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Cabinet Overturns CRTC's Globalive Decision

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On December 11, 2009, the Government of Canada announced that it had varied the decision of the Canadian Radio-television and Telecommunications Commission (the "CRTC") regarding the ownership and control of Globalive Wireless Management Corp. ("Globalive").

As we reported in our Communications Bulletin entitled "CRTC Issues Important Decision on Canadian Ownership and Control" on October 29, 2009 (see <http://www.fasken.com/communications-bulletin-crtc-2009/>), there are two principal investors in Globalive – AAL and Orascom. AAL is a Canadian company controlled by a Canadian, Anthony Lacavera. Orascom is an Egyptian-based wireless communications company.

The structure of Globalive as initially presented to the CRTC for consideration had the following features:

- a two-tiered holding company structure with Orascom holding one-third of the voting shares of both holding companies, which were stacked on top of the other;
- 65% of the equity of Globalive held by Orascom;
- 99% of the debt held by Orascom;
- equal participation on the board of directors by Orascom and AAL with the balance of power held by independent Canadian directors selected by a committee with equal representation by the two investors;
- the right of AAL to exit the wireless business and retract its former wireline business in year one at a fixed price;
- the right of AAL to "put" its shares to Orascom at a fixed floor price in the first five years;
- the right of Orascom to sell the business and "drag-along" AAL thereby forcing AAL to sell;
- a technology agreement with Orascom that included a \$100 million fee regardless of whether the technology services were used;
- an intellectual property agreement for the "WIND" trademark which is owned and used by Orascom in other countries; and
- veto powers for Orascom on a number of key business decisions, including

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the business plan, at relatively lower financial thresholds.

During the course of the CRTC hearing, Globalive agreed to make a number of changes to its ownership structure. These changes included: removal of one of the holding companies; making Anthony Lacavera the chairman of the companies constituting the Globalive business; canceling Orascom's "call" and "drag along" rights; eliminating AAL's retraction rights in the first year; reducing AAL's put options in the first five years to a single right in year three; eliminating the negative covenants in Orascom's loan agreement and making the loan renewable for up to five years at Globalive's option; increasing the monetary thresholds with respect to certain of Orascom's veto powers; changing the manner in which the independent directors are selected; and changing the termination arrangements under the Technology Services Agreement.

The CRTC concluded that even with further amendments to board structure, liquidity rights and the financial threshold for the exercise of veto rights by Orascom, Globalive would remain controlled in fact by a non-Canadian given the significant concentration of debt in the hands of Orascom.

Cabinet has reversed the CRTC's decision and determined that, on the facts before the CRTC, it is reasonable to conclude that Globalive is not controlled in fact by non-Canadians. Highlights of the Cabinet decision are set out below.

Composition of the Boards of Directors

The CRTC determined that the board structure should be revised such that AAL would appoint a majority of directors on the board of the Globalive holding company.

Cabinet disagreed, holding that no changes to the composition of Globalive's boards of directors are

required as the influence of Orascom-nominated directors is offset by the combination of directors nominated by AAL and by independent directors who must also be Canadian citizens.

Liquidity Rights

The CRTC found that the price floor and cap on the proceeds generated in the event AAL sells its shares are inconsistent with the relative voting interests of AAL and Orascom, and that the scope of parties to whom AAL can sell its shares should be broadened.

Cabinet disagreed, noting that the liquidity provisions operate in a balanced way as between AAL and Orascom, other than the specified floor price and cap on proceeds to AAL from the sale of its shares. Cabinet found that the cap on proceeds is consistent with the relative equity investment of the parties and that the specified floor reflects risk. Accordingly, while the cap on proceeds might provide an avenue for influence by Orascom, the influence is not dominant or determining in and of itself. Cabinet also held that no changes are required to the scope of parties to whom AAL can sell its shares, as this restriction does not provide Orascom with a means of influencing the day-to-day operations or strategic decisions of Globalive.

Veto Rights

The CRTC held that the financial threshold for the exercise of veto rights by Orascom should be increased immediately to 5% of Globalive's enterprise value.

Cabinet determined that no change to the financial threshold is required immediately, but that the threshold should be increased to 5% of enterprise value at the end of Globalive's first year of operation.

Technical Services Agreement (TSA)

Cabinet, like the CRTC, held that while the TSA would provide Orascom with a means to influence Globalive, the influence resulting from the TSA is not dominant or determining.

Trademark Agreement

The CRTC held that the Trademark Agreement would provide Orascom with influence over Globalive, but as in the case of the TSA, this influence would not be dominant or determining. For its part, Cabinet held that the Trademark Agreement does not provide Orascom with a significant avenue for influence over Globalive.

Financing Arrangements

The CRTC found that the significant concentration of debt in the hands of Orascom is unacceptable.

While Cabinet recognized that where a company is heavily debt financed the concentration of debt and equity in the hands of a single entity can result in significant influence, it concluded that given the “exceptional terms and conditions of the lending instruments which severely restrict the protection afforded to” Orascom and Globalive’s ability to renew the debt for up to six years or to retire it without penalty and at its discretion, Orascom is not able to “control in fact either the strategic or operational decisions of Globalive” as a result of the debt financing.

Conclusion

Cabinet concluded that although the structure of Globalive would enable Orascom to exercise influence over Globalive, taken together Orascom’s

influence is not dominant or determining and accordingly, Globalive is not controlled in fact by a non-Canadian.

Cabinet was careful to state that its decision was based on the “facts of this particular case.”

Subsequent to the release of the Cabinet decision, the CRTC has announced that it is reviewing the ownership structure of another new entrant wireless carrier – Public Mobile Inc. The CRTC stated that it will review Public Mobile’s ownership structure in light of “the existing jurisprudence relating to determinations of control in fact, cognizant of the fact that in varying Telecom Decision CRTC 2009-678, the Government stated that the ‘decision to vary is specific to the facts of this case’.” This certainly suggests that the CRTC considers that the Cabinet decision is confined to its specific facts. Unlike the Globalive review, which was a full-blown “Type 4” review, the review of Public Mobile’s ownership structure will be a “Type 2” review, meaning that while there will be a public file and a public decision, there will be no third party participation in the proceeding.

For further information about the Globalive decision and its implications for your communications business or your communications investment, please contact the undersigned or one of the other members of our communications practice group.

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