

TMT report 2015: Time to sell yourself



The TMT-related issues facing clients are mounting up, whether they be related to data protection, cybersecurity, or fiber optic conflicts, for example – this means plenty of work for TMT lawyers, but work needs to be done on raising the profile of the expertise they offer

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As technology evolves, so do the associated legal issues. Changes to EU data protection regulations, the wider use of the Cloud, cybersecurity, modifications to EU telecoms directives, and fiber optic conflicts are just a few of the problems organisations have to tackle. To do so successfully, they need lawyers. Law firms flourish in markets where there is a lot of activity, so, needless to say, the TMT sector is generating plenty of legal work. Portugal, in particular, has been the scene of some epoch-defining events in the last 12 months, specifically the sale of Portuguese Telecom and the awarding of the contract for the provision of fixed phone services in Portugal to NOS Comunicações. This emergence of a new TMT landscape in Portugal will have a dramatic impact on regulatory frameworks, say lawyers, and will therefore create many opportunities for law firms.

However, despite this abundance of opportunities for providing legal advice, TMT lawyers do still have a number of concerns. The fast-changing nature of the sector, means that law firms' business plans for this area of practice have to be continuously updated. Another issue is the fact that TMT expertise in law firms is rarer than may be expected. Lots of law firms claim to offer TMT legal advice but the fact is that their knowledge of the sector can vary considerably. TMT lawyers themselves acknowledge that, with technology-issues affecting all clients, they face the challenge of having to educate their colleagues in other practice areas about the need for a deeper knowledge of TMT issues. Indeed, TMT lawyers say that many clients do not realise that law firms have specialised TMT practices and, instead, tend to refer such work to corporate law departments.

New products create work

Among the biggest developments to have affected the TMT sector in the last 12 months were EU data protection regulations, according to Gonzalo F. Gállego, partner at Hogan Lovells. "Although the EU regulation has not been approved yet, companies are implementing it anyway, for instance, with respect to Privacy Impact Assessments," he adds. Other significant issues affecting the TMT sector include electronic signatures and remuneration related to news aggregators, according to Gállego. In addition, he says internet services based on "collaborative economy" are

Spain: What are currently the biggest opportunities for law firms in the TMT market?

"The concentration process isn't over. Yoigo has been on sale for years, and it's difficult to know how it will end. Concentration of cable operators also looks inevitable. Euskaltel has announced its merger with R Cable but it is unlikely that this will be the only transaction to come." **José Giménez, partner, Linklaters**

"The concentration of players in the telecommunications market leaves room for law firms to provide legal advice across several practice areas in connection with the integration of procedural, manpower and regulatory matters. Similarly, there will continue to be corporate transactions across the market, which law firms should continue to monitor." **Juan Rodríguez Cárcamo, partner, Pérez-Llorca**

"Mobile e-commerce is experiencing major growth. Big companies, small ones and even traditional shops are on their way to developing attractive, useful and secure apps for shopping purposes. Lack of regulation challenges law firms when traditional shopping practices and digital ones must meet." **Francesc A. Baygual, partner, Roca Junyent**

"As the approval of the EU Data Regulation approaches, interest from companies in compliance thereof, or being prepared for the adoption of a nearly new system, has considerably increased. This has resulted in new and sophisticated legal projects." **Norman Heckh, partner, Ramón y Cajal Abogados**

"Many of the traditional sectors are converging with new technologies and, therefore, a new range of opportunities have been opened in the last year. This is the case, for example, with the entertainment and leisure industry where a traditional sector is moving up to a different level and profiting from all the innovation such as the geolocation technologies." **Patricia Lalanda, senior associate, Loyra Abogados**

"The main opportunities for law firms in the TMT market are related to the improvement in the economy, the entrance into the market of new operators and the emergence of new technologies and the related challenges, such as big data, 'Internet-Of-Things', information security and cyber attack protection." **Alejandro Touriño, partner, Ecija**

"We have observed an increase in the online sale business, both in companies devoted to the massive sale of products of different types and brands and in smaller businesses which are now becoming more professional in this kind of sales and have improved their platforms. both

giving rise to new legal issues, while insurance and banking aggregator sites are coming into conflict with more traditional businesses in these sectors. “New products create a lot of legal work,” Gállego says. In addition, cybersecurity and data protection are significant challenges facing the sector.

Cloud computing is posing a big challenge for companies, says Baker & McKenzie partner Raúl Rubio.

“The Cloud is leading to data protection and cyber security issues – with the Cloud, information is replicated in different locations and it is accessible online so there is potential access for hackers,” he adds. Osborne Clarke partner Rafael García del Poyo says Cloud infrastructure and software is “complicated by IP issues related to licensing and managing risk”. He adds: “There are also jurisdictional issues regarding applicable law.” Other matters creating significant legal

work include smart cities, according to García del Poyo, specifically issues relating to parking spaces and weather forecasts, for example, such as how data is shared between different operators. Meanwhile, telecoms companies awarded licenses often engage lawyers because they want to “stretch” the license so it covers, for example, e-commerce. García del Poyo adds that other opportunities for law firms include advising telecoms companies on how they can adapt e-payments licenses to cover more than one jurisdiction.

DLA Piper partner Diego Ramos highlights cybersecurity as a major issue. He adds that another major development has been the political changes in city halls in Spain: “City halls are huge purchasers of technology.” Ramos adds that there has been significant transactional activity in the TMT sector recently. “It was amazing, the market was hot for M&A deals,” he adds.

The nightmare is over

The modification of the EU telecoms directives will have a significant impact on clients, says Javier Torre de Silva, partner at CMS Albiñana & Suárez de Lezo. “After a public consultation and a lot of modifications, there will be a change in the licensing regime, you used to have to notify regulators of a new product in each jurisdiction, which was a nightmare, but under the new directive, you will just notify once – Europe will become a single market in this respect,” he says.

Another issue lawyers are monitoring is how fiber optic conflicts will be resolved, according to Torre de Silva. “The regulators are changing the rules – Telefónica stopped the development of the new optical fiber network because they will have to share it, and therefore feel they are not getting an adequate return on investment.” Similarly, the issue of 4G network sharing agreements is also generating work for law firms, according to Torre de Silva.

Meanwhile, another development is the new patent law in Spain. “The last patents law was a crazy idea,” says Torre de Silva. “Everything was registered as a patent so people didn’t trust the Spanish patents.”

A major trend in the TMT sector at present is the market “being driven by the need for content”, says Gómez-Acebo & Pombo partner Almudena Arpón de Mendivil. She adds: “The audio-visual market is booming because of the increased convergence of the telecommunications, media and technology sectors, and the possibility of offering attractive or unique content is essential to remain a meaningful competitor in the market. This is the rationale behind the Telefónica/DTS merger, the challenge of the merger conditions in relation to competitors such as Vodafone and Orange and of the announced agreement between Netflix and Vodafone”.

Arpón de Mendivil also highlights the steps taken in relation to the creation of a “true single digital market” in the EU, including legislative measures such as the review of the EU Directive on Audiovisual Services, the enactment

from the technical and legal perspective.” **Jordi López, managing partner, Pintó Ruiz & Del Valle**

“The problems between large consumers and companies remains a source of litigation and other legal issues as does personal data protection and measures to prevent fraud.” **Manuel Sáez, partner, Casals Abogados**

“Technologies like 3D printing will revolutionize many areas, from manufacturing to logistics, and a whole rethinking of the legal issues surrounding them is needed.” **Manuel García, partner, Lupicinio International Law Firm**

“Social media platforms and instant messaging, which present data privacy issues; cloud computing and outsourcing activities, specifically privacy concerns but also in respect to contractual and compliance matters; big data and smart cities; portability of data; e-commerce and e-gaming.” **Belén Arribas Sánchez, senior associate, Monereo Meyer Marinel-Io Abogados**

“The new European legislation on protection of personal data or the regulation of cyber risks are practices in which TMT lawyers should play a leading role.” **Miguel Geijo, partner, RCD - Rousaud Costas Duran**

of new data protection regulations and reforms of the IP and criminal rules in Spain to further protect the digital environment.

The TMT market is becoming more global and that is presenting challenges, according to Uría Menéndez partner Pablo González-Espejo. “We’re changing leagues, we were playing in the local leagues, but now there are huge corporate transactions – now you could see transnational deals, clients are aiming to create a single market,” he says. “Spanish and Iberian players will play in the European market and the regulations will change.”

Developments in the TMT sector are being driven by the “new economic situation”, argues Alejandro Touriño, partner at Ecija. He adds: “In TMT, most of the regulations come from laws from the 1980s, they’re out of date. It is extremely difficult to provide legal security to new operators in the digital economy when laws are not adapted to this e-context.” Gállego highlights another issue relating to the fact that, nowadays, through platforms such as YouTube and Vimeo, “mere individuals with a webcam and an microphone may become huge content providers – perhaps with 30 million subscribers – but not be subject to laws regulating media content providers”. Rubio says that, in general, there is now more TMT work for law firms: “Clients are more active, we are growing, but prices are still at the same level as during the crisis.”

Take care with conflicts

But law firms still face challenges, according to Olswang partner Blanca Escribano. She adds: “The European Commission’s Digital Single Market review is challenging the status quo. OTT (Over-The-Top) players may be regulated the same way that traditional telecoms are. In addition, the commission is challenging the current territorial copyright licenses, and therefore geoblocking. Hence, law firms may need to think more carefully about conflicts of interest when deciding which side you represent.”

Touriño adds that law firms have to be more flexible with regard to business plans: “Firms have to be open-minded to new developments and trends – our strategic plans used to cover the next two years, but now they focus on the next three to six months, in a sort of ‘lean manufacturing’ approach.”

García del Poyo says that lawyers always have two clients, “the real client and the internal client”. He adds: “We [TMT lawyers] have to share our abilities and knowledge with the wider firm – with issues such as the single digital market initiative and geo-blocking, it is time for us [TMT lawyers] to do good marketing within our firms.” According to García del Poyo, TMT lawyers have to make more of an effort to raise the profile of the work they do among other lawyers at their firms.

Portugal: Are there any emerging TMT trends that are particularly challenging for clients?

“The need of traditional electronic communications operators to ensure profitability from the investment made in fiber networks, the competition of ‘Over-The-Top’ players and the challenges of new business models based on cloud computing, big data and the ‘Internet-of-Things’.” **Luis Neto Galvão, partner, SRS Advogados**

“We understand that data protection, in particular issues around the ‘right to be forgotten’ will be challenging for certain clients as some new practices may have to be implemented.” **João Caiado Guerreiro, partner, Caiado Guerreiro**

“The increasing use of the internet, not only for communications but also for advertising, news and broadcasting is boosting new opportunities and trends. On the other hand, clients are now obliged to constantly seek new products and innovations in order to create new trends. As such, finding valuable start-ups and executing B2B joint venture agreements is becoming more and more important for clients that wish to be in the front row of innovation.” **Rodrigo Almeida Dias, partner, F. Castelo Branco & Associados**

“In terms of technology, it is now a fact that all companies use technological tools to communicate, present and provide services, and manage their resources. Dependence on technology - and who provides it - is increasing. Internet of Things is gaining importance, not only from the viewpoint of the consumer, but also for companies and industries.” **Filipe Mayer, partner, CCA Ontier**

“Cloud storage and data privacy matters have definitely raised new concerns and challenges for clients.” **Ana Rita Painho, partner, Anselmo Vaz, Afra & Associados**

The challenge for TMT lawyers is to ensure partners in other practice areas at their firm get acquainted with issues relating to technology, says González-Espejo. “All clients require technology-related legal advice – all firms claim they are doing this type of work, but it’s not easy to educate lawyers in other practice areas, it’s not easy to bring it to their attention.”

Gállego says that clients requiring TMT-related legal advice often contact law firms’ M&A and commercial departments: “Not all

companies are aware that they are able to get specialised TMT advice – we have to show clients that this specialisation has been developed.” However, Ramos argues that some lawyers working in other areas of practice do understand that their specialism has some common ground with TMT law. “For example, employment and litigation lawyers realise there are productive overlaps and a fertile ground for cooperation.”

Don't get lost

Escribano says it is important to constantly keep up to date with the latest developments in TMT law: “The industry changes faster and faster. If you're not involved in the sector for a while, you can easily get lost and therefore, pure TMT lawyers are becoming more and more in demand.” It is vital that law firms ensure all of their lawyers understand the latest developments in the sector, argues González-Espejo. “You can't afford to have young lawyers who don't have a basic understanding of the digital world – they should have these basic skills.” García del Poyo adds: “Technology is transferable to all areas of the law – the law is generally becoming more digital.” However, Torre de Silva argues that TMT lawyers have a responsibility to be familiar with other areas of the law. “We should know about constitutional law and we need to know about labour law,” he adds.

Bird & Bird partner Javier Fernández-Samaniego says that, with a lot of TMT companies relocating, particularly to Ireland, TMT lawyers in Spain are now competing with their peers in the UK and Germany, for example, as well as Ireland itself. “This is a big challenge, because local lawyers in each EU jurisdiction are now less necessary,” he adds. Rubio says that, unfortunately, lawyers now “have to tell lawyers that Spain is not necessarily the best country in which to base their business as a result of excessive and inconsistent regulation and legal uncertainty when applying”. However, Fernández-Samaniego says that there are good opportunities for TMT lawyers in Spain: “Clients will offer services on a global scale and Spain is a good platform to serve them from as a cost-effective but at the same time high quality jurisdiction.”

González-Espejo says the market for TMT-related legal services is becoming increasingly competitive. “More young lawyers are interested in this area and they have an advantage in that they were born and raised in a digital world,” he says. In Ramos' view, the market is getting reshaped and lawyers have to find the answers to new challenges. “Lawyers need to learn more about the TMT business, they have to adapt and think more about risk control than about theoretical issues,” he adds.

Anyone can go global

What does the future hold for the TMT sector? “New technologies will change, there is artificial intelligence, big data, robotics, decision-making technologies – in the future we will be talking about ethics and taking an ethical perspective,” says Rubio. Cybersecurity and competition will be significant challenges for clients in future, according to Fernández-Samaniego. “The competition for clients is no longer traditional,” he adds. “Even individuals can become competitors of well-established business but, on the other hand, every local client regardless its size can be a global player.”

Judges and courts are not “up to speed” with legal issues affecting the TMT sector, according to Escribano. “We should expect specialisation in this field – international clients are often reluctant to choose Spain as a jurisdiction for litigation,” she says. “The justice is very slow and there's not a culture of paying huge damages here, so technology companies prefer to choose other European jurisdictions for dispute resolution – in international law firms that means Spanish lawyers have more difficulty attracting more cases and fees to our offices.” Torre de Silva says that the TMT sector is “democratising”. He adds: “Every company should have a TMT department or TMT lawyer – a lot more clients need our services.” There will be consolidation in the TMT legal services market, according to Gállego. “All firms say they have TMT expertise because clients ask for it. However, this expertise is not always real.”

Arpón de Mendivil says the TMT market is very active, which is good for all law firms doing TMT work.

“Competition is growing in the market, most law firms now acknowledge the need to have expertise in this area of

law – and even if matters are cross border, clients will increasingly appreciate our local insight, for example with regard to how different regulators apply the rules or who are the main stakeholders,” she says. García del Poyo says there is an increasing need for TMT lawyers to take a global perspective. “We should identify local issues globally – the new economy and its laws should work with the old economy and its laws.”



Regulations are ‘ill-adapted’ to deal with the realities of the TMT sector

Araoz & Rueda partner Ainhoa Veiga says TMT markets pose continuous challenges – which she says also “have to be seen also as opportunities” – due to constant advances in technology. In addition, she says regulations are often

“ill-adapted to deal with the realities and trends in TMT markets”. She continues: “Just take the example of what is going on with new business models ensuing from the so called ‘sharing economy’, such as Uber, which is not only being challenged due to a lack of a ‘legal characterization’ but even its directors are being criminally indicted in France.”

Veiga believes that disruption will continue to be a challenging trend. She adds: “How to take advantage of disruptions to improve productivity and value in many clients’ legacy business is critical. The digital ecosystem is accelerating disruptive innovations and technologies capable of reshaping and restructuring entire sectors.”

Portugal: Stock market ripples

Lisbon-based TMT expert Magda Cocco, partner at Vieira de Almeida, says the Portuguese market has been lively in the last year with a number of notable M&A transactions. Of the major deals, she highlights the sale of Portugal Telecom by Brazilian Group Oi to French company Altice. “Given Portugal Telecom’s place as a heavyweight at the top of the Portuguese telecom sector, this transaction has caused ripples in the Portuguese stock market and has given competitors and prospective investors a new outlook on the Portuguese telecom market,” Cocco says. She adds that TMT clients, operators, investors and lawyers are curious about what impact this will have on the sector in future.

Other TMT developments highlighted by Cocco include the designation of new universal service provider.

“Following the early termination of the agreement entered into with Portugal Telecom for the provision of universal service in Portugal (subject to €33.5 million compensation for Portugal Telecom), a public tender took place for the designation of a new provider of universal service in the country,” she says. “In June 2014, this role was attributed to NOS Comunicações (the outcome of a merger between Optimus and ZON), which is now responsible for the provision of fixed phone service in Portugal.”

What opportunities does the Portuguese TMT sector now offer law firms? Cocco says that the aforementioned developments have meant new legal and regulatory challenges have emerged. She adds: “Regulatory provisions and frameworks must now play catch-up with the TMT market and ensure that the new TMT status quo – with inevitable shifts in market power and in output to consumers - is reflected in the regulatory framework. In addition, the regulator must have the tools and mechanisms to ensure the adequate management of these changes, to facilitate effective competition and benefit end users.”

The need for knowledge

PLMJ partner Daniel Reis says that it is possible the Altice deal could trigger more M&A activity, while data protection work will “grow exponentially”. However Reis adds that law firms operating in the TMT sector still face significant challenges: “[The challenges are] retaining talent as clients continue to in-source legal services, and the corresponding reduction of budgets for outside counsel.”

Gonçalo Machado Borges, senior lawyer at MLGTS, echoes the view that clients are exhibiting a tendency to keep work in-house. He adds: “Regulatory work has also suffered from a less interventionist stance by the national regulatory authority though TMT-specific compliance needs are, and will remain, a relevant challenge both for clients and law firms.”

Meanwhile, there are a number of emerging trends that could prove problematic for TMT clients in Portugal.

“Judges and courts are not up to speed with legal issues affecting the TMT sector.”

Blanca Escribano
Olswang



Machado Borges says: "Competition from OTT service providers poses an increasing challenge for network operators. Increasingly strict data protection requirements will also present challenges regarding network security and compliance mechanisms, particularly in the context of traffic data and 'Big Data'."

There are a number of other developments in the TMT sector that will prove challenging for clients and law firms alike, according to Leonor Chastre, partner at Cuatrecasas, Gonçalves Pereira. She highlights georeferentiation and 'Internet-of-Things' and says that it is difficult to predict what conflicts will emerge as a result of these trends. One of the biggest challenges for law firms will be developing specialist knowledge in these areas, she adds. Some lawyers anticipate that the level of transactional work in the TMT sector will now decrease. Francisco Brito e Abreu, partner at Uría Menéndez-Proença de Carvalho says law firms will instead find an increasing number of opportunities in areas such as the licensing of software and hardware and outsourcing arrangements. In addition, he adds that there will be opportunities related to the development of new media and the structuring of internet sales, including providing advice in the area of consumer law, labelling and advertising. Advising internet service providers on data protection and privacy laws, as well as e-commerce issues should also be a rich source of work, according to Brito e Abreu.