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Interconnection
28th - 31st January, Berlin **2002**
Operator Case Studies
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NEWS

1. COMPETITION

BRAZIL

INFRASTRUCTURE SHARING BETWEEN TELECOM SERVICE PROVIDERS

More than a year after it released draft regulations, the National Telecommunications Agency (ANATEL) recently approved and issued as Resolution No. 274 of 5th September, the rules on infrastructure sharing among telecommunications service providers.

The new rules set out the conditions and standards for sharing of ducts, conduits, poles, towers and utility easements in the telecommunications sector. Instead of a price list, ANATEL has prescribed a calculation methodology for actual infrastructure costs.

The prices for use of poles – considered reasonable and non-discriminatory by ANATEL – range from BRL 1.05 to 1.20 (approx. USD 0.38 to 0.44), and cannot be used as a guidepost for infrastructure relationships in other sectors, such as energy and oil.

The major points in the new Resolution are:

- only infrastructure over-capacity may be shared with other telecommunications companies;
- acts or omissions aimed at protracting an agreement between telecommunications companies will be treated as unfair competition under antitrust laws; and
- caps on the amount payable by the telecommunications service providers applying for use of another service provider's infrastructure were adopted.

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BRAZIL

COMPETITION INTRODUCED IN WIRELINE TELEPHONY MARKET

On 27th August 2001, the National Telecommunications Agency (ANATEL) submitted for comments proposed regulation establishing guidelines for the granting of fixed telephony authorisations, as of January 2002, when the Brazilian market will open for the entrance of new competitors.

According to the proposal, the current fixed telephony operators will be entitled to apply for authorisations in other regions, only if they bring forward to December 2001 all their universalisation targets undertaken with ANATEL.

The market opening will also allow the provision of fixed telephony by other companies established in Brazil, provided that they fulfil ANATEL's requirements and pay the license fee to be defined by ANATEL. Authorisation will be granted for an indeterminate period and irrespective of prior bidding procedures.

However, as the radio frequency spectrum is insufficient to satisfy all interested parties, the right to use radio frequencies in order to render fixed telephony must be applied for separately, and will be subject to prior bidding procedures. The radio frequency authorisation will be granted by ANATEL for 20 years, renewable only once for the same period.

Under the proposed regulation the new fixed telephony providers will have to provide local services at least in all State capital cities and in cities with more than 200,000 inhabitants.

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EGYPT

TELECOM INDUSTRY LIBERALISATION

The Telecommunications Industry has improved significantly in Egypt over the past few years. The Egyptian Government, under the privatisation program, has realised the need for the development of the telecommunications industry to meet domestic and international demands. Domestically, radical and structural reform in the telecommunications industry has been undertaken.

The governmental agency which monopolises telecommunications services in Egypt – Arab Republic of Egypt National Telecommunications Organisation (ARETO) has been transformed into an Independent Authority – Telecommunications Regulatory Authority (TRA) – and a public company – Telecom Egypt (TE), and in 1999 a new Ministry of Communication & IT (MCIT) was established. Internationally, Egypt is now a member of the WTO and signatory to the GATT and is, therefore, committed to liberalising the telecommunications services under WTO rules.

The MCIT has been paving the way for the liberalisation of the telecommunications industry by encouraging private sector participation and allowing fair competition among existing operators. MCIT has also called for an international tender, namely, "International Public Bid to Liberate the Telecommunications Services." Tenders of said bid were submitted on 17th September 2001, requiring the service of a consultancy firm to assist MCIT in issues related to telecommunications policy, in order to establish a market-based environment reflecting international best practice.

For more information concerning the details of said bid see:

http://www.mcit.gov.eg/f_tenders.htm

EU

COMMUNICATION ON STATE AID AND PUBLIC SERVICE BROADCASTING

On 17th October 2001 the European Commission adopted a Communication that clarifies the application of State aid rules to Public Service Broadcasting (the "Communication").

The Communication will enable the Commission to take decisions on various complaints¹ lodged by private operators concerning State financing of public broadcasters. The Communication from the Commission takes into account recent developments and provides guidance to public authorities and operators.

The main provisions of the Communication are the following:

- public service broadcasting plays a particular role as defined by the Amsterdam Protocol;
- funding by state resources of public service broadcasting is, in principle, to be qualified as State aid. Therefore the Commission has exclusive competence to control eventual abusive practices;

¹ The Commission has opened formal State aid procedures regarding public service broadcasting in Italy and France. Pending cases also involve Spain and Portugal. The Commission also received notification of aid from the United Kingdom and from Belgium and is examining complaints concerning the funding of public broadcasting in Greece, Ireland, Austria, Denmark and Sweden.

- Member States are free to define the public service remit. However, the definition of the public service remit cannot extend to activities that could not be reasonably considered to meet, in the wording of the Protocol, the “democratic, social and cultural needs of each society”;
- Member States shall establish a clear and precise definition of public service in broadcasting;
- public broadcasters shall be entrusted with a public service mission by means of an official act of the Member State;
- Member States should arrange for an independent body or authority to control and monitor the fulfilment of the public service mission by the public broadcasters;
- public funding shall be limited to what is necessary for the fulfilment of the public service mission, the proportionality criteria derived from Article 86 EC Treaty. When carrying out the proportionality test, the Commission will consider whether any distortion of competition arising from the aid can or cannot be justified by the need to perform the public service;
- based on the so-called “Transparency Directive”, the public broadcasters shall hold separate accounts for public service and non-public service activities.

The Communication is available on the Internet pages of the Commission's Directorate General for Competition:

<http://europa.eu.int/comm/competition>

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ITALY WIRELESS LOCAL LOOP

Further to the Decision 822/00/CONS on the Procedures for the release of frequency bands, on 31st October 2001 the Italian Communications Authority issued a Decision concerning the allocation of frequency bands for point to multipoint broadband networks and measures for developing effective competition.

In particular, the Decision provides for the release of seven licenses in frequency bands 24,5–26,5 GHz and three licenses in the frequency bands 27,5–29,5 GHz for each geographic area (which generally corresponds to an Italian region).

Licensees awarded such frequencies may employ owned or third party infrastructures and may use shared capacities and devices in order to offer services to the public. Shared infrastructure may for part of specific commercial and technical agreement between operators.

Article 5 of the Decision provides that specific terms and conditions be applied to operators retaining significant market power in a given geographic area. Such operators may not provide telecommunications services by means of WLL frequencies for a period of up to 48 months from the allocation of frequencies and they must hold separate accounts.

The above mentioned provision is intended to guarantee newcomers fair access to the market. The Decision is currently with the Communications Ministry and it is reasonable to assume that the Tender procedure for the release of the relevant licenses will be issued within the next few months.

For more information see the Italian Communications Agency's web site: www.agcom.it/provv/d_400_01_CONS.htm

LEBANON PRIVATISATION OF THE TELECOM SECTOR

Led by Prime Minister Rafik Hariri, the Lebanese government, confronted with the necessity to liberalise and regulate the local telecommunications sector, is looking at a long-term, efficient and realistic strategy period.

Lebanon's telecom sector is faced with a multitude of weaknesses, among which the State controlled monopoly of the Public Switch Telephone Network (PSTN), the Ministry of Telecommunication's (MOT) operations on non-commercially viable and modern administrative systems, the lack of data networking and related services, and the limited competition in mobile telecom services whereby the only two private GSM operators provide the market with equivalent services at identical prices, such market still being regulated by Decree Laws No. 126 and 127 dated as of 12th June 1959.

Obviously, the first challenge for the Lebanese government was to restructure the telecom sector through the adoption of a policy paper and the enactment of a new law to substitute the existing regulations and propel Lebanon in the new telecommunications and information age.

As of 1999 MOT started working on a draft law, which was subsequently submitted to the Council of Ministers for approval by mid 2000.

With the entry of a new government later in that year, the first draft was withdrawn from the Council of Ministers and sent back to MOT for further consideration, specially on issues related to regulatory objectives, open markets, competition and other administrative and social factors.

In March 2001 MOT submitted its second draft for the Council of Ministers who, after long and hard discussions, approved the draft and passed it to the Parliament for final enactment as a law.

The Parliamentary Committee in charge of reviewing the draft has only recently accepted the government's proposal in general terms, but has made certain amendments to clauses concerning the social and employment impact of liberalising the sector, knowing that MOT and its commercial operating company (OGERO) account for almost 4,000 employees, some of whom will have to be reallocated to the private entities willing to enter the market.

The draft law, as reviewed, mainly features a new concept of liberalising the telecom market which maintains close relations between the regulator and the private operators, the creation of an administrative and financially independent regulatory authority with a pre-defined role for the MOT in overlooking public policies through preparing and submitting draft laws and decrees, open, though limited competition in the market through the launching of international bids for GSM and UMTS licenses, and a fair and comprehensive policy for transferring MOT's employees to the new Authority and to the new private operators.

The draft law is expected to be enacted by year-end.

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SPAIN RESOLUTION ON DOMINANT OPERATORS

The Spanish Telecommunications General Law imposes on the Telecommunications Market Commission (TMC) the obligation of determining and publishing, on an annual basis, the list of dominant operators in each of the markets quoted below.

Pursuant to this list, published on 4th October 2001 and coincident with the list published last year, the dominant operators are the following:

- fixed telephony market: Telefónica de España, S.A.U.;
- leased lines market: Telefónica de España, S.A.U.;
- mobile telephony market: Telefónica Móviles España, S.A. and Airtel Móvil, S.A.; and
- interconnection market: Telefónica Móviles España, S.A. and Airtel Móvil, S.A.

For more information see: www.cmt.es/cmt/decisiones/ultima.html or contact: aam@gomezacebo-pombo.com

2. COMPUTER CRIME

THE NETHERLANDS VIRUS CREATOR SANCTIONED

On 27th September 2001, the District Court of Leeuwarden, Netherlands awarded a 150 hour unpaid community service order against a Dutch national who was found to have created the Anna Kournikova worm virus earlier this year.

The creator of the virus, whose internet nickname was "OnTheFly", used a commonly available virus generator known as the VBS Worm Generator to create his virus, which then rapidly spread across the internet infecting thousands of machines. Soon after the spread of his virus OnTheFly posted an apology on a web site and then turned himself in to the local authorities. Deborah Weierman of the FBI's Washington D.C. office confirmed soon after that the FBI had opened an investigation into the spread of the virus.

OnTheFly was brought to justice under Article 350a, Paragraph 3 of the Netherlands Penal Code which provides for a maximum sentence of four years imprisonment for disseminating data "intentionally and unlawfully that are intended to cause damage by replicating in a computerised device or system". The 150-hour non-custodial sentence was awarded by the court in recognition of his expression of regret and of the small amount of damage caused by the virus.

An Argentinean teenager, known by his internet nickname "Kalamar", was known to be the author of the virus creating tool which OnTheFly used for the Kournikova virus. No criminal proceedings were brought against him and after the spread of the Kournikova virus he released a newer, more powerful version of his virus-creating tool which is also available from a host of different web sites.

It is clear that prosecuting alone does little to prevent the spread of viruses and education on appropriate defences against viral attacks is a key factor in minimising the effectiveness of attacks.

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3. CONSUMER PROTECTION

EU GREEN PAPER ADOPTED

With the adoption of a Green Paper on Consumer protection in October 2001, the Commission launched the debate over essential B2C issues within the EU. This debate would seem necessary with regard to today's e-commerce situation, including cross-border relations. As the Commission is aiming to determine the future orientation of EU consumer policy, it also wishes to stimulate consultation at European level.

Two options are set out for debate by the Green Paper:

- further harmonisation addressing specific issues (as in the past); and
- set forth a framework directive to complement specific legislative measures.

Indeed, the light volume of cross-border exchanges shows consumers' lack of confidence for participating in such transactions.

On the other hand, SOHO companies hesitate to propose their goods at the European level. This timorous behaviour can be explained by the

considerable differences between Member States legislation about consumer protection.

Therefore, national legislation should be harmonised or adapted in order to balance cross-border transactions with consumer protection interest.

The Green Paper can be downloaded at:

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_pract_index_en.html

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EU SOFT LAW AND THE CONSUMER INTEREST

As a demonstration of Europe's interest in self-regulation, the European Consumer Law Group published "Soft law and the consumer interest" (the "Report") in March 2001. The Report essentially gives views on how the use of soft law may serve consumers' interests.

The Report examines the effectiveness and practice of self-regulation by describing some consumer groups' experience with this mode of regulation. The Report objectively explains some of the reasons for the increased interest in soft law shown by the legislator and business in recent years, and the real place and function of self-regulation within the traditional legislative framework.

The Report looks in detail at five main questions:

- where is soft law alone not appropriate;
- soft law at the level of the European Union;
- problems with soft law, which includes coverage, the drive to regulate, independence and stakeholder participation, monitoring, sanctions, and transparency;
- how soft law systems deal with the problems; and
- the possibility of an EU directive on soft law for it to gain credibility.

The Report can be downloaded in Adobe Acrobat format at:

http://europa.eu.int/comm/consumers/policy/eclg/rep03_en.pdf

For more information contact: LE_GOUJEFF@vocats.com

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

FRANCE SEARCH ENGINE LIABILITY

The simplicity in the use and efficiency of search engines to find information on the internet is one of the main reasons for their success and substantial development.

Yahoo! type search engines, which classify words by topic and categories, now have to compete with the ultra-rapid tools that allow sites to be referenced on the basis of their hit record when searching by word, phrase or question. Special attention needs to be paid to the legal problems associated with the specific technical features of these engines that allow intelligent access to information.

When an internet user searching a site consults the engine by choosing one or several key words reproducing a trademark, the engine collects the key words and relies on lists of metatags to identify the site being searched

for. Difficulties may arise when the results of the search made on the basis of metatags reproducing trademarks lead to the sites with no link to the activities and operating without the authorisation of the owner of the trademark used.

French judges had failed to address the issue of search engine liability until recently. In the Delanoé case of July 2000, the Chairman of the *Tribunal de Grande Instance* of Paris considered that this issue should be decided by the judges examining the case on its merits, and not in summary proceedings.

On 5th September 2001 a search engine was for the first time held liable by judges examining the case on its merits, after two decisions rendered in summary proceedings. In the case *Cadremploi vs. Keljob*, the *Tribunal de Grande Instance* of Paris sentenced Keljob, a search engine that specialises in listing employment offers, to the payment of damages amounting to one million French francs. Keljob was also ordered to stop referencing Cadremploi employment offers. The judges considered that Keljob had infringed Cadremploi's trademark and company name, reproduced on its site and in its advertising brochures. In addition, they considered that Keljob was using a qualitatively substantial part of the contents of Cadremploi's database without the consent of Cadremploi, and was, consequently, violating the *sui generis* right of Cadremploi, pursuant to article L.341-1 of the French Intellectual Property Code. Keljob has already lodged an appeal.

The French judges have also ruled against the use of a trademark in a metatag by a site when the criteria of infringement were met. In the *Distrimart* case, the *Tribunal de Grande Instance* of Paris held, in a summarising judgment of 4th August 1997, that the use by the company *Distrimart* of the terms 'home & object' and 'decoplanet' as key words on its site's homepage constituted infringement of the trademarks registered by another company for internet-related items, since it led to confusion of the consumer. Likewise, the reproduction of the trademarks registered by company *Chanel* in the metatags located on a site selling luxury goods of another company constituted infringement under the reasoning of the Court of Appeal of Paris of 16th November 1999.

While the first signs of the controversial debate are only beginning to appear in France, in September 2000, US judges already addressed the issue of search engine liability in connection with the use of trademarks in the proceedings brought by *Playboy Enterprises, Inc.* against *Netscape* and *Excite*. *Playboy Enterprises Inc.* claimed that *Netscape* and *Excite* infringed its trademarks by selling advertisers a group of words that included the terms 'Playboy' and 'Playmate' and programming the advertising banners to appear in response to a search made on these terms.

The US judges held that the trademark did not confer the right of absolute ownership of the terms 'Playboy' and 'Playmate', which, although they are registered trademarks, are part of day-to-day language. In addition, according to the same judges, there was no infringement to the extent that the search engines use the terms for purposes other than identifying the origin of products or services, and not as trademarks. Finally, the judges stated that there should be evidence of infringement or risk of confusion. In France, the use of a trademark for products or services identical to those designated in the registration document is prohibited, regardless of whether there is a risk of confusing consumers. However, the risk of confusion must be shown when the trademark is only imitated or when the trademark is used for products or services similar to those designated in the registration document.

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5. CONTRACT LAW

GERMANY REFORM ON CONTRACT LAW

On 11th October 2001 the German Parliament approved the act on modernising German Civil Law, in particular regarding contract law (to come into force on 1st January 2002).

This act incorporates the following three European guidelines into German law:

- the Directive on certain aspects of the sale of consumer goods and associated guarantees (Directive 1999/44): regarding contracts of sale the consumer now is entitled to claim from the seller the repair or replacement of faulty goods free of charge. This right had been laid down only for the parties of a contract for work and services. However, regulations concerning this right could be found in standard contract terms. Besides these new regulations the customer is still entitled to demand annulment of sale (cancellation) or reduction of the purchase price (reduction). These entitlements expire two years after the time of delivery in contrast to the current ruling limitation period of six months.
- the Directive on combating late payment in commercial transactions (Directive 2000/35): late payment constitutes a breach of contract, which has been made financially attractive to debtors in the past by low interest rates on late payments. Therefore a decisive shift has to be made in order to reverse this trend and to ensure that the consequences of late payments will discourage late payments. The future interest rate for late payment will be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out on the first calendar day of the half-year in question plus at least seven percentage points. This would result in an interest rate of 10.62 % instead of 8.62 %;
- the Directive on electronic commerce (Directive 2000/31): only a few terms of the Directive have been implemented in contract law. Most of the terms can be found in the Introductory Act to the Civil Code; and
- The possibility to conclude contracts by electronic means is set out in the German Civil Code. As the Directive allows each member to maintain some restrictions for the use of electronic contracts, Germany has decided to allow electronic contracts only for sale and purchase agents and service agents. Many other provisions to be introduced into German law – especially those concerning the information to be provided by the service provider – can be found in the Introductory Act to the Civil Code;

Furthermore, the following acts have been integrated into the German Civil Code without any changes to their content:

- Gesetz über allgemeine Geschäftsbedingungen (Standard Contract Terms Act);
- Haustürwiderrufsgesetz (Act on the right to cancel front door transactions);
- Verbraucherkreditgesetz (Consumer Credit Act);
- Teilzeit-Wohnrechtgesetz (Act on alternation of rights on time-shared dwellings);
- Fernabsatzgesetz (Act on distance contracts);

The standard limitation period has been reduced from thirty to three years.

Under the act, the consumer must no longer bear the burden of proof for faulty goods in the event of a defect occurring within the first six months of purchase. It is now up to the vendor to prove that the defect did not exist on the day of purchase. In order to make contract law easier for the contracting parties, it has been partly assimilated to the UN sales convention (CISG).

Furthermore, some leading principles of German law which hitherto only existed in case law, have now been transformed into statutory law, i.e. breach of duty prior to the contract (culpa in contrahendo).

For more information see: www.bundesregierung.de

6. CONVERGENCE

INDIA INFORMATION TECHNOLOGY MINISTRIES TO BE MERGED

The merger of the Ministry of Information Technology and the Ministry of Communications was proposed by the Minister for Parliamentary Affairs on 27th September 2001.

The merger of the Ministry of Communications and the Ministry of Information Technology into a single ministry has been initiated to make it easier for the government to manage convergence issues effectively, in the light of the pending Communications Convergence Bill 2001 which was tabled in Parliament in the Monsoon Session.

The combined ministry is to consist of the Department of Telecommunications, Post and Department of Information Technology, which would each be headed by a secretary. In addition, a single national advisory committee would replace the separate advisory committees for telecommunications and information technology.

The Prime Minister's approval for the merger is currently being sought and the two ministries should be merged shortly.

For more information see: <http://www.economicstimes.com>

INDIA ISPs NOT ALLOWED IN NET TELEPHONY

The Department of Telecommunications (the DoT) has recently re-affirmed its stance that Internet Service Providers (ISPs) will not be allowed to provide internet telephony services. The present ban on internet telephony is to be lifted from 1st April 2002, in favour of holders of licenses for basic, national long-distance and international long-distance services. DoT is not in favour of allowing ISPs to provide internet telephony services since, unlike the other telephony service providers, they do not charge entry fees, universal access levies or conform to stringent licence fee obligations.

The DoT has approached the Telecom Regulatory Authority of India (the TRAI) to recommend the guidelines for opening up the segment and TRAI is expected to come out with its suggestion on the issue by the end of November.

For more information see:
www.economicstimes.com/articleshow.asp?catkey=569038520&art_id=1127635107&sType=1

7. DATA PROTECTION

EU DATA FLOWS FROM EU TO THIRD COUNTRIES

As a result of European legislation on data protection, the European Commission was asked by international business organisations to approve standard contractual clauses aimed at ensuring an adequate level of protection for data transfers from the EU to third countries. These clauses are limited to personal data transfers from a data controller in the European Union to another data controller located in a third country and are intended to supplement the clauses approved by the Commission on 18th June 2001.

If approved by the European Commission, the clauses could be used as a legal basis when transferring personal data from a European Member State to a third country without having to submit clauses to national data protection authorities for approbation.

The clauses can be found at:
http://www.iccwbo.org/home/statements_rules/statements/2001/contractual_clauses_for_transfer.asp

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LUXEMBOURG CONDEMNED FOR NON-IMPLEMENTATION OF DATA PROTECTION DIRECTIVE

The Commission initiated an infringement procedure against the Grand Duchy of Luxembourg for non-incorporation of Directive 95/46 on the protection of individual with regard to the processing of personal data and on the free movement of such data into Luxembourg law.

Under Directive 95/46, the Member States were to bring into force the law, regulations and administrative provisions necessary to comply with that Directive, at the latest at the end of a period of three years from the date of its adoption, which was 24th October 1998, and immediately notify the Commission thereof.

Having given the Grand Duchy formal notice to submit its observations, the Commission sent a reasoned opinion to that Member State requesting it to adopt the measures necessary to comply therewith, within a period of two months from the date of its notification.

In accordance with settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system to justify a failure to comply with the obligation in a directive.

The Grand Duchy could not justify its failure to comply by the change of government and has therefore been condemned.

The decision of the Court of Justice of the European Communities (case C-450/00) as well as the opinion of Advocate General can be found at:
<http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&lango=fr&Submit=Rechercher&docrequire=alldocs&numaff=C-450%2F00&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

For more information contact: LE_GOUEFF@vocats.com

8. DOMAIN NAMES

AUSTRIA COURT RULING ON PUBLIC INSTITUTIONS DOMAIN NAMES

In a recent case (4 Ob 39/15 – *Rechnungshof*), the Austrian Supreme Court decided on the use of the domain www.rechnungshof.com by a private person, with *Rechnungshof* being the federal audit office. The web site contained the statement, that it does not have any official character, but no link to the official web site of the *Rechnungshof* was provided. Instead, the web site announced that it contains "all insider information from the Austrian federal audit office". The court ruled that this presentation did constitute an infringement of the Republic's right of name (sec 43 of the Austrian Civil Law Code) because it appeared to provide information originating from sources related to the federal audit office and and as such created a potential risk of image loss for the official institution.

This decision does not appear to be fully in line with the court's previous rulings in similar cases. In an earlier decision dating back to September 2000, the court dealt with the use of the domain www.bundesheer.at by a private person. *Bundesheer* is the official name for the Austrian federal armed forces. The respective homepage presented itself as an information platform related to military topics, stating that it was in no way related to the federal armed forces and provided a link to the ministry's official web site. Here, the court decided that the Republic's right of name was not infringed by the use of the word *Bundesheer* on a private homepage, because the domain owner had avoided any possibility of confusion for internet users.

For more information see: www.internet4jurists.at

CANADA COURT DECLINES JURISDICTION IN DOMAIN NAME DISPUTE

On 15th August 2001, the Ontario Superior Court of Justice in *Easthaven Limited v. Nutrisystem.com Inc.* declined jurisdiction in a case involving a dispute over the domain name "sweetsuccess.com".

The defendant, *Nutrisystem.com Inc.*, is a corporation incorporated under the laws of the State of Delaware with its principal place of business in Pennsylvania, USA. It is engaged in the marketing, sale and distribution of weight loss programs, including over the internet. It is the owner of the trademark "sweetsuccess," registered in the United States.

The plaintiff is incorporated under the laws of Barbados and has its head office in Barbados.

Easthaven and *Nutrisystem* had previously brought their dispute before a US district court in Pennsylvania and had commenced proceedings under ICANN's Uniform Domain Name Dispute resolution policy.

Easthaven commenced its action in Ontario in the attempt to prevent *Tucows Inc.*, the domain name registrar, from transferring the disputed domain name to *Nutrisystem*.

Nutrisystem moved to dismiss the later claim on the basis of *res judicata*, abuse of process or forum non-convenience.

The Ontario court declined jurisdiction, finding that there was no "real and substantial connection" between the subject matter of the action and the right of the court to assume jurisdiction over it.

The Ontario court found it difficult to characterise a domain name as either real or personal property since it lacks physical existence (it left open the possibility that a domain name is a form of intangible property).

According to the court, the mere fact that the disputed domain name was registered through a corporation that carries on business in Toronto (i.e. *Tucows*), does not give the domain name a physical presence in Ontario. Since neither of the parties, nor even the disputed domain name had a sufficient connection with the Province of Ontario, the court declined jurisdiction in this matter.

The decision is interesting insofar as it struggles with a subject that has been the source of jurisprudential controversy, namely the precise legal nature of a domain name.

For more information see: <http://aix1.uottawa.ca/~geist/easthaven.htm> or contact: cmorgan@mccarthy.ca

9. ELECTRONIC COMMERCE

CANADA QUEBEC ADOPTS E-COMMERCE LEGISLATION

On 21st June 2001, Quebec's An Act to establish a legal framework for information technology, S.Q. 2001, c.32 (the "Quebec Act"), received royal assent. The Quebec Act was proclaimed in force on 1st November 2001, except for one provision, in force since 17th October 2001, that indicates which minister is responsible for the administration of the Quebec Act.

Whereas almost all other provinces in Canada have already or are in the process of adopting virtually identical e-commerce legislation (based on a model act adopted by the Uniform Law Conference of Canada in September 1999), the Quebec Act takes a distinct approach to its subject matter.

The purpose of the Quebec Act is to ensure:

- the legal security of documentary communications between persons regardless of the medium used;
- the coherence of legal rules and their application to documentary communications using information technology;
- the functional equivalence and legal value of the documents, regardless of the medium used, and the interchangeability of media and technologies;
- the linking of a person with a technology-based documents (e.g. by means of a signature and, if need be, through certification); and
- the harmonisation of the technical systems, norms and standards involved in communications by means of technology-based documents. Among the basic principles sanctioned by the law is that the legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen.

The Quebec Act is drafted in a theoretical style that contrasts markedly with the practical approach to issues of electronic commerce adopted in the common law provinces. Among the specific failings of the Quebec Act is the fact that it does not provide any specific or practical guidance as to when and under what circumstances a binding contract may be formed online.

For more information see: <http://publicationsduquebec.gouv.qc.ca/en/frame/index.html> or contact: cmorgan@mccarthy.ca

10. FINANCIAL SERVICES

EU AGREEMENT ON PROPOSED DIRECTIVE FOR DISTANCE SELLING OF FINANCIAL SERVICES

On 27th September 2001, the Council reached an important agreement (hereafter the "Agreement") regarding the proposed directive for the distance selling of financial services which is due to set common rules for selling contracts for credit cards, investment funds, pension plans, etc. to consumers by phone, fax or internet (hereafter the "Proposed Directive").

Worked out during the Belgian Presidency, this Agreement thus resolves the main difficulties over which talks stumbled during the Internal Market Meeting of 30th May 2001.

In this respect, it should be remembered that one of the main purposes of the Proposed Directive is to determine the law applicable to the relation between a consumer and a financial institution offering remote services. Countries such as France, Spain, Portugal or Italy initially supported the idea of the application of the law of the consumer, whereas more expansionist countries, such as Luxembourg, advocated the application of the law of the service provider.

Finally, the Member States agreed in Brussels that the choice of the applicable law will be given to the consumer.

The Agreement also introduces different amendments to the Proposed Directive, which are:

- prohibition of abusive marketing practices seeking to oblige consumers to buy a service they have not solicited ("inertia selling");
- rules to restrict other practices such as unsolicited phone calls and e-mails ("cold calling" and "spamming");
- obligation to provide consumers with information before a contract is concluded; and
- consumer's right to withdraw from the contract during a cool-off period – except in cases where there is a risk of speculation.

The Agreement is due to be adopted without discussion at a forthcoming Council meeting and will then be submitted to the European Parliament which should take a position before the end of the year.

For more information see:

[http://europa.eu.int/rapid/start/cgi/questen.ksh?p_action.gettxt=qt&doc=MEMO/01/3050\[RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/questen.ksh?p_action.gettxt=qt&doc=MEMO/01/3050[RAPID&lg=EN)

or contact: LE_GOUEFF@vocats.com

INDIA STIFF DISCLOSURE NORMS FOR 'DOTCOMS'

The Securities and Exchange Board of India (the "SEBI") Accounting Standards Sub-committee on valuation of dotcom companies has recommended a number of disclosure requirements for dotcom companies.

In its report the Sub-committee prescribes detailed qualitative disclosure requirements for dotcom companies including market position, competition, prime-mover advantage, description of technological processes, as well as patents or licenses, industrial or commercial contracts, general terms of contracts, alliances and partnerships, description of intangible assets and how they will be used to generate future cash flows, etc.

In addition to the qualitative disclosure requirements, the report also prescribes extensive quantitative disclosure requirements.

These include sources of revenue by business segment sub-categorised under appropriate headings, including advertising income, subscription income and transaction income amounts, if any, of barter transactions recorded as a component of gross revenues and cost of revenue, selling and marketing expenses if such amounts exceed 5 % of either of total revenues or cost of revenues or selling and marketing expenses.

The report also states that very detailed operational statistics should be supplied on viewership, page views, quarter-on-quarter growth, percentage of repeat business, percentage of business generated from top five customers, advertisements, cost of acquiring a customer and revenue per customer.

For more information see: <http://sebi.gov.in/report/dotcom1.html>

11. INFORMATION SOCIETY POLICY

EU COUNCIL OF EUROPE'S RECOMMENDATION ON SELF-REGULATION

On 5th September 2001, the Committee of Ministers adopted Recommendation (2001) 8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communication services).

This recommendation stresses that everyone should benefit from the development of new communications and information services. Nevertheless, the Committee of Ministers stated that the free use of these services should not prejudice human rights or the fundamental rights of others, especially of minors.

Therefore, the Committee of Ministers, aware of self-regulatory initiatives taken by industries, recommends that Member States' governments incorporate in their legislation the principles appended to the recommendation. These principles concerns self-regulatory and user protection against illegal or harmful content.

The main principles relate to:

- self-regulatory organisations;
- content description;
- content selection tools;
- content complaints systems;
- mediation and arbitration; and
- user information and awareness.

For the full text of the recommendation see:

<http://cm.coe.int/ta/rec/2001/2001r8.htm>

For more information contact: LE_GOUEFF@vocats.com

INDIA DRAFT QUALITY OF SERVICE RULES FOR ISPs

The Telecom Regulatory Authority of India (the "TRAI") is for the first time planning to issue minimum quality of service (QoS) norms for Internet Service Providers (ISPs).

An on-line customer survey conducted by TRAI on the problems faced by Internet users in India indicated that customers were dissatisfied due to delay in access, slow response time, unstable connections and occasional non-availability of their internet accounts due to capacity constraints.

In an attempt to address the quality issues in the overall interest of growth of internet services and customer satisfaction, TRAI has taken the first step towards streamlining quality norms so that accountability of ISPs towards users can be established under regulatory supervision.

TRAI has issued a consultation paper on QoS to solicit the views of stakeholders and obtain feedback, with the objective of framing benchmark parameters relating to accessibility, reliability, provision of service and service operability.

For more information contact: vaibhav@nishithdesai.com

MEXICO E-MEXICO PROJECT

The e-Mexico project that seeks to link the entire Mexican Republic through the internet, could take as long as ten years to conclude, according to the public declarations given by Mr. Julio Cesar Margain, General Co-ordinator of the program.

e-Mexico is a rather ambitious project launched by Mexico's President, Mr. Vicente Fox, in an effort to promote the economy throughout the country, even in remote areas where technological infrastructure is scarce or non-existent.

The overall budget for e-Mexico will add-up to USD 4 billion. The initial investment for the year 2002 will range between USD 300 and USD 400 million.

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

12. INTELLECTUAL PROPERTY

CANADA COURT OVERTURNS ONLINE TRADEMARK INFRINGEMENT ACTION

On 11th September 2001, the Ontario Court of Appeal in Pro-C Limited v. Computer City, Inc., Docket no. C34719, overturned a trial judgement in which the court awarded the plaintiff CAD 450,000 in general damages and CAD 750,000 in punitive damages for trademark infringement. The plaintiff was the registered owner of the trademark "Wingen", used in Canada in association with its software products. The defendant had adopted the same trademark for use in the United States in association with a non-competitive product (personal computers). The plaintiff used the trademark as its domain name for its corporate web site.

When the defendant's American customers sought information on the Internet regarding the defendant's personal computers, they mistakenly visited the plaintiff's web site.

The plaintiff alleged that its web site was so overwhelmed that it could not service its own customers and that its business was damaged.

At issue on appeal was whether the trial judge had erred in deciding that the defendant had "used" the trade-mark in Canada in violation of the Plaintiff's right to exclusive use under the Canadian Trademarks Act.

According to section 4 of the Trade-marks Act, a trademark is deemed to be "used" in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares.

Because the defendant had not actually sold computers marked with the trademark "Wingen" in Canada through its own web site (or otherwise), the Court of Appeal held that there had been no "use" of the trademark by the defendant in Canada, and hence no infringement. The appeal thus clarifies the application of local law to a foreign web site operator.

For further information see:

<http://www.ontariocourts.on.ca/decisions/2001/september/pro-cC34719.pdf>
or contact: cmorgan@mccarthy.ca

13. MEDIA

CHILE ANALYSIS OF DIGITAL TELEVISION TECHNOLOGICAL STANDARD

The Undersecretariat of Telecommunications (Subtel), free-reception television operators and providers of television equipment of Chile are currently analysing which technology standard should be adopted for the implementation of digital television.

A working group comprised of the above-mentioned authority and market players discussed the issue during the second and third quarters of this year. However, the group ended its discussions without reaching any final conclusions.

There are two main preferences in relation to this matter.

The first alternative is the Advanced Television System Committee standard (ATSC), which operates with a channel separation of 6 MHz and has already been adopted by the Federal Communication Commission of the United States of America (the FCC).

The second alternative, which is mainly used in Europe and with a common channel separation of 8 MHz, is the Digital Video Broadcasting (DVB) standard.

Supporters of the ATSC standard (which include domestic operators of free-reception television) base their preference mainly on the following grounds:

- among other countries, the ATSC standard has already been adopted by the USA, Canada, South Korea and Taiwan; thus, its adoption would ensure greater availability of digital television equipment and infrastructure at lower prices;
- the 6 MHz channel separation with which this standard operates is the same as the one currently used by the operating analogue television systems in Chile (NTSC); therefore, the ATSC standard is viewed as the natural continuation of the same;
- the ATSC standard allows high definition (HDTV) and standard definition (SDTV), whereas the DVB standard would only allow SDTV; however, it is important to note that HDTV using DVB is currently at a developmental stage; and
- the ATSC standard allows high unidirectional data transmission flow (approx. 1Mb/s).

Supporters of the DVB standard base their preference mainly on the following grounds:

- the DVB standard can operate with a channel separation of 8 MHz, 7 MHz and, theoretically, 6 MHz;
- DVB allows the use of mobile television receivers, which would not be possible with the ATSC standard;
- the DVB standard allows a single frequency network, which is interesting for channels that operate with repeater stations;
- DVB is less vulnerable to interference between 10 and 15 db than ATSC; and

- the DVB standard also allows high unidirectional data transmission flow (approx. 1Mb/s)

We have been informed that Subtel is currently working to issue a decision on this matter by the end of 2001. Likewise, Subtel intends to fully implement a digital television system in our country by the beginning of 2014.

For more information contact asilva@carey.cl or emartin@carey.cl

IRELAND NEW REGULATORY APPROACH ON OWNERSHIP AND CONTROL

On 18th October 2001, the Broadcasting Commission of Ireland ("BCI"), the regulatory body for independent radio and television broadcasters, issued a policy statement on ownership and control, which covers the following issues:

- the meaning to be given to the terms "control", "substantial interest" and "communications media";
- control of multiple independent radio stations: the BCI will carefully consider situations where 15 to 25 % of stations are controlled by the same person. Control of more than 25 % of stations is "unacceptable";
- media concentration: the BCI outlines the criteria, points of reference and models it will apply in determining and responding to concentration across the communications media;
- local broadcasters: while local ethos will continue to be a key policy objective, local ownership is not seen as essential to maintaining a local ethos; and
- 100 % ownership of broadcasters: the BCI is abandoning a rule on maximum percentage holding in broadcasters. Subject to safeguards for pluralism and diversity, 100 % holdings in broadcasters will now be allowed.

The full text of the policy document is available at:
<http://www.irtc.ie/ownpolicy.htm>

NEW ZEALAND RESTRUCTURING OF STATE BROADCASTER

In [Issue 8](#) of "the i.n.k.", we commented on the Government's Charter for Television New Zealand Limited (TVNZ), New Zealand's state-owned television broadcaster. The Charter sets out a number of social objectives for TVNZ to fulfil "predominantly through free-to-air broadcasting". The Charter is to be implemented from 1st July 2002.

The Minister of Broadcasting, Marian Hobbs, has announced a proposed new governance structure and legal status for TVNZ to facilitate the implementation of the Charter.

New legislation will be introduced to change TVNZ from a "State enterprise" to a "Crown company". As a state enterprise, TVNZ was required to be as profitable and efficient as a comparable business not owned by the Crown.

As a "Crown company" the emphasis on profit is reduced: TVNZ will be required to generate an *adequate* return on shareholder's funds and operate as a *successful going concern*. However, its primary focus will be to meet the objectives of the Charter.

As a Crown company, TVNZ's structure will comprise a "superboard" or holding company and two independent subsidiaries, one for television channels and the other for transmission services. The transmission company will itself act as a holding company for a number of operating companies.

The new structure for TVNZ is designed to separate the television business with its Charter obligations from the transmission business.

The transmission group will continue to pursue goals of private sector-equivalent profitability and will operate effectively unconstrained by the content-related social policy objectives of the Charter.

The legislation establishing the new TVNZ structure is expected to be introduced into Parliament before the end of 2001.

For more information on the new structure of TVNZ see:
<http://www.executive.govt.nz/speech.cfm?speechalph=36327&SR=0>
For full text of the Charter see:
<http://www.executive.govt.nz/minister/hobbs/tvnz>
For more information contact: david.boswell@bellgully.com

14. TARIFFS

AUSTRIA LANDMARK DECISIONS ON MOBILE INTERCONNECTION PRICING

In the landmark decisions dated 5th November 2001 (Z 14, 15/01 and Z 5, 7/01), the Austrian regulator, Telekom Control Commission, significantly reshaped the interconnection pricing structure of Austrian mobile operators.

All previous decisions of the regulator in this context have been based on the principle of reciprocity of mobile interconnection charges between the Austrian incumbent Mobilkom Austria and the biggest alternative provider max.mobil. Yet, in its decisions of 5th November 2001, the regulator decreased Mobilkom Austria's interconnection termination fees (to a level of EUR 0.1125 from 1st April 2002), whereas max.mobil's termination fees were left unchanged at a level of EUR 0.1380. The regulator based its decision mainly on the fact that Mobilkom Austria's market share is still considerably higher than that of max.mobil. It also took into account international benchmarking (which showed that the interconnection charges of Austrian mobile operators were already among the lowest in Europe).

The two decisions at issue concerned interconnection disputes between Mobilkom Austria AG and max.mobil, respectively, with a fixed network operator. It remains to be seen whether the regulator will apply the same principles (i.e. non-reciprocal interconnection fees) in its decision on mobile to mobile interconnection disputes to come.

The regulator's decision can be accessed at its web site: www.tkc.at

GERMANY NEW INTERCONNECTION RATE STRUCTURE

Deutsche Telekom AG has recently introduced element based charging. Element based charging means that calls routed under interconnection arrangements are priced according to the number of switches owned by Deutsche Telekom AG they typically pass.

The prices depend on the amount of switching capacity used for the calls, irrespective of the distance covered. This approach generally ensures fairer prices. New entrants that have invested larger sums in their own infrastructure are able to take greater advantage of cheaper connections than competitors that have only invested smaller sums in their own telecommunication networks.

On 1st January 2002 a new interconnection rate structure for element based charging will be introduced.

The new rate structure will comprise three tariff gradients (local, single transit and double transit).

The peak rates (Monday to Friday from 9.00 to 18.00) will be priced at EUR 0.0065 per minute in tariff gradient I, EUR 0.0107 per minute in tariff gradient II and EUR 0.0186 per minute in tariff gradient III.

The off-peak rates (Monday and Friday before 9.00 and after 18.00; all day Saturday and Sunday and national holidays) will be priced at EUR 0.0044 per minute in tariff gradient I, EUR 0.0071 per minute in tariff gradient II and EUR 0.0122 per minute in tariff gradient III.

The rates determined for tariff gradients I and II are about 25 % lower than those put forward by the Deutsche Telekom AG. In contrast, the new tariff for gradient III corresponds to those proposed.

The new rates are about 10 % higher than those determined in September 2000 in response to Arcor's representation. The new prices will be about 14 % lower than current prices.

These gradients are in turn based on a network interconnection structure made up of two network levels, with 475 local catchment areas at the lower level and a total of 23 basic catchment areas at the upper level.

The charges originally put forward by Deutsche Telekom AG were based on a three-tiered network. Competitors would have had to interconnect with Deutsche Telekom AG at a total of 936 areas in order to be able to purchase national wholesale services at the lowest tariffs.

The Regulatory Authority for Telecommunications and Post (RegTp) sees the new two-tiered network configuration as representing a compromise between the existing network structures of Deutsche Telekom AG and those of its competitors. It also shows the best practice efficiency in service provisions, given that efficient operator costs are the yardstick applied in accordance with the Telecommunications Act when regulating prices.

Under the current arrangements interconnection at the lowest level was possible at a maximum of 293 points. This number will be increased by some 60 % to 475. This means that all competitors will have to invest considerable sums if they want to secure the lowest tariff gradient throughout the country.

If the 936 catchment areas put forward had been approved instead of these 475, the number of interconnection points would have tripled. The rates now determined are proportionate and will allow Deutsche Telekom AG to recover its costs, even if it retains its current network structure.

For more information see: www.regtp.de/aktuelles/pm/02284/index.html

SPAIN LEVY FOR RESERVATION OF RADIO-ELECTRIC SPECTRUM

On 30th December 2000, Law 14/2000 on Tax and Administrative Measures increased the levy for reservation of radio-electric spectrum by 1.400 %

Mobile and Local Multipoint Distribution System (LMDS) operators appealed against this measure, resulting in the payment of the levy being suspended until the appeals have been settled.

The Government has also announced that it will reduce the levy to be paid next year. The measure is included in the draft Law on Tax and Administrative Measures, which will be passed together with the State Budget Law in December 2001.

Under the State Budget Law the levy will be reduced by 64.5 % of the total amount fixed last year for all operators reserving radio-electric spectrum.

The figures forecast for this levy are as follows:

Service	Levy 2001 (EUR million)	Levy 2002 (EUR million)	Reduction (%)
GSM-900	31.42	24.07	23.4
DCS-1800	33.96	30.13	11.3
UMTS	162.98	35.15	78.4
LMDS	66.74	5.56	91.7
TV	10.76	11.06	- 2.79
Broadcasting	4.81	4.81	0

For more information see:

www.elmundo.es/2001/09/22/economia/1050618.html

or contact: aam@gomezacebo-pombo.com

15. TELECOMMUNICATIONS

BRAZIL NEW RULES FOR MULTIMEDIA COMMUNICATIONS SERVICES

The Brazilian telecommunications market has just regulated a new type of service that is essentially a private network. The rules of the Multimedia Communications Service (*Serviços de Comunicação Multimídia – SCM*) were adopted by the National Telecommunications Agency (ANATEL) Resolution No. 272, published on 10th August 2001.

For more information see:

http://www.pinheironeto.com.br/bibli_itnews_02_attach1.asp

For more information contact: rapdecunto@pinheironeto.com.br

BRAZIL 3.5 GHZ AND 10.5 GHZ FREQUENCY AUCTIONS

On 15th October 2001, the National Telecommunications Agency (ANATEL) submitted for comments the proposed rules for the auction of the right to use the 3.5 GHz and 10.5 GHz frequency for a period of 15 years.

The use of the radio frequency is connected to a prior license to exploit a fixed telecommunication service. According to the proposed Invitation to Bid, the winners will have to provide the service described in the license in all the State capital cities and in cities with more than 500,000 inhabitants, 18 months after the granting of the right to use the radio frequency.

For more information contact: rapdecunto@pinheironeto.com.br

GERMANY COURT DECISION ON LIMITED VALIDITY OF PHONE CARDS

Legal action has been brought against Deutsche Telekom AG, which sells phone cards to be used on public telephones. In October 1998, Deutsche Telekom AG introduced a limited period of validity for phone cards. After expiry of this period which was three years and three months after fabrication the cardholder could no longer use the phone card. Any credit lapsed on the expiry date without refund.

The court held that Deutsche Telekom AG standard contract terms form the basis for the sale. However, such standard contract terms must be in line with sections 9 – 11 of the act on standard contract terms (ASCT).

The limitation of validity qualifies the conditions for the cardholders' use of the phone card. In contrast to the lower courts the federal high court held that the provision unequivocally provides for the loss of any credit at the end of the validity period.

The court therefore rejected the argument that a limited validity period breaches the transparency obligation which states that the standard contract terms used must be easily understood by the consumer.

However, it held that the clause unreasonably prejudices the customer and is not in line with the regulation in section 9 ASCT. Section 9 ASCT rules that the provisions in standard contract terms are void if they unreasonably disadvantage the contractual partner or the user contrary to the requirements of good faith.

Deutsche Telekom AG argued that due to the continuous development of information technology, phone cards as well as public telephones require constant adaptation. According to Deutsche Telekom AG, this means that unlimited use of telephone cards is not possible.

Furthermore, limiting the validity of telephone cards is the only means of preventing misuse.

The court ruled that although these arguments justify the limited period of validity, they do not suffice to justify the loss of credit without restitution on the expiry date.

For more information see:

www.uni-karlsruhe.de/~BGH/PressemitteilungenBGH/PM_043_2001.html

ITALY RIGHTS OF WAY REVIEW

The Communication Authority is considering whether to review the regulatory framework on the regulation of rights of way, and is also under pressure on account of the discriminatory treatment of operators involved in metropolitan networks.

The current regulatory framework focuses on the outcomes of the public consultation Decision 824/00/CONS and Article 4, Para. 3 of Law no. 249/97 providing for the equal and non-discriminatory rights of operators in the setting up and installation of telecommunications networks on public property.

Municipalities are requested to assure equal treatment of operators when granting excavation rights and may require applicants to notify their fees in compliance with community obligations.

The Authority is currently reviewing the regulation in order to identify an outline framework with regard to the arrangements and limits according to which such community obligations may be imposed on operators.

Since the opening of the liberalised market in 1998, fundamental discrepancies have been registered between concessions and excavation rights being granted by municipalities.

The forthcoming regulation is intended to reduce the risks that operators face on investments and network planning, limiting different local regulations on permissions and focusing on the introduction of transparent, objective and non-discriminatory principles for the issuing of local concessions and permissions.

The new regulatory framework should also give the Authority powers to settle eventual disputes arising between municipalities, local authorities and telecommunications operators for the issuing of the administrative titles.

For more information see:

http://www.agcom.it/provv/d_824_00_CONS.htm

MEXICO

PUBLIC BID FOR MEXICAN ORBITAL POSITION

The Federal Government has decided to postpone the commencement of the bidding process for Mexican orbital slot 77 degrees west, in an effort to review the soundness of the bidding rules issued several months ago by the Mexican Ministry of Communications and Transportation.

The orbital slot has an associated Ku frequency band and can be used for the provision of direct to home services, and data transportation. Both services are not only attractive for the Mexican market, but will also allow the winner of the bidding process to offer its services in countries such as the United States and Canada, with which the Mexican Government has entered into the corresponding international treaties and protocols.

PamAmSat has already indicated its decision not to participate directly in the bidding process, although the possibility of having Pegaso (its Mexican joint venture) participate in the process is still being contemplated.

For more information see: www.sct.gob.mx

or contact aam@bstl.com.mx

PORTUGAL

INCUMBENT INTENDS TO BUY THE PSTN

The Portuguese incumbent, Portugal Telecom (PT), has very recently started negotiations with the Government in order to buy the public switch telecommunications network (PSTN), which currently belongs to the public domain.

At the same time, PT is willing to terminate the Concession Agreement for the provision of telecommunication services, concluded in 1995 before the liberalisation of the telecom sector.

PT believes that the operation of the public network under a concession agreement only makes sense under a monopoly regime. In recent declarations to the press, the CEO of PT, Murteira Nabo, stated that now that the sector has been completely liberalised and that PT is a 99.9 % private company (where the Portuguese State still holds a "golden share", represented by 500 shares in the company, and pursuant to which it retains veto rights for strategic decisions), the concession agreement is no longer justified.

Moreover, Portugal is the only country in the European Union where the PSTN still belongs to the State. On the other hand, even though PT has invested more than EUR 2.5 billion in the network, the Portuguese Government is not willing to transfer its ownership for free.

This proposal by PT followed on from the position adopted publicly by the president of the National Regulatory Authority (ICP), Luís Nazaré, in September, which was to propose the creation of a company to own, manage and operate the public network infrastructure. Luís Nazaré said that this company's capital should be open to all interested telecommunications operators. This suggestion has not been backed by any public decision or position made by ICP, or by any other public authority.

Both the above proposals have stirred argument and debate in the sector about the implications that could arise from the adoption of either one of these options.

The Portuguese Government is currently still evaluating the proposal made by PT, the terms and conditions of which have not yet been made public. The Portuguese Minister responsible for the telecom sector has confirmed that negotiations between PT and the Government have started but refused to comment on the details of the envisaged transaction.

For more information contact: mc@veiradealmeida.pt

SPAIN REGULATION ON MOBILE ANTENNAE

There is currently increasing social alarm regarding the possible negative effects on human health caused by mobile antennae.

The regulation approved by Royal Decree 1066/2001² aims to restore the trust of citizens by establishing the necessary conditions to protect the radio-electric public domain, as well as restrictions on radio-electric emissions and measures to protect public health from radio-electric emissions.

Regarding protection of the radio-electric public domain, the regulation quotes the installations that merit a certain level of protection, by imposing limitations on or mitigating their ownership and the procedures to establish the same.

As regards the establishment of measures to protect public health from radio-electric emissions, some limits on the exposure to those emissions are set forth, following the Recommendation of the Council of the European Union of 12 July 1999. These measures are, namely:

- to authorise the functioning of an installation, a declaration of conformity with the exposure limits for nearby areas must be presented;
- within a term of nine months, operators must present this declaration of conformity for their existing installations;
- operators shall also present annual certificates covering the emission levels of their systems;
- operators are obliged to enclose and put warning signs in those areas in which emissions exceed the exposure limits. This obligation will apply to existing installations one year after the entry into force of the regulation;
- the Ministry of Science and Technology will inspect installations to ensure enforcement of the Regulation; and
- the Ministry will also publish an annual report on the results of its control activities.

For more information see: www.mcyt.es/infor_admin/legislacion.htm or contact: aam@gomezacebo-pombo.com

SPAIN REGULATION ON MVNOS

The Ministry of Science and Technology has prepared a draft Order to regulate the rights and obligations of Mobile Virtual Networks Operators (MVNOs) in Spain.

This regulation, which will amend the Order of 22nd September 1998 on Individual Licences, includes a new class of individual licence (class A2) that will entitle operators to provide mobile communications services to the public using a set of switching and transmission means but without assuming the rights and obligations related to the establishment or exploitation of the network which are associated with class B or C individual licences.

The Ministry has announced that access by MVNOs to the radio-electric network of mobile network operators will be based on the rule "allow but not oblige".

² Royal Decree 1066/2001 of 28th September 2001 approving the Regulation establishing conditions to protect the radio-electric public domain, restrictions on radio-electric emissions and measures to protect public health from radio-electric emissions.

The draft Order also states that mobile operators have the right to reach roaming agreements at a national level to interconnect their networks.

This Order was expected to be passed in September 2001. However, the adoption process has been delayed and it is not likely to be passed until the end of December 2001.

For more information see: www.promovil.org/pdf/pro_ord.pdf or contact: aam@gomezacebo-pombo.com

UK OFTEL CONFIRMS CO-MINGLING FOR LOCAL LOOP UNBUNDLING

Further measures to improve access to BT exchanges for the purpose of unbundling local loops have been confirmed by OfTel. Operators will be able to install their DSL equipment in any operational part of a BT exchange to provide high speed services to customers.

The ability for operators to co-mingle their equipment within a BT exchange could lead to significant savings on costs and time for installation of equipment. Co-mingling is a form of physical co-location where an operator's equipment is fitted and operated in the same area in an exchange as BT houses its own equipment without physical separation.

This step is likely to reduce operators' start-up costs for installing equipment at BT exchanges and follows on from a draft proposal published by OfTel earlier in the year.

For more information contact: Cdl@olswang.co.uk

UK BT AND ONE2ONE LOSE 3G AUCTION CASE

BT's BT3G and One2One have lost their claim in the UK Court of Appeal over unfair treatment by the Government whose Trade & Industry Secretary gave Vodafone and Orange an extension of time to pay the fee for their 3G licence.

Vodafone's takeover of Mannesmann, which then owned Orange, necessitated the sale of Orange as the merger would mean the owning of more than one 3G licence by one operator.

This was contrary to the auction rules on award of licences and the Government therefore gave Vodafone and Orange extra time in which to pay for their licence, which saved them almost £1 million a day.

The case turned mainly on the fact that the Auction Conditions expressly recognised that bidders might be subject to 'pre-conditions' (e.g. special regulatory approvals) and that licences would not be granted until the pre-conditions were met.

The conditions also allowed the Secretary of State at his discretion to disregard any association between bidders, a discretion which he exercised in One2One's favour.

One2One and BT were aware of these when they applied to take part in the auction. Also, the dispensation granted to Vodafone and Orange was held not an illegal 'state aid' in that the Secretary of State had in fact behaved as a rational commercial party would have done in withholding the grant until the pre-condition, i.e. disposal of Orange, was satisfied.

For more information contact: Cdl@olswang.co.uk

16. UNIVERSAL SERVICE

SPAIN

TELEFÓNICA ESTIMATES THE LOSS GENERATED BY THE PROVISION OF THE UNIVERSAL SERVICE

The Telecommunications Market Commission (TMC) stated on 19th July 2001 that the provision of the Universal Service during 1998 and 1999 (a net cost of EUR 1,139.7 million according to Telefónica's estimation) did not constitute a competitive disadvantage and, consequently, the operator had no right to compensation. The grounds for that decision were that Telefónica's market share during the period fell by less than 10 % and its rate of return on investment was higher than 12 % (a rate considered reasonable by the TMC for year 1999).

In addition, the resolution declared that the accounting system applied by the operator was not correct.

On the other hand, in the estimate presented to the TMC by Telefónica on 15th October 2001, the latter considered that the loss generated by the provision of the Universal Service during the year 2000 was EUR 781.3 million. The TMC will assess this declaration of the estimated net cost presented by the operator.

Should the TMC consider that the provision of the Universal Service generates a net cost and that it puts Telefónica at a competitive disadvantage, the regulator might decide to create a National Fund to compensate the operator. This National Fund would collect contributions from all public network operators and publicly available voice telephony service providers in proportion to their respective market shares.

For more information see: www.negocios.com/cgi-bin/show_news.pl or contact: aam@gomezacebo-pombo.com

COMMENTARIES

CHILE

DECISION FROM THE ANTITRUST BOARD ON TARIFFS FREEDOM REGIME

In relation to fixed telephony services, the Chilean Telecommunications Act sets forth that should "the market conditions not be sufficient so as to guarantee a tariffs freedom regime", the Telecommunications Undersecretary should establish – by means of a Decree, the tariffs that incumbent fixed telephony companies are allowed to charge to customers.

The Antitrust Board (the "Board") is the entity legally entitled to decide whether or not the market conditions allow such a tariffs freedom regime.

In 1998, the Board ruled that conditions existing in the telephony market did not allow incumbent companies to freely determine their telephony tariffs. Accordingly, the major fixed telephony company *Telefónica* CTC (CTC), was subject to tariff regulation – through Decree No. 187, for a period of five years (up to May 2004).

However, in January 2001, CTC required the Board to review its 1998 decision, arguing for those purposes that the "telecommunications market conditions had materially changed from 1998 to 2001" and that competition then existing in the market justified a tariffs freedom regime in its favour.

As a result of a disputed and controversial procedure, in which the telecommunication and economy authorities, the National Economic Prosecutor and the main telephony companies took part, the Board decided on 11th July 2001 that conditions currently existing in the telephony market do not allow incumbent firms to benefit from a freedom tariffs regime (Resolution No. 611). Therefore, the Board confirmed that Decree No. 187 currently governing CTC customers' rates cannot be amended and must remain in force until its legal five-year expiry in 2004.

In issuing such a decision, the Board took into consideration, among other matters, interesting issues related to the regulation of telephony monopoly, definition of relevant market, contestability of such a market, and substitution existing between fixed telephones and mobile ones.

Some of the most relevant considerations set forth in Resolution No. 611 are the following:

- significant market to calculate CTC market participation is "Chilean fixed telephony market";
- even though mobile telephone numbers have substantially increased during recent years, even surpassing the number of fixed lines, mobile telephony may not yet be considered as a substitute for fixed telephony. As a matter of fact, traffic originating from fixed telephones during 2000 was more than ten times that of mobile telephones. In addition, the average price of a mobile telephony service minute is substantially – more than six times - higher than the comparable fixed telephony service price. Thus, considering traffics and prices of mobile telephony in relation to fixed telephony, it may be concluded that they are not substitute services for each other, nor are they relevant competitive products;
- in the above-described market, the incumbent company's participation is still higher than 80 %. Moreover, in some Chilean regions CTC holds 100 % of the fixed telephony services market offering;
- in contrast, its competitors' market share only ranges from 0.4 % to 4.4 %;
- hence, the Chilean fixed telephony market is still highly concentrated;
- the above-defined relevant market is not contestable, since there are no relevant potential competitors to CTC. New technologies such as coaxial cable telephony, PLC technology, WLL, 3G or similar, only

constitute immature and future means of competition that do not at present qualify as being a relevant offering of telephony services;

- network unbundling that should be implemented by CTC according to the Board's 1998 Resolution does not show any relevant developments to date. This is particularly serious considering that CTC networks are an essential means of operation of other telephony and ISP companies;
- considering the above, in a tariffs freedom scenario, the incumbent company will have economic incentives to increase the prices charged to customers in non-competitive regions, in order to make use of predatory pricing in those regions where it faces incipient competitors.

Consequently, the Board decided that the current conditions of the fixed telephony market do not allow the incumbent company to enjoy tariffs freedom treatment; it therefore ruled that Decree No. 187 should remain in force.

However, the Board took into consideration that new telephony technologies are evolving and recognised that market conditions could change in the near future. Accordingly, the Board recommended that:

- the telecommunication authorities continue their best regulation and supervision efforts in order to foster the development and growth of such new technologies that could compete with fixed telephony technology in the near future;
- the same authorities reinforce regulations aimed at obtaining the unbundling of incumbent companies' networks;
- National Economic Prosecutor supervises the relevant market and undertakes to inform the Board of any relevant changes occurring in the competition levels existing therein.

For more information contact: mehme@fn.cl or rferrada@fn.cl

EU

REGULATING WITH COMPETITION LAW: WHY THE PROPOSED USE OF DOMINANCE TO TRIGGER EC TELECOM REGULATION IS FLAWED

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The EC Commission has now accepted that the guiding principles for *ex ante* regulation should be the same as for competition law. The draft *Framework Directive* adopts the competition law test of dominance (40%–50% market share as a rule of thumb) to replace the little loved 25% threshold of Significant Market Power (SMP) under the *Interconnection and Licensing Directives*. However, the basis and operation of this "regulatory convergence" is flawed. The unmodified application of competition analysis does not constitute an adequate access and interconnection regime. This is principally due to the Commission's failure to base telecommunications regulation on the goal of maximising consumer welfare.

THE COMMISSION'S PROPOSALS

Under the proposed regulatory package *ex ante* regulation will be imposed on operators who are dominant, which confusingly is also called SMP. Determining dominance will be undertaken by the EC Commission in accordance with the principles set out in the draft *Market Analysis Guidelines*. These mirror those under competition law. National Regulatory Authorities (NRAs) will have scope to determine the geographic market within each Member State, and undertake competitive assessments to determine whether operators are dominant within the pre-defined product and trans-national markets identified by the EC Commission.

FAILURE TO INCORPORATE DYNAMIC EFFICIENCY

The draft *Framework Directive* requires NRAs to promote open and competitive markets; economic efficiency; create appropriate incentives for investment and innovation; develop internal markets; and promote the interests of European citizens. This goes much further than competition law which pays little attention to these dynamic efficiency goals, and indeed excludes consideration of these for fear of encouraging old style industrial intervention. Yet most surprisingly, the draft *Market Analysis Guidelines* take no direct account of investment incentives and efficiency considerations in assessing market power. Since access and its price cannot be divorced from a network operators' ability and incentive to invest in infrastructure, providing appropriate incentives for investment and innovation are important. In short, the unmodified adoption of market analysis from competition law does not implement the *Framework Directive*.

UNDUE SHORT TERMISM

The short-term nature of the competition law approach also clashes with the *Framework Directive's* goals. Under EC competition rules, the analysis looks at changes likely to occur within one year. This seems the position under the *Framework Directive*. Further, it is proposed that annual reviews will assess whether SMP status is warranted in the light of changing market conditions. That is, a short time period will be used to trigger *ex ante* regulation. This cannot be consistent with the objective of using *ex ante* regulation to deal with instances of permanent market power, or statements that market definition under the *Framework Directive* should be prospective and forward-looking. The Commission itself notes that in determining dominance in dynamic markets, a period longer than three years may be insufficient.

The proposed annual reviews of SMP jar with the requirement that *ex ante* regulation should provide a stable backdrop for investment and innovation. Annual reviews will result in persistent regulatory uncertainty, and reflects an odd trade-off between the need to avoid regulatory obsolescence and certainty. Indeed, if there is genuine concern that SMP designations will be overtaken by changing market conditions within a year, then it is doubtful that the Commission has correctly identified the need for *ex ante* regulation in the first place!

DOMINANCE IS AN INAPPROPRIATE TRIGGER

Dominance is an inadequate trigger for *ex ante* regulation. It is defined as the ability of a network operator to act independently of its competitors and customers i.e. an operator with market power. This test has a number of defects.

First, it will generate excessively narrow market definitions. Markets are defined in competition law as the narrowest set of products which would constrain the price increasing ability of a firm, and therefore tend to ignore other products which have a similar constraining effect or a different set of products which would also constrain price-setting behaviour.

Second, the test is not followed by the Commission itself. In recent merger decisions involving network operators, the EC Commission has significantly downplayed the standard market definition/dominance approach, relying more on dynamic interactions between vertical and horizontal links in the supply chain.

Third, dominance is seen as a flawed test and replaced in most advanced antitrust laws by that of "*substantially lessening competition*". For example, the UK Government following "best practice" plans to adopt the latter test for its new merger law. These factors suggest that regulation of the communications sector is achieving consistency with an outmoded competition standard; one not even adhered to by the EC Commission in its enforcement of competition law!

CENTRALISES MARKET PRE-DEFINITIONS

There are serious concerns about the proposal to centralise and pre-define markets by the EC Commission. In competition law, markets and dominance are based on detailed case-by-case assessments. Under the draft *Framework Directive*, the EC Commission will pre-define product markets on a Community-wide basis each year. There is no reason to suppose that this will generate meaningful market definitions, especially when most markets will be national in character. This urge for harmonisation is likely to lead to excessive regulation which does not reflect market conditions. It may also result in a lack of consistency as NRAs seek to adjust to the centralisation of market definition by adopting differing market share thresholds to trigger SMP. Alternatively, the system could degenerate into a highly centralised formalistic system where SMP is found by NRAs using pre-defined markets and pre-determined market shares.

IGNORES REGULATORY COSTS/EFFECTIVENESS

There is no serious consideration of the effectiveness and costs of telecommunications regulation. Once SMP has been determined, NRAs can impose a range of obligations on network operators including mandatory access, cost-based tariffs, non-discrimination, etc. It is not self-evident that these will generate sustainable increases in consumer welfare. That there are reservations about the effectiveness of some of these regulations can be seen by the differing approaches taken by NRAs over the mandating of access to mobile networks – some have imposed mandatory access sometimes at cost-oriented tariffs; while other NRAs have concluded that open access will not generate significant consumer welfare gains and/or stifle innovation and reduce investment.

A REGULATORY MISMATCH

The unmodified use of competition law analysis to frame *ex ante* regulation is flawed because it:

- does not distinguish between short-term market power and long-term persistent market failure. The law will therefore be over-inclusive in the sense that it will regulate some activities which need not be regulated and/or impose remedies which do not produce permanent increases in consumer welfare;
- omits dynamic efficiency factors and therefore risks damaging sustainable competition;
- does not foster regulatory certainty; and
- does take into account the costs and effectiveness of proposed regulatory options.

The EC Commission's approach is flawed because it has not set up a robust consumer welfare (cost-benefit) model of regulation. As a result it promotes a simplistic version of competition which has an uncertain relationship to sustainable effective competition that increases the long-term welfare of consumers. In order to remedy this, the factors identified above will need to be addressed and systematically incorporated into the practical application of the Framework Directive.

INTERNATIONAL OFFERING SECURITIES VIA THE INTERNET: TOWARDS A SAFER INTERNATIONAL REGULATORY ENVIRONMENT

by Stephan LE GOUEFF and Eric JUNGBLUT
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The development of the internet presents numerous opportunities for financial institutions as it provides a quick, inexpensive and effective distribution mechanism to offer and advertise financial services.

However, financial institutions wishing to use the internet as a marketing and sales instrument face a number of regulatory uncertainties.

Amongst the different issues that those institutions are facing, the question of which national regulator has jurisdiction over their *online* activities is certainly one of the most crucial but also one of the most difficult to apprehend.

Indeed, with the appearance and the development of the internet, financial products have become marketable from anywhere worldwide. In these conditions, the danger for a financial institution with a web site is that one or more national regulators may deem that the web site of the financial institution is aimed at its nationals.

In this case, those regulators may impose registration, licensing, re-posting, or other regulatory requirements on this institution. They may also impose fines or take action for criminal sanctions.

This being said, the main difficulty for a financial institution operating a web site is to have a clear view of the policies followed by each national regulator, insofar as many of them have not yet clearly disclosed the circumstances under which they may be competent to take action.

Therefore, a number of different international organisations³ have recently reflected on the problem of creating a safer and clearer international regulatory environment.

It appears, indeed, to many key players in the financial sector that a reasonable level of certainty is required to allow financial institutions and investors to make efficient use of the internet.

In an attempt to provide some solutions to this issue, the International Organisation of Securities Commission (IOSCO), which groups together the regulatory authorities of the main industrialised countries, released a report on securities activity via the Internet (hereafter the "Report") in June 2001.

This Report⁴, which follows a first report published by the same institution in 1998, explores certain key questions raised by recent developments in internet use such as:

- the current use of the internet by investors;
- the role of the securities industry and regulators;
- the technological capacity, resilience and security of online brokerage firms;
- liability for hyperlinks to third party information and for maintaining web sites during offerings;
- day trading;
- internet discussion sites; and
- internet service providers and enforcement of securities laws.

However, one of the main merits of this Report is certainly to reiterate a set of rules (which were already set out in the 1998 report) under which regulators should exercise their jurisdiction over the internet activities of financial institutions.

The purpose of this paper is to briefly describe the solutions proposed by IOSCO in this respect.

³ For instance, see the report of FEFSI of April 2001, on the use of the Internet with respect of funds' promotion.

⁴ This Report is accompanied by four appendices, which are intended to provide an overview of Internet securities activity and its regulation throughout the world. Thus, Annex I lists Internet-related laws and regulations by individual jurisdictions. Annex II provides a jurisdiction-by-jurisdiction description of Internet use in 19 member jurisdictions. Annex III contains a consolidated list of all the official web addresses of securities and futures regulators, self-regulatory organisations and other securities-related organisations. Annex IV reviews the work of other international organisations regarding the Internet. The full Report and the other annexes can be accessed directly on the IOSCO's web site at: www.iosco.org.

IOSCO'S PROPOSALS

The main interest of the IOSCO's proposals lies in its attempt to establish criteria for the competence of regulators.

The IOSCO recommendations suggest that a regulatory authority should take action on internet offers where those offers of securities or services have a significant effect upon residents or markets in a regulator's jurisdiction. In determining whether the offer meets this test, regulators should consider whether, among other things:

- the offer targets residents of the regulator's jurisdiction;
- the offeror accepts orders from, or provides services to, residents of the regulator's jurisdiction; and
- the offeror uses e-mail or other media to "push" the information to residents of the regulator's jurisdiction.

The Report also describes factors that would support a regulator's decision not to assert jurisdiction. These include:

- the offeror clearly states to whom the Internet offer is directed, rather than appearing to extend the offer to any jurisdiction;
- the offeror provides a statement on its web site listing the jurisdictions in which it is (or is not) authorised to offer or sell its securities or services; or
- the offeror takes precautions that are reasonably designed to prevent sales to residents in the regulator's jurisdiction. For instance, the offeror should screen addresses and other residency information provided by persons responding to the Internet.

A FIRST STEP TOWARDS MORE SAFETY?

The IOSCO's proposals deserve to be welcomed *per se* as they seek to reduce the existing uncertainty faced by financial institutions offering securities online by providing a common set of rules to determine the competence of the different financial regulatory authorities.

These guidance are all the more useful for financial institutions as several regulatory authorities of western countries have already more or less followed those recommendations. Thus, according to IOSCO's Report, 19 jurisdictions have, to date, through guidance or interpretative releases, clarified the circumstances under which they intend to exercise their regulatory authority over web sites offering securities.

This being said, it is regrettable that the proposed IOSCO rules have not been harmonised through an internationally binding agreement and that it remains optional for regulators to adopt them. In addition, it is regrettable that some of the proposed criteria are not clearly defined. For instance, terms such as "significant effect" on the national market are quite unclear and are ultimately open to multiple interpretations.

Thus, although the IOSCO proposals cannot, for the time being, be considered as providing a global and final solution to the regulatory uncertainties surrounding the offer of securities via the internet, they constitute a first and positive step towards a safer international regulatory environment.

MEXICO FOREIGN INVESTMENT IN THE TELECOMMUNICATIONS INDUSTRY: PERSPECTIVE UNDER THE WTO AND MEXICO AN LAW⁵ (PART I)

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⁵ Presented at the International Bar Association conference, Cancun, Mexico, 31st October 2001.

BRIEF HISTORIC OVERVIEW

In the last couple of decades Mexico has undergone a substantial change in its foreign investment policies and in the role it wants to play in the ongoing globalisation process. Mexico has shifted from a 1970's restrictive foreign investment policy that sought to promote Mexican investment and regulate foreign investment, to a concerted, and so far highly successful effort to modernise the Mexican economy, attract more foreign capital into Mexico and become an active participant in globalisation.

On 9th March 1973 the Law to Promote Mexican Investment and Regulate Foreign Investment (*Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera*) was enacted under the Presidency of Luis Echeverría Alvarez. The main purpose of the law was to "promote Mexican investment and regulate foreign investment to stimulate balanced development and consolidate the country's economic independence."

Foreign investment in telegraphic and radiotelegraphic activities was exclusively reserved for the State. Radio and Television was exclusively reserved for Mexicans or Mexican entities with foreign investment exclusion clause.

The Mexican economy naturally suffered the consequences of such policies. Instead of stimulating the development of Mexico's economy, Mexican investors found themselves in a market with no real competition. Factories became old and useless, product and service quality declined and the consumer became a hostage to economic inefficiency.

It was in this environment that on 31st March 1976 the Mexican Ministry of Communications and Transportation (SCT) granted to Teléfonos de México, S.A. de C.V. (TELMEX – then a majority owned state company) a license to provide local and long distance telephony services for 30 years, even though the former entities that then comprised Telmex had been rendering the service since 1926.

The protectionist policies of the Mexican government adversely affected the technological development of Telmex's network and consequently the quality and availability of the service.

Recognising that technologies were becoming increasingly sophisticated, the Mexican Federal Constitution was amended in 1983 to include communication via satellite as an activity exclusively reserved for the State. That is, effectively, no private individual or entity could engage in the provision of satellite services. Rather, these services were vested on the Federal Government, first through the telegraphic area of the SCT and as of 1986 through a federal decentralised agency known as *Telecomunicaciones de México*.

Under the Presidency of Carlos Salinas de Gortari, Mexico radically changed its policies towards foreign investment. Protectionist policies were replaced by liberalisation tendencies. One of the underlying policies of the Mexican government relied on the recognition that Mexico's economy and financial situation could not survive based on a "closed" economy but only through the creation of an efficient economy where Mexico could benefit from foreign investment and from imported products and exports.

In addition to its active role at the Uruguay Round, Mexico began seeking to enter into free trade agreements with other countries. Internally, it realised that in order to demonstrate to potential trade partners and most importantly to foreign investors that Mexico was determined to change its protectionist policies, several changes were urgently required.

In the telecommunications area, one of the first changes was the 1990 privatisation of Telmex. From a commercial standpoint Mexico needed a more efficient and reliable network that could serve as an instrument to achieve the country's modernisation and competitiveness in almost any area of commerce. Although it seemed to contradict the Government's policies, it was then argued that no serious investment could be made during the privatisation process were it not for the assurances given to Telmex's Mexican investors that the market would not be opened to competition for 6 years.

Three years later, the 1973 Foreign Investment Law was abrogated and the Foreign Investment Law (*Ley de Inversión Extranjera* – FIL) was enacted. The policy change was radical. Instead of limiting foreign investment to 49% in virtually all activities, the criteria was reversed: if not expressly regulated, commercial activities could be carried out in Mexico by companies wholly owned by foreign investors. In the telecommunications field, the FIL currently imposes a 49% foreign investment limitation on entities holding a concession pursuant to the Federal Telecommunications Law (FTL).⁶

Concurrent with the internal changes, Mexico had been negotiating the North American Free Trade Agreement with Canada and the United States (NAFTA) and continued to be an active participant on the Uruguay Rounds. During the 1994 Marrakech meeting, a resolution was adopted to negotiate the progressive liberalisation of basic telecommunications services. Basically, the agreement was to initiate negotiations aimed at achieving the progressive liberalisation of network and telecom services (basic telecommunications services) under the WTO.

Consistent with the liberalisation obligations assumed by Mexico, both under NAFTA and GATT/WTO, under the Presidency of Ernesto Zedillo the Mexican Federal Constitution was amended to re-categorise communication via satellite from a "strategic activity" to a "priority activity" where private investment was allowed. The FTL was enacted a couple of months later (June 1995).

MEXICO'S COMMITMENTS UNDER THE WTO

The resolution that set forth the guidelines for access to the basic telecommunications markets, is guided by two fundamental principles: most favoured nation and transparency.

According to the WTO, it is permissible not to apply the most favoured nation principle to certain services, provided that the exceptions to such principle are in place for a period not exceeding 10 years and provided further that such exceptions (as included in the list of exemptions in a particular segment) are reviewed within 5 years.

The transparency principle consists of governments' obligations to publicise the laws, regulations and administrative decisions that rule the provision of basic telecommunications services. Additionally, each country shall have to make sure that information is readily available to the public including information on, for example, tariffs, other terms and conditions governing the provision of services and network interfacing information.

Generally speaking, Mexico agreed to open the market to competitors in all telecom market segments irrespective of whether the public telecommunications network was owned by the provider or whether the service was supplied through re-sellers (*comercializadoras*).

The nature of the services envisioned included telephony, data transmissions, private leased circuits, paging and other cellular services, etc.

The Mexico list of commitments, subjected the telecommunications services provided through a public telecommunications network based on wire and radio-electric means⁷ to limitations on transborder services and foreign investment as follows:

- international traffic shall have to be routed through an international gateway;
- any individual or entity wanting to install, operate and exploit a public telecommunications network in Mexico will require the prior obtainment of a license issued for such purpose by the SCT;

⁶ Due to the fact that the FTL had not been passed when the FIL was enacted, the original wording of the FIL, only indicated a 49 % restriction on basic telephony.

⁷ Radio broadcasting, cable television, DTH, DBS and digital audio were specifically excluded.

- the use and exploitation of frequency bands for specific purposes shall require the prior obtainment of a license issued by the SCT to the winner of the corresponding public bid;
- no foreign governments can participate in the capital stock of a Mexican concessionaire;
- foreign investment is allowed up to 49 % of the concessionaire's capital stock;
- foreign investment in entities providing cellular services can surpass the 49 % foreign investment limitation provided a favourable resolution is previously obtained from the Foreign Investment National Commission;
- services other than international long distance requiring the use of satellites up to the year 2002, shall use Mexican satellite infrastructure; and
- private telecommunications networks used to commercially exploit telecommunications services will require the prior obtainment of the corresponding license from the SCT.

As to resellers (*comercializadoras*), the list of commitments recognised the possibility of establishing resellers, subject to the following limitations:

- international traffic shall have to be routed through an international gateway;
- a permit is required from the SCT;
- only entities considered as Mexican investors can apply for the permits;
- no foreign governments can participate in the capital stock of a Mexican concessionaire;
- concessionaires of public telecommunications networks are forbidden from participating (either directly or indirectly) in the capital stock of a reseller, unless the specific approval of the SCT is previously obtained; and
- the rules governing resellers will be set forth in the corresponding regulations. No permit will be issued by the SCT until such regulations are enacted.

On other telecommunications services (i.e., value added services and the establishment of private networks), the list filed by Mexico before the WTO established that the SCT must grant a permit allowing the provision of value added services and the establishment of private networks.

In addition to the list of commitments, Mexico adhered to the WTO reference document addressing certain commercial measures intended to prevent monopolistic practices and promote access to the markets by new competitors.

IMPLEMENTATION OF WTO COMMITMENTS IN MEXICO

We have already discussed some of the actions taken by the Mexican government either in advance of, and others concurrent with, Mexico's negotiations concerning the Telecommunications sector under the WTO.

The privatisation of Telmex, already seen as a means to promote commerce in Mexico, can also and should also be interpreted (at least theoretically) as a first step in the elimination of Telmex's monopoly in Mexico.

The FTL reflects many (if not all) the provisions contained under the list of exceptions submitted by Mexico under the WTO. Indeed, the FTL provides that licenses are required in order to install, operate and exploit a public telecommunications network (this is, a network that commercialises telecommunications services). The network can comprise alambic or wireless means.

As indicated above, specific use spectrum (i.e., spectrum allocated by the Mexican Federal Telecommunications Commission (COFETEL) to be exploited for the provision of a particular service), will also require a concession title. The frequency will be auctioned and awarded to the highest bidder.

Concession titles are also required to obtain the right to occupy Mexican geo-stationary orbital slots and exploit their associated frequency bands; and to exploit, in Mexico, the frequencies associated with foreign satellites.

Consistent with the transparency principle and the legal certainty principle under Mexican law, the FTL contains the requirements for obtaining concession titles as well as the time frame within which the authority must resolve each application⁸.

To date, 13 concession titles on local telephony, 8 concession titles on wireless telephony, 21 concessions for the provision of international long distance telephony, among other telecommunications services, have been granted.

Resellers need to obtain a permit from the SCT and concessionaires may participate in the capital stock of such companies provided the corresponding authorisation from the SCT is secured. To date, except for re-sellers of public telephony, no permits have been granted as no regulations have been yet issued. It is worth mentioning that even though Mexico's WTO list provides that reseller permits would only be provided to Mexican entities, no such limitation was established under the FTL.

Contrary to what is indicated under Mexico's list, the establishment of private networks does not require any prior approval from SCT and the provision of value added services can be made through the simple registration of the services with COFETEL (no permit is needed).

Even though the list of exemptions does not deal directly with the treatment of satellite communication, as discussed in previous sections, Mexico's Constitution was amended to allow access to the sector for private investment.

As a result of the legislative changes on satellite communication, the Mexican satellite industry was privatised. The privatisation took place through the transfer of all assets owned by *Telecomunicaciones de México* (TELECOMM) (including Mexican orbital slot positions and the *Morelos* and *Solidaridad* satellites) to a newly formed corporation: *Satélites Mexicanos, S.A. de C.V.* (SATMEX).

60 % of the shares representing the capital stock of SATMEX were sold to private investors through an upward bidding process. The winner had an option to acquire an additional 15 % of the company's capital stock within a certain period (such option was immediately exercised by the winner of the bidding process). The remaining percentage of the company's capital stock is held by the Mexican government, who will eventually sell its interest in the company through an IPO.

Currently, SATMEX is the sole holder of concession titles for the exploitation of Mexican orbital slots and their associated frequencies.

Until recently, SATMEX was a natural monopoly created by the State. A couple of months ago, the Mexican government granted two concession titles to different Mexican groups to exploit the frequency bands associated with foreign satellites in Mexico. SATMEX has objected to the granting of such licenses and the matter is pending before the courts. Additionally, the SCT will commence the upward bidding process for orbital slot 77 degrees west in the first quarter of 2001.

⁸ On this last aspect, it should be noted that according to the Mexican Federal Law on Administrative Procedures (which is a suppletory law to the FTL), failure by the governmental authority to issue the corresponding resolution, shall be deemed to be a tacit denial (*negativa ficta*) of the application.

UK REGULATION AT A CROSSROADS: BROADBAND POINTING THE WAY⁹

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INTRODUCTION

The telecommunications industry, being technology based, is in a constant state of transition. Now and again, however, there is the possibility for some great leap forward, stimulated either by technological development or structural change. The advent of broadband is one such event.

Broadband technologies have the advantage that they can be supported by so-called legacy networks, both telecommunications and (terrestrial) broadcasting, as well as new access platforms such as fixed and mobile wireless (including satellite) and fibre optics.

For the immediate future broadband will necessarily be provided via a mixture of these old and new technologies because in nearly all countries of the world, with the possible exceptions of Sweden and Japan, an economic way has yet to be found to bring optical fibre to the home let alone to the kerb.

The fact that the industry is in transition through the emergence of new technology is particularly highlighted by DSL, digital subscriber lines, a technology which enables the metallic local loop of a legacy network to be reengineered to support high bandwidth transmissions. However, this new technology is still relatively expensive and has been seen by incumbents as more of a threat than an opportunity, often with consequent drag effects on its implementation. In particular, because of the costs involved and the technical limitations on DSL's deployment, in some countries it may never become a mass market medium; for the moment, in Europe, most competing DSL operators are targeting niche, premium, markets which will provide the necessary returns on investment.

PATHS TO CUSTOMERS - BROADBAND ACCESS PLATFORMS

In terms of access platforms, the main options as of today are:

- ISDN
- Leased Lines
- DSL
- Digital terrestrial transmission (DTT)
- Digital satellite, broadcasting digital television (DTV)
- Digital cable
- Fibre optics
- Fixed wireless (FWA)
- Mobile wireless, such as Third Generation Mobile (3G)

Of the above possibilities, over the next few years only leased lines, DSL, cable and FWA appear likely to provide true broadband (i.e. excess of 2 Mbps transmission speeds) to residential and SME customers. Some reports suggest that fibre to the home may also emerge as a competitor in the next few years, although this seems likely to be very much on a selective basis.

According to a recent report prepared for the European Commission¹⁰, in the short term ADSL (Asynchronous DSL) and cable (particularly in the residential sector) will compete to be first to market in the provision of broadband services, with ADSL likely to accelerate ahead in the initial

⁹ Presented at the International Bar Association conference, Cancun, Mexico, 1st November 2001.

¹⁰ The Development of Broadband Access Platforms in Europe' - BRDC Ltd, August 2001.

stages given its broader availability. Cable should gradually catch up and overhaul DSL because of cable's higher capacity. After all, DSL is only a temporary solution, a 'patch-up' of the local loop. In the medium term, besides the choice between cable and ADSL, other technologies will begin to play their part, such as FWA, fibre, digital satellite and DTT. In the longer term, the market for ADSL is expected to decline and coaxial cable to be replaced by fibre, which should be relatively 'future-proof'. By this time transmission speeds to the home are expected to have risen from 2 Mbps to in excess of 10 Mbps.

In considering these different means of access, it is well to bear in mind that whilst the European Commission has warmly embraced the concept of technology neutrality, i.e. that networks and systems should be regulated in the same way irrespective of the type of technology used, the general public is equally technology neutral, but in a disinterested way. Customers are concerned with ubiquity, quality and price and will look at a broadband service predominantly in terms of what it can deliver. It is in the latter sense that such a choice is technology driven, but the vast majority of customers will be unaware of the technology solutions that dictate, to a greater or lesser extent, the nature and amount of content that they can receive and how and when they can receive it.

OPERATORS' STRUGGLE FOR SELF-DETERMINATION

The development of competition not only between service providers but also between different technology platforms is key to the advancement of consumer choice. Such competition brings about innovation, improves customer service levels and helps drive down prices. However, such competition will inevitably be inhibited if the service providers themselves do not hold the reins of all the elements of their services. This particularly applies to DSL.

DSL service providers, for example, are dependent on the incumbent for the provision of local loop facilities and are therefore subject at many levels to the vagaries of the incumbent's activities. These can, and do, manifest themselves as delays in provisioning, service quality problems, unreasonable terms and conditions (including pricing) and operational/procedural problems in relation to processing of customer orders. Whilst other operators have the advantage of their own facilities (e.g. local for cable) they are not always blessed with their own long distance links that are needed to terminate their traffic. They still have to negotiate and agree interconnect arrangements: where there is a multi-operator environment such as in the EU there is a reasonable prospect of achieving interconnect on reasonable terms, which anyway is underpinned by the prospect of regulatory intervention. Nonetheless, those operators reliant on interconnection do not have complete control over all their network requirements end to end.

Operators who have built new national networks from scratch, particularly the mobile operators, are rather more masters of their own destiny even though they may rely on fixed operators for interconnect and delivery to/from fixed terminals. Their own ubiquity guarantees a lesser dependence on the incumbent than local or regional operators and their stimulation of additional traffic (as opposed to substitution) makes them, for the moment appear less directly competitive to fixed operators, although this will gradually change as mobile tariffs decline and mobile terminals are used in a quasi-fixed mode.

Given the difficulties that DSL companies have experienced to date, this is to a considerable extent an endorsement of the advantages of self-determination in telecommunications networks. The nature of some of those difficulties is highlighted in the next section.

DSL ISSUES - A CASE STUDY

DSL has had a very rough and controversial passage in Europe since its commercial launch in the last year and entry into force at the beginning of 2001 of the EC Regulation mandating the provision of unbundled local loop ('LLU') facilities to other operators (the 'LLU Regulation'). Recent cases

investigated for example by the UK telecom regulator OFTEL demonstrate that DSL issues are particularly likely to give rise to disputes:

- operators have alleged for example that BT discriminated in its own favour by allocating space in its exchanges for installation of DSL equipment on a different and more favourable basis than that applied to other operators. As a consequence BT had awarded itself not only a headstart but also the benefit of its DSL equipment being installed in exchanges of relative strategic importance, with little or no space left in some of these exchanges for third party equipment to be installed. This complaint was rejected by OFTEL as being neither an abuse by BT of a dominant position (since OFTEL surprisingly concluded it was not dominant in the relevant market).
- operators complained that the terms and conditions offered by BT for provision of LLU facilities were unreasonable, in breach of BT's licence condition and the LLU Regulation; in particular, as to availability of collocation space, the requirement to physically segregate operators' equipment from that of BT, inadequate service level obligations, liability limits, and restrictions on transferring rights to collocation space. OFTEL made a determination to require BT to amend and improve its offer to resolve these complaints.
- BT's unwillingness to allow other operators' equipment in its exchanges without physical segregation was challenged by one operator and after investigation Oftel decided that the ability for operators to 'co-mingle' their equipment within a BT exchange could lead to significant savings on costs and time for installation of equipment, and so ordered BT to meet requests for co-mingling subject only to exceptions on good technical grounds.
- Oftel also investigated BT's collocation charges and at the time of writing has indicated its intention to require reductions in a number of areas, particularly as a result of co-mingling, but also because BT was found to be over-recovering its costs for distant location services.

REGULATION FACILITATING BROADBAND

The off-repeated regulatory mantra of technological neutrality is particularly apt for broadband given its potential availability over a multiplicity of different network platforms and technologies. The European Commission, in particular, has fully subscribed to this approach in its proposed Directive 'on a common regulatory framework for electronic communications networks and services'¹¹ where it is currently provided that national regulatory authorities, in carrying out their task, should give preference to measures which are technologically neutral and ensure that there is no discrimination in the treatment of undertakings providing electronic communications networks and services wherever they operate in the EU.

¹¹ COM (2001) 380 Final.

Whilst such pontifical statements are sometimes useful cudgels with which to beat legislators and regulators to conform, regulatory intervention will never be a complete answer.

One problem that has become starkly apparent from the DSL experience, if it was not already evident from the saga of interconnection, is the question, touched on in section 3 above, of operator dependency. So long as competitive services by one operator rely on inputs from another operator which is its competitor, this tension will lead at least to inefficiencies and at worst to blocking moves and thus to regulatory intervention or litigation. Serious requests for regulatory intervention regarding competition-related issues are likely to be confined to major cases which will bear lengthy analysis and protracted decision-making, though recognising that national regulators and competition authorities do invariably have the right to issue interim directions to preserve and protect the parties' positions.

In the early liberalising jurisdictions, such as the US and the EU, it has become very apparent that the key to market entry and expansion of consumer choice is access, on fair and reasonable terms, to the infrastructure, facilities and even sometimes key data of the incumbent monopolies. This has manifested itself not only in interconnection and local loop unbundling but also in conditional access systems regulation, 'open access' rulings affecting cable systems and other 'essential facilities'-type initiatives.

The issue of access is likely to be central again in the regulatory drive for convergence, in order that proprietary facilities, platforms, technology and interfaces should not be used to restrict competition and consumer choice.

CONCLUSION

In many countries of the world, legislators and regulators are already putting in place what they regard as the modern regulatory regimes to support broadband. In Europe, as we have seen, this involves ensuring that regulation is not only harmonised and consistent throughout the region but also that there is no discrimination by platforms. Elsewhere, in some countries of South America (e.g. Brazil), regulators are considering how best to introduce a scheme that will facilitate broadband. In the light of experience to date and the discussion earlier in this paper, I would suggest the following principles as paramount:

- technology neutrality
- regulatory treatment to respect strict separation of content from transmission
- avoidance of restrictions on e-commerce and online services, as these will drive broadband uptake
- ensuring access to networks and services on fair and reasonable terms, recognising investment risk and minimising bottlenecks
- prohibitions on the abuse of market power and other restrictions of competition, in order to encourage investment, and
- a regulatory authority structured and resourced to cater for convergence.

Whilst not exactly cast in tablets of stone, adherence to such principles is likely at least to engender a sympathetic environment for broadband to realise its enormous potential.

EVENTS

BELGIUM FORUM ON CYBERCRIME IN BRUSSELS

On 27th November 2001, a plenary session will take place of the EU Forum on Cybercrime, organised by the European Commission. The meeting will take place from 9:30 to 17:30 h. in the Charlemagne Building, 170 rue de la Loi, 1040 Brussels (Metro: Schuman).

The main topic for discussion will be retention of traffic data. In addition, the European Commission will present a proposal for a Framework Decision on serious attacks against information systems, provided that this proposal will have been officially adopted when the meeting takes place.

To participate, please send an e-mail with your name and organisation to INFISO-JAI-cybercrime (Registration closes on 25 November at midnight) to: comments@cec.eu.int

For more information see:

http://europa.eu.int/information_society/topics/telecoms/internet/crime/wpa_pnov/index_en.htm

GERMANY INTERCONNECTION IN BERLIN

On 28th to 31st January 2002 will take place the Interconnection 2002 conference.

Interconnection remains the largest business cost for most network operators. IIR's 9th Interconnection forum offers operator case studies and up-to-the-minute regulatory developments, to minimise interconnect costs and maximise revenues.

For more information see: <http://www.iir-conferences.com/a.cfm?id=720>

US SAN DIEGO INTERNET CONFERENCE

The "Satellite Internet Services and Applications conference" will take place on 5th and 7th December at the Catamaran Resort Hotel in San Diego.

This conference will explore the capabilities of satellites to augment the terrestrial internet and the opportunities created by these technologies.

For the conference agenda, the confirmed speakers and to register, see: <http://www.actconferences.com/sisa2001/agenda.htm>

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