation between competitors will continue to be subject to national and EU competition rules against anticompetitive agreements, such as art. 101 TFEU. These rules normally are flexible enough to be applied to crisis situations, but factors related to the Covid-19 crisis will be taken into account when assessing conditions for an exemption. The EU Commission has issued a temporary framework which basically exempts conduct that is necessary to ensure the supply and adequate distribution of essential scarce products and services related to the Covid-19-crisis.<sup>4</sup> A number of national competition authorities have adopted similar communications. The framework applies mostly to undertakings operating in certain industries (*e.g.* medicines and medical equipment), and cooperation between telecommunications operators would not normally be covered by this exemption. It may, however, be possible to base an exemption on the creation of consumer benefits by the fact that electronic communications or services are brought to consumers faster, in greater capacities or at a better quality. Any form of cooperation which would be acceptable only in times of crisis would have to be limited to the period in which the Covid-19 crisis continues to exist and not go beyond what is necessary to achieve the claimed benefits. The EU Commission is ready to provide swift ad hoc guidance (also by means of “comfort” letters) to necessary cooperation agreements that have a European dimension.
- A number of telecommunications providers have offered free additional minutes or broadband capacity to customers in view of the increased need to rely on electronic communications during Covid-19 times. It is very unlikely that this could be regarded as objectionable predatory pricing, since such temporary offers will not normally drive the price for the relevant packages below average variable costs (and not for a substantial length of time). It might be necessary however to make sure that these practices do not give rise to a price squeeze compared to access or termination prices or to price discrimination putting wholesale customers at an unjustified disadvantage. Any coordination of network management measures (such as reducing video streaming resolution in order to grant additional capacity) would be subject to the abovementioned assessment under art. 101 TFEU. That includes not only express coordination through agreements, but can also cover seemingly innocuous situations, such as where one competitor publicly announces a policy subject to competitors doing the same, and then competitors accept that offer by following.

### 3 Prepare facts-based justifications for managing congested networks

Given the considerable increase in internet traffic during the Covid-19 crisis, internet service providers (ISPs) may have resorted to a variety of traffic management techniques to avoid congestion.

These techniques include prioritization of mission-critical applications, limiting traffic of less essential background services, video optimization, and prioritization of critical services over streaming services. The seamless functioning of business-related tools (such as internet SaaS services and commercial VPNs) and education-related services is fundamental.

Under the EU Net Neutrality Regulation ISPs are prohibited from engaging in traffic management measures unless specifically justified. Exceptions to this prohibition apply in particular if those measures are necessary to comply with EU or relevant national legislation, to preserve the integrity and security of the network or to prevent or mitigate the effects of exceptional or temporary network congestion.

Because it is an exception from the general prohibition ISPs will need to interpret the possibility to take exceptional traffic management measures in a restrictive manner, making sure that the implemented measures are proportionate, limited in time and also limited to those measures strictly necessary and ensuring that equivalent categories of traffic are treated equally. If traffic management measures are applied it is important to prepare and document facts and circumstances justifying the exception from net neutrality rules.

Additionally, the EU Commission and BEREC call on ISPs to closely cooperate with the national regulatory authorities and to inform the same, in a timely manner, on the taken traffic management measures in order to ensure the necessary transparency and to allow for such measures to be monitored for compliance with the EU Net Neutrality Regulation.



### **4 Consider increased opportunities for M&A and network sharing agreements**

- The Covid19-crisis has once again illustrated the crucial importance of strong and ubiquitous electronic communications networks. There may thus be increased opportunities for acquisitions given that regulators will give greater weight to efficiencies brought about in terms of creating stronger and more resilient networks including, in particular, the faster roll-out of fiber and 5G. The 5G backlash in many countries may also result in closer scrutiny of environmental impact and more cumbersome administrative procedures.
- Likewise network sharing agreements between competitors may be viewed more benignly on the aforementioned grounds. This will be true in particular where there are no less restrictive ways to bring about the desired benefits and where the commonality of costs implied in the sharing is not substantial.
- Due to the emergency, investment in quick deployment of less advanced ultra-broadband technology (FTTC, FWA) in white areas, not already covered by FTTH networks, can become much more attractive.

### **5 Possible adaptation of telecommunications specific regulation**

- The strong reliance on internet based communications (such as home office or video conferencing) has underlined the importance of very high capacity networks (VHCN) including 5G mobile services which offer a unique value proposition encompassing high-speed broadband and low latency packaged in a cost-effective solution. Even though national telecommunications regulators do not seem to be inclined to modify rules on access regulation there will be a stronger case post-Covid-19 for accepting innovative co-investment models and for relaxing ex ante price regulation in order to drive roll-out.
- As far as mobile communications are concerned, national spectrum regulators should be ready to speed up 5G auctions and to adopt investment-friendly pricing models for acquiring usage rights. They should also be amenable to increased flexibility in the use of mobile spectrum. Available measures may include providing short-term/emergency spectrum licenses to mobile network operators (MNOs) for access to any portions of unallocated spectrum, expediting the issuance of licenses to MNOs where new technologies may enable operators to assist with improving connectivity and deploying services, facilitating access to backhaul spectrum, and removing red tape and restrictions on ways to immediately access more spectrum, including spectrum sharing.

### 6 Heightened FDI scrutiny (cf. DE, FR etc.) and possible measures against non-EU providers of critical infrastructure

Rules on the scrutiny of foreign direct investments have been introduced or strengthened at EU and Member State level (e.g. DE, FR) to protect sensitive assets.

The concern is that the crisis could result in opportunistic acquisitions of strategic assets via FDI as more companies suffer from the effects of the pandemic. This will be relevant for any acquisition of companies providing telecommunications equipment or services by a non-EU buyer.

As a result, understanding the process and anticipating potential considerations and

concerns early on can avoid unexpected hurdles and allow parties to better assess deal certainty and timing.

In addition, the Covid-19 crisis may lead to increased resentment against the provision of critical infrastructure (elements) by companies from foreign state-controlled economies.

The EU Commission has come under increasing pressure to involve Member States and support the creation of “EU champions” in order to protect the European interests. Further diversification of suppliers may thus have to be considered.



### FURTHER GUIDANCE

For Cleary Gottlieb’s latest thinking on coronavirus-related topics, please visit our COVID-19 Resource Center.

If you have any questions, please reach out to your regular firm contact or any of the following:

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