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FROM THE EDITOR

In order to provide readers with additional content, a new « Commentary » section has been introduced into « the i.n.k. » .

The « News » section is intended only to provide short and factual description of legal issues relevant to the Information Society, in the various countries covered by the newsletter, with a possibility to read more on the topic covered by clicking on the corresponding URL or by contacting the author of the news item.

In the « Commentary » section, the members of our Editorial Board will provide, in the form of short papers, an analysis of selected issues.

Our first commentary considers the opening of an on-line account in Luxembourg.

I hope you continue to enjoy reading and using « the i.n.k. ».

Stéphan LE GOUÉFF, Editor, LE_GOUÉFF@vocats.com.

NEWS

1. COMPETITION

EGYPT

CONSUMER PROTECTION AND COMPETITION

The Minister of Economy and Foreign Trade presented a draft law concerning the organisation of competition and prevention of monopoly ("Draft Law"), to be discussed and issued by the People's Assembly.

The objectives of the Draft Law are to promote and to protect free competition between the different economic sectors, as well as to prevent monopoly, thereby increasing the efficiency of resource utilisation. The aim is to promote the economic and financial sectors and consumer protection within the framework of the development of the role of the private sector and the global economic reformation program, which are currently being adopted in Egypt.

The Draft Law broadens the concept of prevention, including the acts and deeds that would harm, restrict or limit, free competition. The applicability of the proposed law shall be upon all persons and establishments carrying out financial and economic activities, including trade, industry and services in any sector, with the exception of State owned or managed strategic establishments providing drinkable water, gas, petrol and electricity, in addition to what the President of the Republic decides to exclude.

The Draft Law specifies the prohibited agreements between individuals or establishments that harm competition, aiming to :

- decrease, increase or control sale or purchase the price of goods or services ;
- restrict or limit the production, distribution, manufacture and marketing of goods or services ; or
- place restrictions on their provisions.

The Draft Law also prohibits the division of an existing or potential market on the basis of geography, consumer categories, determined time periods, or co-ordination between individuals or establishments for submitting bids.

The Draft Law further provides that :

- the above-mentioned prohibition does not apply to establishments having a dominant position and which own a market share exceeding 50 %, nevertheless in the case of malpractice or abuse of the dominant position, this shall be considered a harmful practice regardless of the establishment position ;
- the Prime Minister is entitled to determine the sale price of strategic goods and services relating to governmental activities. Establishments violating the provisions of the proposed law may submit, an application to the concerned committee to remedy the violation ;
- the terms and conditions which are applicable to mergers ;
- the establishing of an independent body to safeguard competition and to enforce the provisions of the proposed law. Said body shall be a public legal entity subordinate to the Prime Minister, the competencies and the Board of Directors' formation and means of appointment of members and liabilities of the said body. The majority of said Board of Directors shall be composed of non governmental employees in order to provide independence and impartiality.

For more information contact : kmlaw@kamelaw.com

IRELAND

LEADING MOBILE OPERATOR FOUND NOT DOMINANT

In a recent judgement (Meridian Communications Limited and Cellular Three Limited vs. Eircell Limited, the High Court found that the largest Irish mobile telecommunications operator, Eircell, was not in a dominant position in the Irish mobile telecommunications market, despite a 60% share (the balance being held by Esat Digifone Limited ("Digifone"). There is also a new entrant third operator. The case was brought by two firms within the same group, Meridian and Cellular Three, which sought to provide mobile services based on access to Eircell's network or on the discounted supply of airtime on that network. The two firms sought an order from the High Court compelling that access and supply on the basis of Section 5 of the Irish Competition Act, 1991 (as amended) which prohibits abuse of a dominant position in terms which are in all substantive respects identical to Article 82 of the EC Treaty.

In considering the dominance issue, the Court accepted that, "in general, the existence of a very high market share is indicative of dominance". However, the Court also found that the essential characteristic of market dominance is the ability to act "*to an appreciable extent*" independently of rivals and consumers. Therefore in considering whether Eircell occupied a dominant position, the Court also made the following observations:

- the significance of Eircell's large market share is diminished due to the dramatic decline of its share following Digifone's entry in 1997 ;
- the price of mobile services has fallen ;
- the significance of the low number of competitors (three) is reduced by the relative strength of Digifone which is well placed to exploit any laxity on the part of Eircell ;
- the reduction in the significance of high barriers to entry due to the relatively low barriers to expansion ;
- the existence of incentives to compete due to the advantages of gaining customers, many of whom are new and independent of the existing operators ; and
- the number and scale of innovations introduced is indicative of a degree of response to customer demand and of competition.

In summary, the Court was not convinced that Eircell could act to an appreciable extent independently of its competitors and ultimately of its consumers. Meridian failed to prove that Eircell was dominant and as a result, Meridian's claim based on abuse of dominance in contravention of Section 5 of the Competition Act failed.

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2. CONSUMER PROTECTION

NORWAY

DISTANCE SELLING – WITHDRAWAL RIGHT

On 1st May 2001, the Norwegian Act regarding consumer's right of withdrawal in respect of distance selling entered into effect (the "Act"). The new Act replaces the Consumer Purchases Cancellation Act, 1972, and implements parts of Directive 97/7/EC on the protection of consumers in respect of distance contracts. Other parts of the said Directive are already implemented in Norway through amendments in the Norwegian Marketing Act, 1972, in effect from 1st March 2001.

The new Act applies to sale of goods and services to consumers from a seller or service provider acting as part of his business activities, if the sales contract is made over a distance or outside the seller or service

provider's ordinary place of business. A "Consumer" is defined as a physical person who does not mainly acquire the goods or services as part of business activities.

The new Act may also apply if an association enters into a distance contract for the personal benefit of its members being consumers. This implies that if, for example, a consumer or an association makes a purchase under a B2B web site mainly for personal purposes, the Act will apply.

Exempt from the Act is the sale from automatic vending machines and automated commercial premises, and sale outside ordinary place of business if the total amount to be paid by the consumer is beyond NOK 300.

The Act does not apply :

- for sales outside the seller's the ordinary course of business, if the seller or service provider seeks out the consumer upon express request from the consumer and the agreement comprises of the goods or services being part of the consumer's request ;
- to sales concluded at an auction unless the offers are only meant to be given through remote communication and that the goods are not used or specially made. The Act will apply to auctions being part of a sales trip arranged by the seller or service provider ;
- for the sale or construction of real property and time-share property, but does apply for the entering into rental agreements ;
- to agreements regarding financial services entered into other means than telephone ; and
- to investment services.

For more information see : www.tkgl.no
or contact : arne.ringnes@tkgl.no or heidi.aasheim@tkgl.no

3. CONTENT OF INTERNET, AUDIO-VISUAL AND INFORMATION SERVICES

CANADA INTERNET BROADCASTING

On 3rd May 2001, the Copyright Board of Canada granted a request from the Washington-based National Association of Broadcasters ("NAB") and the Canadian Association of Broadcasters ("CAB") to appear before it when the board holds hearings on an application from JumpTV.com, Inc. ("JumpTV"), a Montreal-based start-up that transmits television signals on the Internet.

JumpTV wants to retransmit TV signals under the same rules that cable operators and direct-to-home satellite operators do. NAB, which represents ABC, CBS, NBC, Fox and others, will likely argue that JumpTV will be breaking the law if it proceeds with its plan. CAB, which represents CTV, Global, and others, has taken the position that JumpTV is not a transmitter under the Canadian Copyright Act. JumpTV and the Canadian Cable Television Association had argued that the NAB and CAB ought to be excluded from the hearings.

Whilst no date has yet been set for the hearings, it is understood that the participants expect them to start in the autumn. If JumpTV is successful, it, like Canada's cable system operators, would pay the copyright board an annual fee that would be distributed to rights holders, some of whom are members of the NAB.

The planned copyright board hearing will pick up where the iCraveTV hearings abruptly left off last year when the latter company shut down so as to avoid a massive U.S. damages judgement.

For more information see : <http://www.jumpTV.com/mediaframe.html>
or contact : cmorgan@mccarthy.ca

LUXEMBOURG CONTENT OF EUROPEAN WORKS

A regulation (the "Regulation") setting forth the rules applicable to the content of European works and independent producers was adopted on 5th April 2001.

The Regulation is applicable to :

- broadcasting services that are authorised in Luxembourg ; and
- television services that are deemed to be subject to Luxembourg's jurisdiction according to the Directive 89/552/EEC "Television without Frontiers".

The Regulation gives a definition of the European works and details the programmers obligations in respect thereof. More specifically, it implements the provisions of Directive 97/36/CE amending the "Television without Frontiers" Directive by providing that:

- where possible, every broadcast reserves at least 50% of the transmission time to European works, save for the time dedicated to the news, sports, games, advertising, teletext and home-shopping services ;
- where possible, every television programme reserves at least 10 % of its transmission time to European works from independent producers.

For more information see :
<http://www.etat.lu/memorial/memorial/a/2001/a0421704.pdf>
or contact : LE_GOUEFF@vocats.com

LUXEMBOURG ADVERTISING AND HOME-SHOPPING REGULATION

A regulation (the "Regulation") setting forth the rules applicable to advertising, sponsorship, home-shopping and self-promotion in television broadcasts has been adopted on 5th April 2001.

The Regulation is applicable to :

- broadcasting services that are authorised in Luxembourg ; and
- television services that are deemed to be subject to Luxembourg's jurisdiction according to the Directive 89/552/EEC "Television without Frontiers".

The regulation completes the Law on Electronic Media of 27th July 1991 by defining the rules applicable to advertising. More specifically it :

- defines how advertising and home-shopping may be inserted into television programs ;
- defines the contents of advertising and home-shopping and sets forth the criteria to be complied with ;
- provides limitations applicable to specific products such as medicines and alcoholic beverages ;
- sets the maximum duration of transmissions dedicated to advertising and home-shopping ;
- provides that channels can be entirely dedicated to home-shopping or to self-promotion, under certain conditions.

For more information see :
<http://www.etat.lu/memorial/memorial/a/2001/a0421704.pdf>
or contact : LE_GOUEFF@vocats.com

NEW ZEALAND PUBLIC BROADCASTING CHARTER

New Zealand's Minister of Broadcasting, Marian Hobbs, announced on 1st May 2001 that the Government's Charter for Television New Zealand Limited ("TVNZ") had been approved. The Charter will be implemented on 1st July 2002.

TVNZ is New Zealand's publicly-owned broadcaster. It is a 'state enterprise' under the State Owned Enterprises Act 1986 (the "Act"). The Act sets out the principal objective of state enterprises, which is to operate as successful businesses. State enterprises shall endeavour to be as profitable and efficient as comparable businesses not owned by the Crown and to accommodate and encourage the interests of the community when able to do so. TVNZ pays a dividend to its 'shareholder', i.e. the New Zealand Government.

The Charter is intended to address apparent concerns about the quality of programming on TVNZ's two television channels. Whether the charter is needed, its content, and the costs of implementing it, have been matters of considerable debate in Parliament and in the local media.

The Charter sets out nine objectives for TVNZ to fulfil "predominately through free-to-air broadcasting" and fourteen means to achieve those objectives. The objectives include :

- maintain a balance between programmes of general appeal and programmes of interest to smaller audiences ;
- support and promote the talents and creative resources of New Zealanders and of the New Zealand film and television industry ;
- ensure in its programmes and programme planning the participation of Maori (who are the indigenous people of New Zealand) and the presence of a significant Maori voice.

The specific means of fulfilling the objectives include :

- feature programming that contributes towards intellectual, scientific and cultural development, promotes informed and many-sided debate and stimulates critical thought, thereby enhancing opportunities for citizens to participate in community, national and international life ;
- feature programmes that reflect the regions to the nation as a whole ;
- promote understanding of the diversity of cultures making up the New Zealand population ;
- include in programming for a mass audience material that deals with minority interests.

When announcing the Charter, the Minister of Broadcasting, said she expected decisions on how the Charter goals will be funded to be made soon.

For full text of the Charter see :

<http://www.executive.govt.nz/minister/hobbs/tvnz/>

or contact : david.boswell@bellgully.com

SWEDEN NEW MEDIA AND THE FREEDOM OF SPEECH

Compared to international standards, the Swedish regulation concerning freedom of speech is often said to be somewhat unique. This statement refers to the fact that few other countries have regulated the protection for mass media in such detail on a constitutional level. The detail in the legislation is to be found in both the complex, so called, sole liability system as well as in the fairly detailed regulation concerning the use of certain mass media techniques, for instance print and television.

This provides a strong protection for the Swedish mass media enterprises, and, through them, the citizens' freedom of speech and the public discourse is guaranteed. At the same time the detailed regulation means that the development, and use, of new techniques for mass communication

gives rise to uncertainties, where a piece of information, brought to the public by the use of a certain form of media technique, is covered by the constitution.

Due to the last 5-10 years of technological advances, the current regime, brought into force in 1991, has been criticised for creating a fair deal of confusion and uncertainty when new techniques are used for mass communication. The question of necessary clarifications and adjustments has consequently been a prioritised legislative topic for some years.

Today enterprises and individuals, more or less active in the mass media industry, use new media techniques to a large extent. In order to determine whether their activity is protected by the constitution or not. These enterprises and individuals must have a reasonably clear legal framework to follow.

Also, following the development of the Internet, the World Wide Web and the nowadays comparably cheap techniques for the transmission of audio and video across these structures, many "new" kinds of mass media activities are now taking place.

These new activities include everything, from banks giving financial advice in their own web-casts to live music concerts on the Internet, or simply a regular discussion forum on a web site. The fact that the enterprises behind these new mass media activities are not what is usually perceived as mass media enterprises bring additional confusion.

In 1999 the Swedish government assigned a commission the task of analysing the constitutional freedom of speech in the light of technical advances in the new media, communication and Information Technology fields. The commission had to investigate new techniques available and the need for a more technologically independent regulation for freedom of speech.

The commission presented its report in January 2001. In the report, the commission finds a technologically independent regulation is currently not a feasible alternative and suggests that amendments should be made in order to further develop the existing rules and make them clearer and less dependent upon technology.

Primarily, the commission's work focused on mass communication with the use of techniques connected to the Internet, the World Wide Web and advances within the IT and telecommunications industry. New media techniques such as web transmissions (for instance web-casting using streaming media technique), video on demand, push technology, portals, messaging services and discussion forum are dealt within the report.

In short, the main proposals presented in the commission's report means that the Fundamental Law on Freedom of Speech is extended so that it also covers "direct transmission on request" (i.e. real time web-casting), print on demand and push technology.

For more information contact : erik.bergenstrahle@lindahl.se

4. DOMAIN NAMES

GERMANY GENERIC TERMS AS DOMAIN NAMES

A recent decision of the Federal Civil Court in Germany has now put an end to the long debate in Germany whether the use of generic terms as domain names constitutes a breach of German Competition Law. In the famous "Mitwohnzentrale" (flatshare agency) case the Federal Court have now rendered the final decision.

According to the Federal Court, the use of a generic term as a domain is –in principle– in line with German Competition Law. Only under special circumstances it may occur that a generic term is misleading which would

then result in a breach of German Competition Law. Under usual circumstances, however, the average internet user, according to the Court, would be fully aware of the fact that a "blind" search by generic terms on the internet might only lead to a very limited number of offers.

The Court held that therefore there would be no need to protect the average internet user in such a case by legal means. Nevertheless since a generic term must not be misleading, in the "Mitwohonzentrale" case, the Court held that the Lower Court had not sufficiently explored the question whether under the specific circumstances of this case the public would be misled by the word "Mitwohonzentrale".

The Lower Court will now have to deal with this question again by rendering another decision. However, the basic principle which applies to this and many similar cases in Germany has now been clarified by the Federal Court.

For more information see: <http://www.heisenews.de>

HONG KONG INVESTING IN A DOT COM

Recently, we have been instructed by the Hong Kong Domain Name Registration Company Limited ("HKDNR"), the HK domain name registrar, to implement several major changes to the .hk domain name system. Several domain name registration rules have been relaxed. These changes, which will take effect from 1st June 2001, will allow companies to register multiple .hk domain names and to transfer these names freely. At the moment, there are about 50,000 companies registered with a .hk domain name so these changes shall increase the number of .hk Web sites, build presence for companies on the Web and boost traffic to Hong Kong sites. HKDNR adopts a first-come first-served policy. Although registration fees for a .hk domain name will remain the same (i.e. HKD 200), a new annual renewal fee of HKD 200 will be charged. Existing registrants of .hk domain names must re-register and update their registration information with the HKDNR between 14th May 2001 and 31st October 2001, failing this, their domain names may be revoked. No fee will be charged for re-registration.

Concurrently, the Hong Kong International Arbitration Centre ("HKIAC") has been appointed to resolve .hk domain name disputes. This change is significant as the old system lacked an effective dispute resolution mechanism and disputes would have had to be settled in court. Hence, incurring high costs and loss of time. HKIAC modelled its domain name dispute resolution policy on ICANN's with one exception which is that the registrant or the complainant cannot bring a dispute to court and the decision of the arbitrator is final and binding. In order to avoid or reduce to the minimum number of incidences of cybersquatting and competing claims for domain names, HKDNR will allow an eight-day sunrise period from 1st June to 8th June 2001, giving priority to applicants with a valid Hong Kong trade mark registration. During this period, domain name applications will be processed in a batch and trade mark owners will be given priority in registering names resembling their trade marks.

Other future changes which shall be implemented later in the year include allowing individuals to apply for .hk domain names and the appointment of additional .hk domain name registrars.

For more information contact : dae@jsm.com.hk

5. DIGITAL SIGNATURE

FRANCE REGULATION ON e-SIGNATURE

A decree implementing the new French legislation authorising electronic signature (the "Decree") was adopted on 30th March 2001. The Decree sets forth the conditions under which an electronic signature will be given the same legal effect as a manuscript signature.

The Decree provides that an electronic signature system will be presumed valid, until the contrary is proven, provided that:

- it implements an electronic signature established on the basis of a secured system for creating electronic signatures; and
- the verification of such signature is based on the use of a "qualified electronic certificate".

The system must comply with security requirements set forth in the Decree and, in particular, with technical characteristics ensuring the appropriate protection of the users' signatures (e.g. confidentiality and protection against use by third parties or falsification of the electronic signature). Such system must be certified by a special French government agency or by an authority designated for such purpose by a Member State of the European Union.

A qualified electronic certificate specifying certain information issued by the provider of electronic certification services in accordance with the conditions set forth in the Decree must be used. Furthermore, the provider of electronic certification must comply with some requirements also set forth in the Decree.

The solution proposed by the providers of certification services may be subject to approval by a government agency that will be designated at a later date.

To access the text of the Decree, see : <http://www.legifrance.gouv.fr> or for more information contact : fperbost@kahnlaw.com or slipovetsky@kahnlaw.com

LEBANON DRAFT LAW ON ELECTRONIC SIGNATURES

The Lebanese Government has proposed a draft law on Electronic Signatures (the "Draft Law"), which is the first legal initiative of sort in Arabic countries. This Draft Law is based essentially on the French experience and introduces various modifications to the provisions of Article 142 of the Code of Civil Procedures, by inserting new articles related to authentication and proof.

Under the Draft Law, which shall be passed during the next Parliamentary session, electronically generated documents (meeting certain technical requirements) shall have, for evidence purposes, the same legal validity as already existing written documents.

Accordingly, written proof shall comprise any series of letters, forms, codes or symbols forming a readable meaning irrespective of the medium or device used for their formation or their transmission.

The Lebanese legislative initiative addresses electronic signature from a technological by neutral standpoint, in the sense that it does not impose any specific authentication method or technique in order to recognise a document or a signature.

The Draft Law requires that national laws and regulations do not discriminate against, or otherwise discourage, the use of electronic documents, and states that an electronic document shall have the same

legal value as a paper document, provided that the electronic document is "capable of identifying the originator of the document and that such document was generated, stored and transmitted according to terms able to secure the validity and safety of its content".

The functions of a signature, which is associated to any kind of writing, is to identify the signatory and to express his approval on the obligations resulting from such writing, regardless of its form.

An electronic signature shall be valid "when the means and procedures used are trustworthy and capable of identifying the signatory and confirm the connection between the signature and the associated document".

The Council of Ministers, pursuant to the proposal of the Minister of Economy and Trade, shall issue decrees to set forth the rules and procedures for proving the validity of documents generated, stored and transmitted through electronic means, including the rules and procedures for repudiating the electronic signature or demonstrating its forgery.

For full copy of this article and any further information please contact : leila@alemlaw.com

6. FINANCIAL SERVICES

EU COMMUNICATION ON e-COMMERCE AND FINANCIAL SERVICES

The Lisbon European Council defined the year 2005 as the deadline for the creation of an integrated European market in financial services. Therefore, the European Commission launched a global strategy which purports to create a regulatory and supervisory environment for e-commerce in financial services by 2005. This strategy is intended to boost the development of consumer confidence for such services. The communication highlights 3 priority issues or policy areas :

- ensuring coherence in the legislative framework for financial services ;
- building consumer confidence in redress and Internet payment systems ;
- enhancing supervisory co-operation.

For the Commission, the rules that should apply to cross-border sale and purchase of financial services are the trading rules of the Member State where the service provider is established (i.e. the state of origin).

The Commission's strategy relies on several measures that should enhance consumer confidence and protection, including :

- further harmonisation of national consumer and investor protection rules ;
- the establishment of out-of-court redress ;
- measures to build trust in Internet payments ; and
- enhanced co-operation between public authorities responsible for the supervision of cross-border trade in financial services.

The Commission's communication also discusses the impact of the 2001/31/CE Directive related to the e-commerce legal framework in the field of financial services and its interaction with existing specific regulation.

For more information see :

http://www.europa.eu.int/comm/internal_market/en/finances/general/ecom.htm

or contact : LE_GOUEFF@vocats.com

US

ELECTRONICALLY DELIVERED DISCLOSURES

Pursuant to the Electronic Signatures in Global and National Commerce Act ("E-Sign Act") and in response to consumer comments, the Board of Governors of the Federal Reserve System ("FRB"), the regulatory agency responsible for, among other things, implementing consumer financial services and fair lending regulations, recently adopted interim rules to establish uniform standards on the electronic delivery of disclosures required by law.

The interim rule covers consumer disclosures required by five consumer protection laws and their implementing regulations : Regulations B (Equal Credit Protection Act), E (Electronic Fund Transfers), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings).

Under the interim rule, financial institutions, creditors, lessors, and others may deliver disclosures electronically only if they obtain a consumer's electronic affirmative consent. Disclosures may be sent by electronic mail ("e-mail") to an electronic address designated by the consumer or the disclosures may be made available at another location, such as an Internet Web site.

If the disclosures are not sent by e-mail, consumers must receive a notice alerting them to the availability of the disclosures. Disclosures posted on a Web site must be available for at least 90 days.

Disclosures must be provided before a consumer opens an account; enters into a contract for electronic fund transfer services (or before the first transfer); enters into a lease for personal property in an amount not exceeding USD 25,000 for a term of more than four months (such as an automobile lease), or submits an application for credit. If an e-mail disclosure is returned undelivered, an institution must make a good faith attempt to redeliver the e-mail using the address information available in their files.

The interim rules are available at :

<http://www.federalreserve.gov/boarddocs/press/boardacts/2001/20010329/default.htm>

7. INTELLECTUAL PROPERTY

AUSTRIA SUPREME COURT RULING ON LIABILITY FOR HYPERLINKS

In a highly disputed decision of 19th December 2000 (4 Ob 225/00 t), the Austrian Supreme Court held that the operator of a web site providing links to web sites of other operators is to be held responsible as joint offender for violations of competition law on the web site the link is leading to.

The case concerned a law suit by an Austrian newspaper against a recruitment company which operated a web site with a link to another web site operated by an undertaking active in the advertising business. This undertaking copied contents of the plaintiff newspaper on its web site, thereby violating the Austrian Unfair Competition Act.

The court held that a person establishing a link on a web site is responsible for the content on this web site if users regard such link as extension of its own service portfolio. The decision was heavily criticised, since it is allegedly based on a fundamental misunderstanding of the functioning of the World Wide Web. Against the court's opinion, it is very questionable whether the average user of the Internet identifies a link found on a specific web site as an integrative part of the services offered on such site.

Applying this ruling, every web site operator providing links to other sites would in fact have to examine whether such sites violate Austrian competition law in order to exclude the risk to be successfully sued by a third person.

The Supreme Court's decision concerned a procedure for an interim injunction. The main proceeding is still pending before the first instance court. It remains to be seen whether the Supreme Court will reverse its decision in the main proceedings.

For more information see : <http://www.internet4jurists.at/entscheidungen>

BELGIUM

ISP LIABILITY FOR MP3 HYPERLINKS

IFPI Belgium, an organisation representing authors and record companies, and Universal, a record company, initiated proceedings against a Belgian ISP for hosting web sites with hyperlinks to MP3 web sites.

On 2nd November 1999, the President of the Brussels commercial Court ruled that the ISP committed an act of unfair trade practices by hosting such web sites while it was informed of the unlawful nature of the hyperlinks. The President found that knowingly hosting such links allowed the unlawful electronic distribution of music and was therefore contrary to fair trade practices. The ISP appealed the judgement.

On 13th February 2001, the Brussels Court of Appeal reversed the judgement. The Court ruled that a diligent and prudent ISP must remove or make inaccessible MP3 hyperlinks within three working days after being advised thereof by e-mail, provided that such e-mail identifies the hyperlinks, the web page(s) on which such hyperlinks are accessible, the unlawful downloadable music copies and the elements making it *prima facie* acceptable to believe that such copies are unlawful. Furthermore, such e-mail must also include the explicit request to delete the hyperlinks or make them inaccessible. The Court added that if hyperlinks are deleted or made inaccessible upon request, the ISP must be held harmless against any damages if later it appears that the music copies were lawful.

The Court of Appeal concluded that IFPI Belgium and Universal had not respected these conditions. Consequently, the ISP had not acted contrary to fair trade practices by not removing the MP3 hyperlinks.

For more information, please see :

http://www.droit-technologie.org/fr/4_1.asp?jurisprudence_id=56

or contact : g.vandendriessche@dbmlaw.be

EU

COPYRIGHTS IN THE INFORMATION SOCIETY

The Directive on the harmonisation of certain aspects of copyrights and related rights in the Information Society was adopted 9th April 2001 through co-decision procedure (the "Directive"). The objective of the Directive is to adapt existing legislation on copyright and related rights in order to take into account technological evolution and, in particular, the development of the Information Society. It was also used to implement, in EU legislation, the obligations set forth in the treaty adopted in 1996 by the World Intellectual Property Organisation ("WIPO").

The directive will likely be available in the EU's Official Journal within a few weeks. Member states will have to implement the Directive in their national law within 18 months after such publication in the Official Journal.

For more information see :

<http://www.europa.eu.int/scadplus/leg/fr/lvb/126053.htm>

or contact : LE_GOUEFF@vocats.com

LUXEMBOURG

IMPLEMENTATION OF COPYRIGHTS DIRECTIVE

The Grand-Duchy of Luxembourg has adopted on 18th April 2001 a new law on copyright, related rights and databases. The new legislation implements the European directive on intellectual property rights, although it was passed before the directive had been published, and replaces former laws of 29th March 1972 on copyright and 23rd September 1975 on related rights.

The law applies to written, musical, graphic, audio-visual and plastic creations, to representations of performances as well as to software and databases. In order to solve negotiation difficulties on copyrights or related rights transfer, the law provides that parties can resort to a mediator or to the Commission on Restrictive Practices when a party considers that the other party is adopting a restrictive commercial practice.

One of the most relevant points is that databases, electronically or not electronically available, are protected on two levels. In addition to the statement in its first article that databases are protected by copyright whenever the structure or the choice of material contained therein is original, the law contains provisions on a *sui generis* protection for databases. Contrary to the copyright protection, the *sui generis* protection of databases is based on the criteria of the quantitative or qualitative investment.

The law is also implementing a major change in the philosophy of intellectual property rights by providing that an author may transfer his moral rights to a third person provided that the author's honour and reputation are not prejudiced.

Contrary to patents and trademarks, intellectual property rights remain normally unregistered. However, a registry for copyright, related rights and databases has been created in order to provide information about the holder of the rights and confirm the date of the creation.

For further information see : <http://www.etat.lu/ECO>

or contact : LE_GOUEFF@vocats.com

UKRAINE

PROTECTION OF INTELLECTUAL PROPERTY RIGHTS STRENGTHENED

The 4th May 2001, the Act amending some acts that strengthen responsibility for violation of intellectual property rights entered into force (the "Act"). In particular, the Act envisages as a violation the unlawful use of works protected by intellectual property rights (works of art, sound tracks, etc.), misappropriation linked to unlawful use of intellectual property rights or other intentional violations of intellectual property rights causing material damages.

Persons who breach the law may be subject to imprisonment and fines. The Act also purports to strengthen the protection of intellectual property rights by setting up a procedure of registration and import for works protected by intellectual property into Ukraine.

The record of works protected by intellectual property right shall be carried out by the State Customs Service. Works are included in the register on the basis of an application filed by the holder of the intellectual property rights for six months or one year time periods. These periods can be extended. When registering a work in the record, the State Customs Service will issue a certificate and inform all customs bodies.

In the event that the holder of the intellectual property rights of a work discovers an infringement of his rights within the period of registration, he has the right to file a motivated claim to suspend customs clearance for the intellectual property object.

Within 24 hours, the customs body should take a decision about the grounds invoked for requiring the suspension of custom clearance. Within the term of suspension of customs clearance, the holder of the intellectual property rights should take legal action before the arbitration court for the protection of his intellectual property rights or solve the issue amicably with the infringer.

The holder of the intellectual property rights should submit to the customs bodies, within a determined time period, a court ruling to attest the beginning of proceedings and the requirement of the suspension of customs clearance's prolongation until the court renders its decision. The customs body has the power to suspend customs clearance on its own.

For more information contact : tmk@lawgris.kiev

8. MARKET ACCESS

MEXICO BIDDING OF ORBITAL SLOT CONSIDERED

The Mexican Ministry of Communications and Transportation ("SCT") and the Mexican Federal Telecommunications Commission ("COFETEL") have begun assessing the possibility of opening the bidding process to grant a concession title to occupy orbital slot 77° West and exploit its corresponding frequency bands.

SCT's plans are to officially announce the bidding process sometime after June 2001 although informal talks with possible interested parties are scheduled to commence shortly. This will be the first time that the SCT bids an orbital slot. The only entity currently holding concession titles over orbital slots assigned to Mexico is *Satélites Mexicanos S.A. de C.V.* ("SATMEX").

SATMEX is the result of the privatisation of the satellite industry previously controlled by the Mexican government (through the satellite division of *Telecomunicaciones de México* –a decentralised government entity), in which the Mexican federal government currently holds a 25 % interest.

For more information see : www.cft.gob.mx or contact : aam@bstl.com.mx

PORTUGAL TENDER FOR DIGITAL TERRESTRIAL TV

On 7th April 2001, the Portuguese Government launched a public tender for the award of a single license, national in scope, for the management and operation of a digital terrestrial television ("DTT") platform. This license shall be granted for a period of 15 years, and is renewable. Bids are to be submitted to the Portuguese Telecommunications Regulator (*Instituto das Comunicações de Portugal*, the "ICP") in electronic format, namely CD-ROM, by 15th June 2001, and shall include a technical and an economic and financial plan. The winner is supposed to be known by 6th August 2001 although this deadline may be extended.

One of the aspects that is creating some discussion around this public tender is the fact that the bids shall be evaluated according to highly subjective and abstract criteria, the most important of them being the contribution to the development of the Information Society and to the contribution of DTT to the development of a duly sustained economic activity.

Considering that this platform shall constitute an alternative to the existing distribution networks, the public tender regulation prohibits the direct or indirect participation in the share capital of the bidders by companies which directly or indirectly hold a participation in an entity that has a 50 % or more market shares in the cable television business or are held by any

such entity. This means that the incumbent telecommunications operator –Portugal Telecom– is not allowed to participate in the share capital of any bidder, as its subsidiary –TV Cabo Portugal– holds more than 90 % of the cable television market.

The licensed operator must guarantee a coverage of 30 % of the national territory by the end of the first year. The coverage guarantee must be 60 % at the end of the second year, and 95 % by the end of the fifth year. This new network will substitute the existing analogue network, which will be switched off. Consumers will not be obliged however to immediately adapt, since a transition period is planned until 2007 (during which both analogue and digital TV will be broadcast in a process known as Simulcast).

For more information see : <http://www.icp.pt/dtuk/indexuk.html>

SPAIN INTRODUCING MOBILE VIRTUAL OPERATORS

The Ministry of Science and Technology aims at increasing competition in the mobile services market. The first step has been allowing the introduction in the market of mobile telephony resellers. These resellers have no rights nor obligations related to network development. Their service is based on previously buying packages of traffic from network operators with bulk discounts and resaling bits of this traffic to their clients.

The Ministry is granting provisional authorisations to operate as resellers of mobile telephony services. For the time being, the following operators have been registered with the Telecommunications Market Commission: Affinalia, Aló, Avirón, BT Telecomunicaciones, Globatel, Primus, Timon and Vallehermoso. These provisional authorizations shall be transformed in the appropriate licences once the new service is regulated by the Spanish Government.

Next step to increase competition in mobile market will be introduce mobile virtual operators (MVOs). At present there is only a draft bill regulating the applicable regime to a new class of licence (type A2) which would entitle virtual operators for the provision of the mobile telephony service without being obliged to develop their networks.

According to this draft bill, MVOs will have the right of accessing to the networks of dominant mobile network operators where they have excedentary capacity. As a difference with resellers, MVOs shall have their own subscriber identity modules ("SIM") and means of transmitting and switching necessary to provide the service.

The Ministry of Science and Technology has stated that "the approval of said bill is a matter of weeks". Once this bill is passed, some of the above mentioned resellers are likely to request a class A2 individual licence.

For more information see :

http://yinq.sgc.mfom.es/secretaria/ve_11.0/sqcinfor/noticias/operadores_virtual301000.htm

or contact : aam@gomezacebo-pombo.com

9. MEDIA

LUXEMBOURG AMENDMENTS TO THE ELECTRONIC MEDIA ACT

The purpose of the Electronic media Act, 27th July 1991 (the "Electronic media Act") is to ensure free access for Luxembourg residents to a large source of information and entertainment. The Electronic media Act also tends to guarantee freedom of speech and of information and the right to receive and to transmit every program that complies with the existing legal provisions.

An Act implementing Directive 97/36/CE of the European Parliament and of the Council of 30th June 1997 and amending the Electronic media Act (the "Act") has been adopted on 2nd April 2001.

In order to clarify when a broadcast will be subject to the jurisdiction of the Luxembourg media authorities, the Act provides when companies specialised in broadcasting activities will be considered as established in Luxembourg.

Moreover, the new article 35 of the Electronic media Act gives the opportunity to a civil and/or legal persons to file a claim with the media authorities to complain that a broadcast violates a provision of the Electronic Media Act or a measure taken under this Act.

More information can be found at :

<http://www.thk.fi/englanti/ajankoht/soneracharges.htm>

10. TARIFFS

ARGENTINA NEW MOBILE TARIFFS REGIME

On 1st May 2001 all the mobile communication companies begun applying a new regime named Calling Party Pays ("CPP") between mobile phones. According to Government studies and statistics, the CPP regime increased tariffs and users of mobile services were not properly informed.

Consequently, three days later, the Communications Agency enacted resolution 122/01 (the "Resolution") providing that the new CPP regime was null and not applicable until said Agency decides otherwise. The Resolution's rationale states that the information given by the mobile communication companies is misleading and that mobile companies cannot amend unilaterally the agreements with users of the service without their previous consent. Furthermore, it expressly states that the CPP regime, as applied, does not comply with constitutional principles and specifically with the Communications Acts.

Articles 2, 3 and 4 of the Resolution, states that companies affected by the Resolution shall present all business plans related to the CPP to the Communications Agency, including amendments, issued before 1st May 2001, for approval. Without the Communications Agency's consent, those CPP regimes shall not be applicable. There is no time limit for said Agency to decide about CPP approvals.

Although the Resolution is binding for the time being, one of the major companies providing mobile services has appealed before an Administrative Court. It is estimated that a decision will be rendered very soon. In the meantime users of the mobile services are celebrating.

For more information contact : gonzaloz@mille.com.ar

FINLAND SONERA REQUIRED TO DISCOUNT INTERCONNECTION FEES

Finland's Telecommunications Administration Centre (TAC) has, on 24th April 2001, demanded Sonera Oyj to significantly discount its interconnection fees for its mobile network. According to Finland's telecom legislation, interconnection fees charged by an operator with significant market power, which Sonera possesses for fixed and mobile network operations, should be non-discriminating and reasonable in relation to costs. Interconnection fees may provide for a reasonable return on invested capital.

TAC inspected, at Telia Finland Oy's request, Sonera's interconnection fees for traffic originating in a mobile network and traffic terminating into a

mobile network. According to TAC's findings, Sonera's interconnection fees contained costs that do not relate to network operations. In addition, Sonera had calculated too high a profit on its invested capital.

For these reasons, TAC found that Sonera's mobile network interconnection fees were not cost-oriented and therefore illegal. TAC has required Sonera to amend its fees to meet the legal requirements within one month.

More information can be found at :

<http://www.thk.fi/englanti/ajankoht/soneracharges.htm>

GERMANY INTERNET FLAT RATE SUSPENDED

As reported the German Telecommunications Regulating Authority ("GTRA") had ordered Deutsche Telekom to offer Internet access to its competitors not only at a price per minute but also on the basis of a monthly flat rate. Background to this decision was that a subsidiary of Deutsche Telekom, T-Online International AG, offered to end-customers access to the Internet for a flat fee.

This resulted in a clear disadvantage to its competitors since Deutsche Telekom did not offer such flat rates to the competitors. Subsequently, Deutsche Telekom challenged the decision of the GTRA in Court and recently in a preliminary judgement the higher administrative Court of Münster suspended the decision of GTRA so that Deutsche Telekom now is no longer obligated to offer flat rates. The main argument of the Court was that T-Online terminated its offer of flat rates thus abolishing the disadvantage of its competitors.

For further information see : <http://www.regtp.de>

11. TELECOMMUNICATIONS

AUSTRIA NEW DECISION ON LOCAL LOOP UNBUNDLING

On 12th March 2001, the Austrian regulator Telecom-Kontrol Kommission ("TKK") issued a new order (decisions Z 12/00, Z 14/00 and Z 15/00) regarding access of alternative network operators and service providers to the unbundled local loop of the incumbent Telekom Austria AG.

Already with decisions of 7th February 2000, 9th May 2000 and 14th July 2000, the regulator established the framework for access to the local loop. The term of these decisions expired on 30th September 2000.

In the new decisions, the regulator addressed the following three main issues :

- the regulator obliged Telekom Austria to grant alternative operators access not only to the entire, but also to parts of unbundled subscriber lines ("sub-loop unbundling"). It is thus now possible for the alternative operator to access the subscriber line not only at the Main Distribution Frame, but also, for instance, at the in-house distribution point ;
- the new decisions further provide for space limits in the assignment of collocation room from Telekom Austria to alternative provider in order to ensure efficient use of the available room capacity ;
- finally, monthly charges for access to the local loop or the sub-loop were reduced from ATS 170 (EUR 12,35) to ATS 160 (EUR 11,63) until 31st December 2001 and ATS 150 (EUR 10,90) from 1st January 2002.

The term of the decision is indefinite, provisions on charges are limited until 30th September 2002.

For more information see : <http://www.tkc.at>

BRAZIL PCS, THE NEW SCENARIO

The first stage of the granting of personal communications services ("PCS") licenses in Brazil by the National Telecommunications Agency ("ANATEL") ended with the execution of only one E Band authorisation term for Region I. The lack of bidders for all C Band licenses and E Band licenses for Regions II and III in this first stage of the procedure caused ANATEL to change its strategy and to create a new scenario.

At this moment, ANATEL must use its best efforts to make the Brazilian market attractive to investors and grant the remaining licenses. Such steps are mandatory for the completion of the agency's model for establishing competition in the mobile market. ANATEL will first auction the remaining E Band licenses (Regions II and III), followed by the C Band licenses.

For the E Band, the auction was previously scheduled for 8th May 2001. However, Telemar, concessionaire of switched fixed telephone service ("STFC") in Region III who is considered to be a strong potential bidder, requested ANATEL to postpone it in view of the new rules for the granting of C Band licenses that were released. The auction is scheduled to take place on 5th June 2001. The bidding procedure for E Band licenses has not been changed.

For the C Band, ANATEL issued on 25th April 2001 the Public Consultation n° 294 that establishes the new rules for the C Band auction. In light of the new regulation, the bidder must acquire a national license rather than one license per region. However, the prices of the licenses and the restrictions for the STFC's concessionaires participation should remain unchanged. The auction is expected to take place in July but no date has been scheduled.

For further information please see : <http://www.anatel.gov.br>

EU REPORT ON PROPOSED FRAMEWORK FOR TELECOM NETWORKS

On 1st March 2001, the European Parliament gave its approval to a common regulatory framework for telecommunication networks and services. This proposal belongs to a group of six proposals that will create a new framework for the regulation of the sector of electronic communications networks and services.

The Parliament adopted the proposition making 77 amendments that were proposed by the responsible committee.

One of the most important amendments that the Committee adopted relates to the definition of "Significant Market Player". A market player should be considered significant if it :

- enjoys a position of economic strength in a persistent way so that it is able to behave without taking its competitors, customers and consumers into account ;
- is able to restrict the access of users to other telecom operators ; or
- if it has sufficient market power at any stage in the supply chain to distort competition as a result of being vertically integrated.

The amendment also considers the possibility for two operators joining forces in order to form a significant market player.

Some amendments deal with the role of the National Regulation Authorities ("NRAs"). One of the important points is that the NRAs will have to provide to the Commission the information it requires.

The information provided by a NRA can be disclosed by the Commission to the NRAs of the other Member States. It will be possible for a NRA to ask the Commission not to disclose the given information but such a request will have to be motivated.

For more information see :

http://www.db.europarl.eu.int/oeil/oeil_ViewDNL.ProcedureView?lang=2&pr_ocid=4478

or contact : LE_GOUEFF@vocats.com

ITALY DECREE ON SATELLITE SERVICES PROVISION

On 21st March 2001 the Italian Communication Agency issued Decree n° 131/01/CONS regarding satellites services supply. According to the Decree, satellite services supply is subject to authorisation or licence to be issued by the Italian Communication Agency.

The services subject to licence are :

- communication services via S-PCS satellite system ;
- network services via satellite operating out of the protected frequencies band (it includes also network services via satellite for the provisioning of broadcasting programmes)

The services subject to authorisation are :

- communication services via satellite using satellite networks operating out of the protected frequencies band ;
- communication services via satellite SNG temporary type.

The Decree provides that the Italian Communication Authority shall grant the licence within six weeks after reception of all relevant documentation. The operators to whom the licence has been granted will have to be registered in a public registry handled by the Communication Ministry. Moreover, the Decree provides that all satellite services subject to authorisation are due to be considered authorised if , within four weeks after reception of the relevant documentation, the Italian Communication Authority does not issue a negative provision.

The text of the Decree can be found on the Italian Communications Agency's web site : http://www.agcom.it/provv/d_131_01_CONS.htm

ITALY DISPUTE RESOLUTION BETWEEN TELECOMMUNICATION OPERATORS

The Italian Communication Authority has issued Decree n° 148/01/CONS regulating dispute resolution between telecommunication operators. According to this regulation, the Italian Communication Authority is called to intervene in a dispute between operators for interconnection and special access issues.

The regulation provides procedural provisions that operators should follow in order to submit the dispute before the Communication Agency. The Communication Agency Department involved may issue a proposal for an agreement. If the parties agree to the proposed agreement, the Department Director will draft minutes to be signed by the operators.

If the proposed agreement is not accepted by the parties, then the Commission body of the Communication Agency shall issue a binding provision. Moreover, the regulation provides a conciliation procedure as an alternative to judicial dispute resolution.

The text of the Decree can be found on the Italian Communications Agency's web site : http://www.agcom.it/provv/d_148_01_CONS.htm

MEXICO PROPOSAL TO AMEND FEDERAL TELECOMMUNICATIONS LAW

Consistent with President Fox's intention of opening the telecommunications market in Mexico, the Mexican Ministry of

Communications and Transportation through the Federal Telecommunications Commission ("COFETEL") as well as other private organisations such as the National Chamber for Electronics, Telecommunication and Information Industries ("CANIETI") and Mexican Attorney's Bar (*Barra Mexicana de Abogados*), have begun working on drafts to amend the Mexican Federal Telecommunications Law.

The proposals are as varied as the players involved. As expected, telephone carriers have joined forces to propose amendments to the Federal Telecommunications Law that will address many of the issues in vogue today such as clear rules for dominant carriers and interconnection rates.

Modifications on the regime for the use and exploitation of the radio-electric spectrum will most probably have to address a more efficient use of the radio-electric spectrum, including the possibility of using one same frequency for different services whilst COFETEL may seek to increase its decision making power. We will have to wait to review the final draft of the proposed amendments to assess whether the amendments to the Federal Telecommunications Law will fulfil the expectations of both the industry and the regulators.

For more information see : www.canieti.com
or contact : aam@bstl.com.mx

MEXICO MOBILE TELEPHONY QUALITY AUDITS

The Federal Telecommunications Commission ("COFETEL") announced, last 7th May 2001 that it would initiate quality tests on mobile telephony throughout the country. The main purpose is to achieve a better service quality and to promote competition between carriers.

The guidelines for the audits and the evaluation methods were set under the Quality Evaluation Agreement of Mobile Networks (*Acuerdo de Evaluación de la Calidad de las Redes Móviles*) executed by COFETEL with all concessionaires, including those authorised to render personal communications services ("PCS").

The auditing process is expected to conclude sometime in December 2001. The purpose of the evaluation is to measure the percentages of non-completed calls and lost calls, as well as the connection time for said calls in each network. The evaluation method consists on measuring each mobile network globally, so as to accurately reflect traffic behaviour and distribution.

The results of this audit will be made public by COFETEL so that the end-user can have access to quality information and guaranteed coverage areas of each concessionaire. Should COFETEL determine that a concessionaire is not providing good quality services, it will analyse on a case by case basis, the possibility of assigning new numbers to such concessionaire to avoid the growth of the end-user base beyond the real capacity of each network.

For more information see : www.cft.gob.mx or contact : aam@bstl.com.mx

NIGERIA PRIVATISATION OF NIGERIAN PTT BECOMES PRIORITY PROJECT

The privatisation of Nigeria's PTT, Nigerian Telecommunications Limited ("NITEL"), has been placed on the front burner of the Federal Government of Nigeria's ("FGN") economic agenda. At a meeting held on 17th April 2001 with officials of Nigeria's privatisation agency, Bureau for Public Enterprises ("BPE"), NITEL and the Minister of Communications, Mr Muhammed Arzika, President Olusegun Obasanjo gave a deadline of September 2001 for the conclusion of NITEL's privatisation or, at

minimum, the selection of a core investor for the privatisation of the Company.

NITEL is wholly owned by the FGN and is the dominant communications service provider in Nigeria. It has 700.000 fixed lines installed and 26.500 connected mobile lines. NITEL maintained a monopoly in the provision of international access facilities until February 2001, when 2 new entrants were granted Digital Mobile Licences ("DML") with international access capabilities.

It currently has a monopoly in the provision of trunk transmission services even though the DML permits the licensees to roll out their own separate trunk transmission networks. FGN intends to sell 40 % of its equity in NITEL and also cede management control to the core investor. BPE has recently appointed a consortium led by PriceWaterhouseCoopers as NITEL's Privatisation Advisers.

The privatisation advisers are yet to come up with a timetable for the exercise. However, prior to the appointment of the privatisation advisers, the BPE had placed advertisements in local and international journals inviting expression of interests from prospective core investors. It is not known what the response has been like so far.

President Obasanjo made an ancillary decision during the 17th April 2001 meeting, in regard to the planned auctioning of a Second National Carrier ("SNC") licence. Nigeria's regulatory and licensing authority, Nigerian Communications Commission ("NCC") had announced in December 2000 its intention to licence an SNC sometime in year 2001.

The BPE is opposed to the issuance of this licence prior to the privatisation of NITEL because it may affect the interest in and value of the NITEL privatisation. Even though the NCC was not present at the meeting or heard on the matter, President Obasanjo ruled that the SNC licensing should be sequenced after NITEL's privatisation.

For more information contact : paul@paulusoro.com

SOUTH AFRICA INTENDED TELECOMS POLICY DIRECTIONS

The Minister of Communications recently released a proposal for telecommunications Policy Directions (the "Policy Directions") to be issued for the post-exclusivity period.

The Policy Directions advocate a managed liberalisation process that will see the introduction of a second national operator ("SNO") to compete against the incumbent, Telkom Limited ("Telkom"), in the area of public switched telecommunication services.

The SNO will be issued with a licence to provide *fixed-mobile* services from the end of Telkom's exclusivity period on 7th May 2001. *Fixed-mobile* services are defined to include international services, national long distance services, payphone, local access services and value added network services ("VANS"). The South African telecommunications industry is governed by the Telecommunications Act (n° 103), 1996 (the "Act"). The Act makes provision for the liberalisation of the telecommunications industry by stating in section 36 that Telkom's exclusivity will be limited to a specific period set out in its licence.

Other clear indicators of South Africa's commitment to telecommunications liberalisation are the South African Government White paper on Telecommunications Policy ("the white paper"), regulations issued by the Independent Communications Authority of South Africa, the industry regulator, and South Africa's telecommunications commitments to the World Trade Organisation's General Agreement on Trade in Services.

In addition to the issue of a second national operator licence, the Policy Directions propose measures that will cover issues such as the empowerment of historically disadvantaged persons, the issue of future services-based licences, the use of voice over IP in under-served areas,

the assignment of 1800 MHz radio frequency spectrum, third generation service licences, universal service, numbering and public emergency communications.

There are certain issues which have been the topic of debate and on which various industry players have suggested further clarity. Some of these issues include the suggested inclusion of two telecommunications operators that are not under state control as shareholders in the second national operator and the concept and definition of fixed-mobile licences.

The Policy Directions can be downloaded from <http://docweb.pwv.gov.za> and the Act and the white paper from <http://www.polity.org.za/>

SPAIN

NEW MOBILE REGULATORY FRAMEWORK

The complex situation of telecommunications operators world-wide and the lack of availability of UMTS technology has determined that the Spanish Government approved a change in the obligations foreseen for mobile operators in the UMTS tender conditions.

Said conditions mandated that UMTS operators should have rolled out their networks by 1st August 2001. However, the obligations related to effective availability of UMTS technology have been postponed so that the deadline is now 1st June 2002. The obligations and commitments assumed by the operators to favour UMTS development are maintained in accordance with the original timetables.

Likewise, the tender for granting two new wireless licenses, which should have been called during the first quarter 2001, has been called off. The above measures have been regarded as an attempt to ensure development of new wireless technologies and to create a stable framework which permits the normal growth of operators in the market.

For more information see :

http://www.telfarifas.com/especiales/especial_ums.html

or contact : aam@gomezacebo-pombo.com

12. WEB SITES

AUSTRALIA

WEB SITE ON INTERNET LEGAL ISSUES

The first legal Australian Web site concerning legal issues in regard to the Internet has been launched recently. The aim of OzNetLaw is to provide information in order to help small and medium enterprises, start-ups, Internet service providers, community organisations and students, to address and solve legal problems related to the use of the Internet. Detailed fact sheets and links to legislation and case law are also available and users have the possibility to ask for advice by e-mail or phone.

See: <http://www.oznetlaw.net.au>

13. DOCUMENTS

THESIS

An LLM thesis on the « *Application of the EC Competition Rules to Telecommunications – Selected Aspects: The Case of Interconnection* » considers the right and duty to interconnect telecommunications networks under the EU telecommunications regime. It deals with specific regulatory and policy issues and the judgements of the European Court of Justice. In short, it provides an overview of the status and the possible future of the interconnection regime in Europe.

http://www.ijclp.org/4_2000/ijclp_webdoc_2_4_2000.html

COMMENTARY

LUXEMBOURG

THE OPENING OF AN ONLINE ACCOUNT : TOWARDS THE BIRTH OF VIRTUAL BANKING

By Eric JUNGBLUT and Céline LELIEVRE

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Each bank must, prior to entering into a contractual relationship with a client, satisfy certain obligations. The most important of those are the identification of the client and, when the opening of a securities account is considered, the determination of the client's investor profile.

While these conditions may easily be satisfied when entering into a standard banking relationship, where the parties meet directly, the matter is more delicate when the parties are not in the presence of each other, as is the case when the opening of an account online is envisaged.

In such case, because paper is still considered as being trustworthy, the banker must "pay special attention to receiving not only all the documentation required, but also complete and satisfactory answers to all the questions that he has been inclined to raised with the client in order to be in a position to reach a satisfactory judgement on the client and on his motives" (Circular IML 94/112). Accordingly, the opening of a bank account remains essentially an *intuitu personae* contract, that is a contract entered into by each party in consideration of the personality and specific characteristics of the other party.

Nevertheless, the adoption of the law of 14th August 2000 on electronic commerce raises the issue of the validity of a bank account opening agreement when it is entered electronically as this act establishes an electronic signature scheme aiming at granting to electronic documents the same legal value as documents bearing manuscript signatures and as it provides the possibility to execute agreements electronically.

This paper purports to determine whether, given this new legislative framework, a bank may satisfy its duty to identify and collect information on his client online.

Duty to identify

In the Grand-Duchy, prior to the opening of an account, a financial institution must proceed with certain verifications regarding the identity of its client.

Indeed, article 39 of the Bank Act of 5th April 1993 imposes on the bank the duty to "require the identification of its clients by means of a document having evidential value when it enters into business relationships, in particular when it opens an account, or savings account, or offers assets safekeeping services".

Regarding natural persons, according to Circular IML 94/112, this identification must be based on an official identification document certifying the identity of the person. The bank must only ensure that the document provided is related to the person producing it by comparing the signature affixed on the identification document with the signature affixed on the bank account opening request and, as the case may be, by ensuring that the picture on the identification document corresponds with the client.

Regarding legal persons, the identification must, according to the same Circular, be made on the basis of official documents including the excerpt of the Commerce Registry and the articles of incorporation.

The opening of an account may also be made at a distance. In such case, the bank must ensure that the copies of the identification documents provided be certified by a competent authority (Circular IML 94/112).

Opening an account online

The compliance with these obligations, when considering entering into a banking relationship online, raises certain difficulties in so far as it is not possible to proceed with the client identification using the original or a certified copy of the official identification document required.

The identification of the client by the bank is crucial, especially when considered in light of the money laundering legislation.

Indeed, in accordance with Circular IML/94/112, the identification of the applicant must "be supported by information on the client, his activities, on the purpose of the desired business relationship" in order for the bank to reduce the risk of being used for money laundering purposes and to detect transactions which may, thereafter, prove to be suspicious because of their incompatibility with the information provided to the bank.

For the time being, the practice followed by certain banks is to allow the banking relationship to be entered electronically provided that it is thereafter completed by a direct (off-line) contractual relationship between the parties or by the provision of the certified copies of the required identification documents of the client.

Certification authorities

As it can be appreciated, in such a scheme, the contractual relationship cannot be completed in a totally dematerialised environment. Accordingly, it may be relevant to determine whether the law of 14th August 2000 on electronic commerce may change once the decree on electronic signature is adopted.

According to this act, an electronic signature backed by a qualified certificate issued by certification services provider has the same legal value as a manuscript signature in so far as the identity of the signatory has been confirmed by a third party (the certification services provider that has issued the qualified certificate).

In this respect, the certification services provider could be considered as a trustworthy mean to identify the client and to meet the specific requirements of the banking industry as these authorities are required to verify a number of information regarding the person requesting an electronic signature certificate, including of course its identity.

However, in such cases, the above referred banking legislation would need to be adapted. Indeed, for the time being, the bank is not authorised to delegate its obligation to identify the client to a third party, even if such third party would be a certification authority accredited under the law of 14 August 2000. The only alternative currently available is that the bank fulfils itself this certification function or that it relies on the identification performed by another banking institution.

Duty to know the client

In addition to its duty to identify its client, the bank is also required to know the client when the opening of a securities account is contemplated. The intent is, according to Circular CSSF/2000/15 regarding the rules of conduct of the financial sector, to provide the client with a service corresponding to his financial situation, objectives, experience and expertise in investment related matters.

Contrary to the issue of the identification of the client, it does not seem that anything can prevent the use of electronic communications in order to obtain from the client the desired information to comply with this duty. The practice currently developing is to require the client to directly fill-in online "client profile" forms.

Conclusion

As it appears from the above, it is not possible, at this time, to have the entry into a banking relationship performed entirely electronically. Accordingly, the regulation which requires the bank to control the identity of the client by obtaining the production of his identification documents, or a certified copy thereof where the parties are operating at a distance, may considerably hinder the development of electronic banking.

Accordingly, it might be advisable for the regulatory authorities to consider the possibility to delegate this duty, not only to another financial institution, but also to certification services provider.

In such a case, when the regulation regarding electronic signatures is adopted and in force, a request to open an account, whether made by e-mail or online on an e-banking site, should be accepted provided that it comprises an electronic signature backed by a qualified certificate issued by certification services provider.

Indeed, such providers, in order to satisfy their identification obligation, have the responsibility, subject to sanctions, to proceed with the verification of a number of information regarding the person requesting the issuance of an electronic signature certificate. Therefore, third parties, including banking institutions, should be entitled to rely on this identification.

When the opening of an account online becomes possible, the development of electronic banking will be unleashed. Only then will the birth of virtual banking be, at last, completed.

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