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## NEWS

### 1. COMPETITION

#### **BRAZIL** **COMPETITION OPENS IN** **WIRE LINE TELEPHONY MARKET**

On 29th November 2001, three months after the submission of a document for public comments, Anatel released the definitive version of the regulation establishing guidelines for the granting of local and long distance wire line telephony authorisations. The regulation was finally published in the Official Gazette as Anatel Resolution No. 283. The version released by Anatel changed some of the rules established in the earlier document."

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#### **FINLAND** **SONERA'S ACQUISITION THWARTED**

In a surprise decision on 21<sup>st</sup> December 2001, Finland's Competition Council prohibited on appeal a business concentration whereby the present control of local network operator Loimaan Seuran Puhelin would be transferred to Finland's national operator Sonera. The decision to prohibit the concentration came as a surprise since Finland's Competition Authority had already approved the concentration in a merger control proceeding. Questions had previously been raised over whether Finland's Competition Council would have the power to overturn a concentration approval decision by Finland's Competition Council.

The concentration concerned the transfer of market power from the local telephone companies in southwest Finland to Sonera. The transaction giving rise to the concentration provided for Loimaan Seuran Puhelin's directed share issue to Sonera which was conditioned upon Loimaan Seuran Puhelin's purchase of one third of the local network operator Turun Puhelin from the City of Turku. Sonera would have obtained a 24% share in Loimaan Seuran Puhelin as a result of the directed share offering. In turn Loimaan Seuran Puhelin would have become the majority shareholder in Turun Puhelin.

The Competition Council's decision is viewed by many to be a significant win for Finland's local telecommunication operators and the national mobile operator DNA Finland Oy. The Competition Council took the view that the concentration would have strengthened Sonera's dominate market position in mobile communications services at the expense of DNA Finland Oy. Currently there are three national 2G operators in Finland: Sonera, Elisa Communications Radiolinja, and local network operator DNA Finland. At the time of writing it is not certain whether Sonera will appeal against the decision of the Competition Council before Finland's Supreme Administrative Court.

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#### **FINLAND** **NO DOMINANT POSITION** **IN NATIONAL ROAMING ISSUES**

On 11<sup>th</sup> December 2001 Finland's Competition Council issued a decision resolving Telia Mobile's Finnish subsidiary's appeal against the decision of

Finland's Competition Authority in January 2000 concerning Finnish GSM operator Sonera's suspected restrictions on competition in its pricing of national roaming services. The Competition Authority took the view that Sonera did not have a dominant market position, either alone or together with Finnish GSM operator Radiolinja, in the relevant market for access to a national mobile network. Additionally, the Competition Authority considered that there was no evidence that the pricing of Sonera's national roaming services violated section 9 of Finland's Competition Act when Telia entered into agreement with Radiolinja for a service operator solution. Section 9 of Finland's Competition Act provides general guidelines allowing Finland's competition authorities to investigate restrictive business practices which are not prohibited per se but which have harmful effects on competition. Section 9 provides that business practice is restrictive and harmful if it decreases or is likely to decrease the effectiveness of trade or prevents or hampers the trade of another business undertaking in a manner deemed to be improper for sound and effective economic competition.

The Competition Council overruled Telia's appeal against the Competition Authority's definition of market dominance and assertion that Sonera did not have a dominant market position. Thus it was confirmed that Sonera does not have either alone or together with Radiolinja a dominant market position on the market for access to a national mobile network. It was found that Sonera and Radiolinja offer services on the relevant market that are identical with respect to their technical implementation and geographic coverage. Sonera's position on the market for access to a national network cannot be compared to Sonera's position on the market for mobile services where Sonera's market share exceeds 60%.

The competition authorities found that the mobile communication market exhibits many characteristics which could indicate that Sonera and Radiolinja have a joint dominant position. Indeed national mobile communications services are offered by two companies whose services are similar with respect to their content, quality and pricing and barriers to market entry. The mobile communications market, does, however, exhibit characteristics that promote competition and hamper oligopolistic operations. These characteristics were identified as, for example, rapid technical development, market growth, and the different cost structure, financial resources, and market shares of the market operators involved. The structure of the market is oligopolistic but no economic links were found between the operators that would justify finding that they possessed joint dominance on the market. It was found that both Sonera and Radiolinja have patent motives for reacting defensively to Telia's proposal for a national roaming agreement since the agreement could negatively affect their competitive position and their investment returns. It was also stated that the fact that Sonera and Radiolinja have a common motive cannot as such be viewed as sufficient indication of joint dominance. The competition authorities also sought the opinion of the EU Commission on the formation of joint dominance in telecommunications.

The Competition Council did take the view, however, that due to its market power Sonera was able to significantly affect the conditions for competition on the market. In this respect the terms and conditions for Sonera's national roaming should have been evaluated in light of Section 9 of Finland's Competition Act. The application of this provision, however, requires evidence of damaging effects. In circumstances where the existence of joint market dominance is close at hand and structural barriers to competition exist in the market, special grounds exist to examine and investigate the applicability of Section 9 of the Competition Act in detail. On this score the Competition Council was of the opinion that the Competition Authority did not sufficiently investigate the application of Section 9. The Council considered that the fact that Telia had, after long negotiations, entered into a service operation agreement with Radiolinja does not permit the conclusion that Sonera's pricing would not have had economic effects. The Council also ruled that the resolution of the matter culminated in the pricing of Sonera's national roaming services whose pricing was not

examined by the Competition Authority. The Competition Council took the view that the matter had not been sufficiently investigated and therefore the Council returned the matter to the Competition Authority for further examination.

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## ITALY GUIDELINES ON SHARED ACCESS TO THE LOCAL LOOP

The Italian Communication Authority's Commission for network and infrastructure has identified and adopted new guidelines for the implementation of shared access to the local loop. The service consists in unbundling provision for the copper cable portion which is not directly employed in the provision of telephony services.

Operators requesting shared access may provide data transmission services based on xDSL technology. The other cable portion will be used for the provision of public telephony services either by POTS or ISDN.

In essence, the guidelines provide the following:

- notified operators must include shared access service in their Reference Offer for the provision of local loop unbundling services; the Offer must also include the technical and economic conditions;
- the economic conditions must comply with non-discriminatory, transparency and cost oriented principles; operators requesting shared access must bear only the incremental costs foreseen for arranging the service;
- shared access may be requested either by license operators or authorised operators (i.e. Internet Service Providers);
- notified operators must also publish unbundled offers related to limited and restricted segments, as well as for network portions within the local loop segment itself.

It is expected that the Decision will contribute to increased competition between operators in the network and carrier markets.

For more information see the Italian Communications Agency's web site: [http://www.agcom.it/comunicati/cs\\_291101.htm](http://www.agcom.it/comunicati/cs_291101.htm)

## SWITZERLAND NO LIBERALISATION OF THE LEASED LINE MARKET

According to a new decision by the Swiss Federal Court, Swisscom, the previous monopolist, does not have to open its leased lines to third parties.

According to a decision taken on 3<sup>rd</sup> October 2001 by the Swiss Federal Court (the *Bundesgericht*, Switzerland's highest court), the incumbent, Swisscom, cannot be forced to grant its competitors interconnection to its leased lines and other transmission media (the hardware per se, i.e. copper and glass cables).

This decision by the High Court Judges reversed an earlier decision taken by the Swiss National Regulatory Authority, the Communications Commission ("ComCom"), in favour of forcing the former monopolist to grant a competitor access to its leased lines (and particularly to its standard services portfolio "Private Line National") against payment of an interconnection fee (instead of the higher retail or mass market prices).

The Swiss Federal Court unanimously rejected the applicability of the interconnection regime to leased lines and other transmission media, essentially based on the reasoning that the new entrant was requesting the use of Swisscom's infrastructure, without added services.

In the Court's opinion, interconnection can apply only to access to the infrastructure of the monopolist where Swisscom is requested to provide additional services. Additionally, the Court argued that it was questionable

whether Swisscom has dominant market power in the leased line market and that in any event, the potential difficulty of Swisscom in granting leased lines at interconnection fees to any third party would justify an exception from the principle of a liberalised market. Finally, the Court underlined that other, more appropriate legal means may apply (like price control mechanisms).

To conclude, the Court has "passed the ball" to the legislator, i.e. to the Swiss Parliament, stating that an amendment of the Swiss Federal Communication Act was necessary, if leased lines and similar services were to be submitted to interconnection rules.

The Court's Decision has been defined as very "monopoly friendly" and as a (further) "setback on the path to free competition" not only by the losing party but also by many of the incumbent's competitors.

For more information see: <http://www.bger.ch>  
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## 2. COMPUTER CRIME

### EU CONVENTION ON CYBERCRIME SIGNED

The Convention on Cybercrime (the "Convention") was adopted by the Council of Europe's Committee of Ministers on 8<sup>th</sup> November 2001 and opened to signature on 23<sup>rd</sup> November 2001.

On the same day, 26 Member States and 4 non-member States signed the Convention.

The Convention will enter into force when signed by 5 countries.

The Convention constitutes the first ever international treaty addressing criminal law and procedures regarding criminal behaviour directed at computer systems, networks or data and other types of similar misuse. It tries to improve international co-operation, to harmonise national laws and requires the adoption of corresponding laws by the various signatories.

The Convention sets forth provisions on:

- offences against the confidentiality, integrity and availability of computer data and systems concerning illegal access, illegal interception, data interference, system interference and illegal devices;
- computer-related offences concerning forgery and fraud;
- content-related offences concerning child pornography;
- offences related to infringement of copyrights and related rights;
- ancillary liability and sanctions concerning attempting and aiding or abetting, as well as corporate liability;
- procedural law concerning search and seizure of stored computer data, issuing of a production order, expedited preservation of data stored in a computer system, expedited preservation and disclosure of traffic data, interception of electronic communications, real time collection of traffic data and the obligation of confidentiality;
- jurisdiction, international co-operation and mutual assistance.

It is interesting to note that countries must establish jurisdiction for offences committed on their territory or by their nationals, unless another state has territorial jurisdiction.

An additional protocol to this Convention will focus on racist and xenophobic propaganda via computer networks.

The full text of the Convention can be found in Word format at: <http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc>

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## **GERMANY COURT RULING ON IMMORALITY OF "TELEPHONE-SEX"**

A lower court in Frankfurt recently ruled that sexual services via telephone are no longer immoral, so that, legally, the offeror of such services and the telephone company can request payment for such services from the recipient of such services.

The court decision was adopted at the same time as a new German law legalising prostitution became effective.

For the first time in German history, prostitutes have access to the social security system and agreements with their customers are legally binding. The court declared that, regarding telephone sex, payment could only be withheld if the recipient of such services provided evidence that the content of the service was immoral and that the contract was, therefore, not binding.

Regardless of whether the service is immoral or not, the telephone company can always request payment for its services, irrespective of any immorality of the service content.

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## **3. DATA PROTECTION**

### **GERMANY EXPERT REPORT ON DATA PROTECTION**

A group of data protection experts, set up by the German federal ministry of the Interior, has presented its report on a reform of German data protection laws.

Overall, the study would like to see the various German data protection laws simplified and standardised and the adoption of a single code on data protection.

The study is critical of the fact that the German data protection framework does not reflect new developments in technology or the globalisation of the economy.

The new regulation should include provisions on the use and transfer of personal data, including information on legal entities, without distinguishing between public authorities and private entities.

The new concept is based on the principle that the use of personal data should generally be allowed without further permission, on the proviso that it does not affect the interests of the individual.

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### **UK RETENTION OF CUSTOMERS' PERSONAL DATA**

The Home Secretary's Anti-Terrorism, Crime and Security Bill ("Anti-Terrorism Bill"), has received Royal Assent after a variety of comments from industry since it was first introduced in late 2001.

The proposed legislation was initially designed to supplement the requirements of the Regulation of Investigatory Powers Act 2000 ("RIPA"). RIPA deals with interception and retention of data by communications providers, and in particular, allows authorised bodies such as the police or intelligence services to require companies providing telecommunications communications services to grant them access to customer personal data.

The initial proposals for the Anti-Terrorism Bill caused controversy by requiring communications providers to retain such data for a variety of purposes for periods of up to 12 months.

However, after much publicised debate, the Bill now merely allows the Home Secretary to issue a voluntary code of practice relating to the retention by communications providers of communications data obtained by or held by them for the purposes of the investigation of issues threatening national security alone.

Further information on the interception of communications in the UK can be found at <http://www.olswang.com/telecoms>

## **4. ELECTRONIC COMMERCE**

### **AUSTRIA NEW E-COMMERCE ACT IN FORCE**

The Austrian e-Commerce Act, which is designed to implement the EU e-Commerce Directive 2000/31/EC, entered into force on 1<sup>st</sup> January 2002. It regulates certain aspects of information society services and implements the "home-country principle" provided for by Art 3 of the e-Commerce Directive as well as exceptions thereto.

One of these exceptions is the regulation of spamming, i.e. the unsolicited transmission of e-mail. Consequently, even though a provider may carry on his online-business throughout the European Union by virtue of the "single passport" (granted by its home country), the provider still has to comply with national copyright laws and the spamming regulations of each jurisdiction to which the provider's services are addressed.

The Directive leaves it to the Member States to decide whether to introduce an "opt-in" or "opt-out" system. The Austrian e-Commerce Act implements the first alternative. According to the "opt-in" system, unsolicited e-mails may only be sent to addressees who expressly agree to such a service in advance.

Furthermore, the Act contains provisions governing the online conclusion of contracts and makes it obligatory for the online provider to provide the customer with certain information (e.g. order confirmation, etc.) in the context of the conclusion of such contracts. In line with general principles of Austrian civil law, the Act provides that an e-mail is deemed to have been delivered as soon as the addressee can access it "in normal circumstances", i.e. if an e-mail is sent at night or on a holiday, it is deemed to have been delivered on the morning of the next business day.

This provision protects the recipient from having to deal with e-mails that have not yet been "seen" and goes further than the Directive, which does not refer to the circumstances in which an e-mail is accessed in legal terms.

The e-Commerce Act also addresses the liability of service providers. Like its European model, the e-Commerce Directive, the Act exempts web-hosting providers from liability for illegal content transmitted over their servers, if they are ignorant of the illegal nature of the content and immediately block access to such content should they become aware thereof. However, the Austrian Act goes further and – unlike the Directive – also excludes the liability of providers of search engines, a provision which caused some controversy in the legal discussion on the Act.

For the wording of the e-Commerce Act refer to: <http://www.bgbl.at>

## 5. ELECTRONIC DEMOCRACY

### GERMANY BUNDONLINE2005: PUBLIC PROCUREMENT VIA INTERNET

The German federal government has launched an Internet-based public procurement system to start in January 2002. As a result, all federal government invitations to tender will be published on the Internet. Companies interested in participating in this new initiative just need a qualified electronic signature. The federal government expects the system to have positive effects on efficiency and competition for both government and suppliers. Public procurement programmes by the German federal government and its governmental authorities amount to approximately EUR 250 billion p.a. or 25% of all public expenditure.

For more information see: [www.e-vergabe.info](http://www.e-vergabe.info)

### GERMANY ELECTRONIC FILING OF LEGAL BRIEFS

Since 7<sup>th</sup> November 2001 German lawyers have been able to file legal briefs with Germany's highest civil and criminal court, the *Bundesgerichtshof* in Karlsruhe. During the first phase electronic exchange of briefs is limited to specific types of correspondence and certain areas of jurisdiction. It is expected that electronic correspondence will lead to lower costs and reduced time spent on court procedures.

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## 6. EMPLOYEMENT

### NORWAY DISMISSAL WITHOUT NOTICE FOR DOWNLOADING MP3 FILES

The employer's right to monitor employees' use of Internet and e-mails, etc. has attracted increased attention in recent years and particularly after the Norwegian Personal Data Act entered into force on 1<sup>st</sup> January 2001.

In its judgement of 14<sup>th</sup> December 2001, the Norwegian High Court supported the dismissal without notice of a 55-year-old IT-consultant for using his employer's computers and Internet line to download MP3 files. The matter was discovered after several complaints by other employees relating to lack of Internet capacity.

A transcript of the log revealed that 50 per cent of the Internet downloading was performed by the consultant. After having locked themselves in the consultant's office, the IT-manager and a colleague then discovered two PCs in the process of continuous downloading. A catalogue transcript of the two PCs revealed that there were approximately 1.541 MP3 files stored.

The consultant later admitted downloading 600-700 MP3 files for private use. Based upon company regulations, the consultant was dismissed without notice, but received payment equal to 4 months' salary.

The consultant filed a suit against his employer claiming the dismissal to be null and void. In the court of first instance, the dismissal was declared void and ruled to be a dismissal with notice since the salary had been paid.

The company was sentenced to pay the consultant damages of approximately EUR 7,500. The sentence was upheld in the first court of appeal.

Before the Supreme Court, the consultant disputed the amount and the nature of the downloading proven before the first court of appeal, and argued that the downloading did not in any way involve a security risk for the company. He claimed that the dismissal did not meet the standard of objectivity set out in the Norwegian Health and Safety at Work Act. He claimed that the company's regulations were not sufficiently upheld; that the reaction was not proportional to the act; that his 28 years of working for the company had not been taken into consideration and finally that no financial loss could be substantiated. Finally, he claimed that the employer had infringed the Norwegian Personal Data Act as well as personal privacy principles when breaking into his office and examining his PCs.

The Supreme Court ruled that the dismissal met the standard of objectivity set out in the Norwegian Health and Safety Work Act. The court upheld the assessment of evidence made by the first court of appeal as regards the amount and nature of the downloading. The Supreme Court found it probable that the consultant's search for unknown IP-addresses exposed the company to a security risk. The Supreme Court found that the downloading constituted a serious breach of the company regulations, company instructions and duty of loyalty towards the employer and that his position as IT-consultant should have increased his awareness of his obligation to ensure that the Internet line was not unduly overloaded. With regard to the seriousness of the consultant's act, the Supreme Court found that a warning from the employer would have been too mild a reaction.

With regard to the claimed infringement of privacy, the Supreme Court found that the transcript of the Internet log and further investigations had to be accepted as administration of the system. As regards the act of breaking into the consultant's office, the Supreme Court did not find that the company was to blame for acting as it did under the circumstances and that it could not be prevented from using the transcripts as grounds for the dismissal. Finally, the Supreme Court held that due to the consultant's serious and long-term breach of instructions and duty of loyalty towards his employer and in spite of his long-term employment with the company, it could not disallow the company objective grounds for dismissal. The consultant was sentenced to pay court costs to his former employer of approximately EUR 31.250.

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## 7. INTELLECTUAL PROPERTY

### LEBANON COURT RULING CONFIRMS SOFTWARE PROTECTION

In an anxiously awaited decision, the Beirut Court of First Instance confirmed a ruling in early January 2002 on the protection granted to Software Products as introduced by Law No. 75 dated 3<sup>rd</sup> April 1999.

The ruling found a reseller of computer software guilty of violating Lebanese Copyright Law by selling pirated products, sentencing him to a fine of LBP 1 million (approximately USD 660) and awarding an additional LBP 2 million (approximately USD 1320) in damages to the plaintiffs, International Software Manufacturers.

The importance of this ruling is that it was the first court decision based on Law No. 75 (Copyright Law) to confirm a newly introduced principle, i.e. the legal protection of Software Products as copyrighted items.

Another significant outcome is the final and clear position of the Lebanese courts in applying the newly established concepts of Software copyright protection despite the latest criticism of the Lebanese legislature by the Business Software Alliance ("BSA"), the software industry's lobbying organisation.

Indeed, Law No. 75 was enacted, subsequently entering into force on 13<sup>th</sup> June 1999, two months after its publication in the Official Gazette and only after fierce debates in the Lebanese Parliament and after certain concessions had been made by BSA members such as Microsoft.

Obviously, the Lebanese Parliament, though willing to grant final and decisive protection for software products, was reluctant to do so without an irrevocable undertaking by BSA members to supply copies of their educational software to schools and students at a discounted rate. The final debate included a commitment by BSA members to provide educational bodies with a 90% discount on educational software.

Since the Law was enacted, BSA members have been trying to obtain a first ruling confirming Copyright protection in order to "send a signal to the pirate community that they cannot ignore the Law".

However, BSA had to wait for over two years before obtaining the first ruling which, though somewhat late in coming, provides additional confirmation of the commitment made by Lebanon to protect the software industry.

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## NORWAY COURT GIVES LEGAL BASIS TO "SPECIAL INTERPRETATION RULE"

As a basic rule for solving disputes with regard to transfer of copyright from the author to other parties, legal doctrine in Scandinavia has for a long time asserted a "special interpretation rule". According to this rule, an unclear agreement shall be interpreted narrowly in favour of the author, who retains all rights not clearly transferred in the agreement. This principle was endorsed by the Norwegian Supreme Court in a decision of 27<sup>th</sup> June 2001.

The case was not strictly speaking about copyright. The defendant was an artist, who for many years made paintings that were used as models for the stamps of the Norwegian Postal Company.

The artist had also engraved most of the metal plates used for the printing of stamps. In the course of such a process, a number of "test prints" are taken before the stamp production actually commences.

The dispute concerned the period from 1985-1994 in which the artist worked as an independent contractor for the Postal Company. He did not dispute the ownership rights to the originals. The question brought before the Supreme Court was whether the artist or the Postal Company had the property rights to the test prints.

The Supreme Court decided in favour of the artist. First, the Supreme Court stated that the engraving constituted an exercise of the artist's copyright, as he had created the original paintings on which the engravings and prints were based.

The court also stated that nothing had been said concerning property rights to the test prints when the artist was commissioned to do the job. Furthermore, the Court found that the Postal Company had shown little interest in the prints while the work was being carried out.

This had given the artist reasonable grounds for believing that he owned the test prints. It also indicated that the Postal Company had, for a long time, "no clear opinion on the question of property rights to the test prints".

The Court added that the agreement between the artist and the Postal Company had to be interpreted in favour of the artist on basis of the

"special interpretation rule": *"It follows from this rule (...) that when an author has transferred the rights to use the work in a specific way or by specific means, the purchaser has no right to use it in other ways or by other means. The rule has been understood to mean that the purchaser obtains the rights that follow directly from the agreement, but that the author maintains the other rights (...). This means that unclear agreements are interpreted narrowly in the favour of the author."*

The ruling gave the "special interpretation rule" a solid legal basis in Norwegian case law. This means that principals wishing to exploit copyright protected material, must be careful to define in their agreements with the author what rights they wish to exercise.

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## THE NETHERLANDS KAZAA FILE-SWAPPING SOFTWARE DECISION

KaZaA, the Dutch file-swapping service, is the latest in a long line of media networks and file-swapping software developers to be sued by musical rights and recording artists' associations.

On Thursday 29<sup>th</sup> November 2001, KaZaA was ordered by the District Court of Amsterdam to take positive steps to prevent copyright infringements occurring via the use of its software.

KaZaA's software, which uses technology developed by another peer-to-peer software company, FastTrack, allows users to access other users' computers and download their files without the intervention of a central server or database (this is known as a peer-to-peer network).

KaZaA's peer-to-peer system uses identical technology to the Grokster, FastTrack and MusicCity networks which were all sued for secondary copyright infringement in October of this year in the United States by the Recording Industry Association of America ("RIAA").

KaZaA has been involved in court action with Buma/Stemra, the Dutch musical rights society, ever since negotiations between the parties broke down on the terms of a licensing agreement to allow KaZaA users to access copyrighted materials.

These negotiations appear to have broken down after news arrived of the RIAA's action in the United States against FastTrack, the company which developed KaZaA's software.

In the Dutch court action KaZaA claimed that Buma/Stemra had unlawfully broken off negotiations on the license agreement and Buma/Stemra counterclaimed that the license agreement was only intended to cover streaming media access and that KaZaA's file-swapping software facilitated the infringement of copyright in works of music belonging to the Buma/Stemra repertoire.

The judge's ruling dealt with KaZaA's claim and Buma/Stemra's counterclaim. He ruled that Buma/Stemra should continue negotiations with KaZaA with the intention of proceeding on a reasonable and fair basis to conclude a licence agreement (imposing a penalty of EUR 454,54 for every day that no agreement was reached), and, he ruled that KaZaA should take measures to render disclosures and/or multiplication of copyrighted works impossible via its network (imposing a fine of Euro 45454,54 for every day that this occurred).

This case highlights the difficulties that intellectual property rights holders may have in closing down peer-to-peer services as the companies offering these services or software may claim (as was the case with KaZaA) that they have no control over what files are swapped using their software.

KaZaA's attorney stated that KaZaA's software programme had already been distributed to over 20 million users and it could not realistically prevent users from breaching the terms of the judge's order.

Apart from the obvious effects of the court's judgement on the parties to the case, the case has had a wider effect. A similar Dutch file-swapping software called XoloX has been withdrawn from the internet by its developers, apparently as a direct result of the litigation against peer-to-peer software clients such as KaZaA. It remains to be seen how MusicCity, Grokster and FastTrack react to the Dutch court's judgement, if at all.

For further information please contact: [martine.de.koning@kvdl.nl](mailto:martine.de.koning@kvdl.nl)

## UAE CONTRACT WITH THE AUSTRIAN PATENT OFFICE

The Industrial Property Department of the U.A.E. Ministry of Finance & Industry recently announced that it has executed a contract with the Austrian Patents Office. Pursuant to the contract, the Austrian Patents Office will review patent applications filed in accordance with the U.A.E. Patent Law (Federal Law No 44 of 1992 Concerning Regulation and Protection of Patents, Drawings and Designs).

The Industrial Property Department does not employ patent examiners. Therefore, it cannot review patent applications or register patents as contemplated by the Patent Law. By hiring the Austrian Patents Office to review applications, the Industrial Property Department will be able register patents in the U.A.E.

The application fee is AED 1,500, which an applicant must pay to the Ministry of Finance & Industry when the application is filed. If the file is acceptable as to form and qualifies for consideration and technical examination, the Industrial Property Department will forward the file to the Austrian Patent Office for examination. If the cost of reviewing the application is greater than AED 1,500, then the Industrial Property Department will invoice the applicant for the additional amount. If the cost of reviewing the application is less than AED 1,500, then the Industrial Property Department will refund the difference.

The Industrial Property Department will not charge a fee for files that do not qualify for technical examination until the files are either completed or revert to the public domain. Once the file is completed, the applicant must pay the application fee and the file will be forwarded to the Austrian Patent Office for review.

For more information contact: [aaadh@emirates.net.ae](mailto:aaadh@emirates.net.ae)

## UAE TRADEMARK APPLICATION PROCEDURES

Ministerial Resolutions Nos. 66, 67 and 68 of 2001 amend the procedures for trademark applications. Ministerial Resolutions Nos. 66 and 67 of 2001 provide that the registration fee and the publication fee shall be payable within sixty days from the date of notice to the applicant of acceptance of the application. In the event that either fee is not paid, the application shall be considered abandoned. Previously, the registration fee was paid upon deposit of the application.

Ministerial Resolution No. 68 of 2001 amends the rules for registration of trademark transfers and licenses. Following transfer of a trademark, the transferee applies for an endorsement in the trademark register to reflect the change in ownership. In support of such application, the transferee must submit documents that evidence the transfer of ownership; previously, such documents were required along with the transferee's certificate of commercial registration, if the transferee was a legal person. An application to register a trademark license must include a statement of the goods, products or services registered and licensed to be used; previously, only a statement of the registered goods, products or services was required.

For more information contact: [aaadh@emirates.net.ae](mailto:aaadh@emirates.net.ae)

## 8. MARKET ACCESS

### IRELAND SELECTION OF 3G MOBILE PHONE LICENCES

The Office of the Director of Telecommunications ("ODTR") is the statutory body responsible for licensing and regulating the telecommunications industry in Ireland. On 18<sup>th</sup> December 2001 the ODTR launched a competition for the selection of third generation ("3G") mobile phone licences in Ireland. Four twenty-year licences (one "A" licence and three "B" licences) will be awarded by means of a comparative evaluation process. The licence conditions are as follows:

- deadline for launch of commercial services is 1<sup>st</sup> January 2004;
- coverage requirements are 80% by the end of December 2007 for the A licence and 53% by the end of June 2008 for the B licences;
- applicants currently licensed to provide GSM services will be required to provide roaming facilities to all new market entrants;
- spectrum access fees are EUR 50.7 million for the A licence and EUR 114.3 million for the B licences;
- applicants are invited to make voluntary commitments concerning, for example, coverage and roll-out in excess of minimum requirements, site sharing and customer service;
- applicants for the A licence are invited to offer access for mobile virtual network operators (MVNOs).

The successful applicants will be announced in June 2002.

The full text of the ODTR Information Memorandum is available at: <http://www.odtr.ie/docs/odtr0196.doc>

### SOUTH AFRICA 2<sup>ND</sup> NATIONAL FIXED LINE OPERATOR LICENCING NOW OPEN

The licensing process for South Africa's second national fixed line operator (the "SNO") recently got underway on 21<sup>st</sup> December 2001. The Minister of Communications issued an invitation to persons from historically disadvantaged groups to apply for a 19% equity interest in the SNO. The SNO will be licensed to provide Public Switched Telecommunication Services, which includes the design, leasing, construction, maintenance and operation of the Public Switched Telecommunications Network.

This invitation to apply is the first phase of the SNO licensing process. The second phase will involve the allocation of a 51% equity interest to a local and/or international investor in the SNO, while the remaining 30% equity interest will be allocated to local South African transport and electricity utilities, Transnet and Eskom.

In terms of the invitation to apply, the successful applicant must be a black economic empowerment company incorporated under South African law, and owned, managed and controlled by persons from historically disadvantaged groups whose members are South African citizens. The successful applicant will be required to establish a new company together with the successful local and/or international applicant and will hold the licence with both Transnet and Eskom.

The term of the licence to be issued to the SNO will be 20 years from the date of signature and the regulator, the Independent Communications Authority of South Africa, will have an option to extend the term for a further 5 years. The Minister has indicated that she will notify the regulator of her decision to grant the application by 31<sup>st</sup> May 2002.

The invitation to apply can be downloaded from: <http://docweb.pwv.gov.za>

## 9. MEDIA

### BRAZIL FOREIGN INVESTMENT BARRIERS TO BE LIFTED

On 11<sup>th</sup> November 2001, the Plenary Session of the House of Representatives finally discussed and approved, at its first reading, the proposal for an amendment to article 222 of the Brazilian Constitution, which would permit foreign investment in journalistic and broadcasting companies. After being passed at its second reading, the proposal must be sent to the Senate, where it will be subject to the same process before being enacted. The proposed wording for article 222 of the Brazilian Constitution, if approved, will allow foreigners to hold up to 30% of the corporate capital of Brazilian journalistic and broadcasting companies.

For more information contact: [rapdecunto@pinheironeto.com.br](mailto:rapdecunto@pinheironeto.com.br)

### ITALY TV REGULATION CONCERNING TERRESTRIAL BROADCASTING

Further to the public consultation dated 11<sup>th</sup> July 2001, the Italian Communication Authority issued Decision No. 435/01/CONS on TV Regulation concerning terrestrial broadcasting by using digital techniques.

With respect to the previous draft, the Decision sets out new terms and conditions applicable to content providers.

In particular, national authorisation (granted for the coverage of a geographic area of at least 80% of the national territory, including the provinces) is awarded to those joint stock ventures with a subscribed and paid-up capital, net of losses, totalling a minimum of EUR 6.200.000 and with at least 20 employees.

Local authorisation (granted for the coverage of a region or province, but of an area with a population not higher than 15 million inhabitants) is awarded to those joint stock ventures with a subscribed and paid-up capital, net of losses, totalling a minimum of EUR 155.000 and with a number of employees greater than or equal to 4.

Content providers are obliged to provide the following information:

- the daily broadcasting schedule and the broadcasting duration;
- the possible sending of the broadcast to a codified system and the eventual fee for access;
- the possible transmission of broadcasting data (which consists of information provided by means of editorial electronic services, provided to the subscriber and which differs from the normal broadcasting system) and/or the exclusive use of the authorisation for data broadcasting transmission;
- the technical measures adopted in order to protect minors and to increase reception for handicapped persons. The contribution for the application shall not be more than EUR 5.165.

With reference to service provision (including conditioned access), service providers must submit a statement to the Communication Ministry Regulator (according to the Decision No.467/00/CONS) and may activate the service according to the conditions described by the statement.

They must comply with the technical standards provided under Decision No.216/00/CONS and must provide a draft plan for the basic services provided to the subscribers.

Finally, the individual license for a network broadcasting operator will be released beginning on 31<sup>st</sup> March 2004.

On the same date, the Italian Communication Authority will enact a Decision aiming to state, *inter alia*:

- the provisions for guaranteeing content provider access;
- the criteria for non-discriminatory access to the use of scarce resources;
- the controls and verifications aimed at guaranteeing separate accounting for operators entitled to an authorisation and/or an individual license;
- after consultation with the Italian Antitrust Authority, the criteria for the use of other frequency bands by the licensees and for the release of other licenses.

For more information see the Italian Communications Agency's web site: [http://www.agcom.it/provv/d\\_435\\_01\\_CONS](http://www.agcom.it/provv/d_435_01_CONS)

### SWEDEN PROTECTION FOR MASS-MEDIA BROUGHT UP TO THE INTERNET AGE

In December 2001, the Swedish Government presented a bill dealing with the constitutional legislation regarding the protection of freedom of expression. The proposal is intended to adjust the current Fundamental Law on Freedom of Expression, which came into force in 1991, to the media reality of today.

The proposed amendments, due to come into force on 1<sup>st</sup> January 2003, will extend the automatic protection received by traditional mass-media enterprises under the current Fundamental Law on Freedom of Expression to cover the use of a number of new techniques for communication with the public.

These include "direct transmission on request" (real time web-casting), print on demand and push technology. Furthermore, publishing firms and printing houses will have this automatic protection as well.

The Government also suggests that it should be possible to apply for voluntary constitutional protection of Internet transmissions performed by actors other than traditional mass-media enterprises.

This means that magazines that are only published on the Internet (e-zines or webzines) and other types of transmissions can be given constitutional protection. The protection requires that a Swedish authority has issued an authorisation with respect to the transmission activities.

In connection with the proposal one can observe a fairly new judgement from the Supreme Court. The case analysed the concept of "publication of personal data made for purposes of journalism" in the Swedish Personal Data Act.

The Supreme Court clarified rules on exemption for purposes of journalism stating that exemption applies not only to professional journalists and traditional mass-media enterprises but also to the average citizen.

All in all, the traditionally strong Swedish protection of the freedom of expression would thus seem to be standing its ground, even in the Internet age.

The bill can be downloaded (in Swedish) at:

<http://www.justitie.regeringen.se/propositionermm/propositioner/index.htm>

For more information please contact: [erik.bergenstrahle@lindahl.se](mailto:erik.bergenstrahle@lindahl.se)

## 10. PROTECTION OF PRIVACY

### EU THE PARLIAMENT WON'T EAT "COOKIES"

The 26<sup>th</sup> amendment proposed by the Parliament with respect to the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385) intends to add to article 5, of the Commission's initial proposal, a paragraph 2(a), providing that "Member States shall prohibit the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user without the prior explicit consent of the subscriber or user concerned. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network".

This text is directly connected to "cookies", those little files saved on the user's computer.

The Parliament wants Member States to require the explicit consent of the recipient of a cookie before it can be sent, providing that this will ensure non-abusive use of the collected data and thus protect privacy.

The full text of the Commission's initial proposal can be downloaded (.pdf format) at:

[http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/com2000-385en.pdf](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/com2000-385en.pdf)

The Parliament's proposed amendments can be found at:

[http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/ndex\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/ndex_en.htm)

For more information contact: [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

### FRANCE THE "NIKON" CASE: INTERNET USAGE FOR PERSONAL PURPOSES

In the Nikon case of 2<sup>nd</sup> October 2001, the French Supreme Court (*Cour de cassation*) addressed the issue of the control of personal e-mails of employees. An employee of Nikon France had been dismissed for gross misconduct, one of the grounds being his use for personal purposes of the computer provided to him for professional purposes. Suspecting that this employee was pursuing another professional activity during his working hours for the company, Nikon controlled different files of this employee on his computer, including a file named "Personal" and had used such file to show that the employee was at fault.

The court considered that Nikon had not respected the employee's right of privacy in his electronic correspondence. The fact that the non professional use of the computer was prohibited did not entail the right of the employee to such privacy.

Consequently, the means that can be used by the employer to control an employee's electronic correspondence are very limited when a message is identified as personal. The real difficulty lies in distinguishing between personal and professional messages.

According to the terms of article 226-15 of the Criminal code, the interception and reading of the content of a personal message is punishable by a one-year prison sentence and a fine of EUR 45,735.

In a report dated 28<sup>th</sup> March 2001, the French data protection authority (the "CNIL") had given indications as to the kind of control authorised for monitoring employees' e-mail correspondence. Although the employer is not entitled to control the content of personal messages sent and received by the employee, it may contemplate other means of controlling the use of e-mails for non professional purposes, such as calculating the number of personal messages, or controlling the volume of documents sent to the employee.

To access the text of the decision see:

<http://www.courdecassation.fr/arrets/99-42942arr.htm>

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or [fperbost@kahnlaw.com](mailto:fperbost@kahnlaw.com)

## 11. TAX

### EU SOLUTION REQUIRED FOR VAT ON \_-COMMERCE

In its conclusions dated 13<sup>th</sup> December 2001, the Ecofin Council:

- invited the Commission and Member States to undertake the elaboration and enforcement of an appropriate electronic system for the calculation, declaration, recovery and affectation of taxes related to electronically provided services imposed where they are consumed; and
- asked the "Fiscal Questions" Group to find a temporary interim solution in order to manage VAT on electronic commerce.

This solution would be adopted for a renewable 3-year period.

The last step in this matter was taken on 7<sup>th</sup> June 2000, when the Commission issued a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EEC) No 218/92 on administrative co-operation in the field of indirect taxation (VAT) together with a proposal for a Council directive amending Directive 77/388/EEC as regards the value added tax arrangements applicable to certain services supplied by electronic means, in order to provide a clear and certain regulatory environment.

On this occasion, the Commission notably stated that the impact of decisions taken in relation to the tax system will play a role in determining whether e-commerce achieves its potential contribution. It claims that it is essential that taxation shall not be a barrier to its growth.

The text of the proposals can be found at:

[http://europa.eu.int/eur-lex/en/com/pdf/2000/en\\_500PC0349\\_02.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0349_02.pdf)

For more information contact: [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

### EU TAX REGULATION APPLYING TO SATELLITE DISHES ONLY

A judgement of the European Court of Justice of 29<sup>th</sup> November 2001, case C-17/00, *François De Coster vs Collège des bourgmestre et échevins de Watermael*, declared that the levy of a municipal tax applying only to satellite dishes was contrary to the freedom to provide services.

- The facts:

A tax regulation, adopted by the municipal council of Watermael-Boisfort, provided for an annual municipal tax of EUR 123.95 on satellite dishes for the years 1997 to 2001, payable by the owner.

The *Collège juridictionnel de Région de Bruxelles-Capitale* asked the Court of Justice for a preliminary ruling on the compatibility of the tax regulation with Community law. With effect from 1<sup>st</sup> January 1999, the tax regulation was abolished after the European Commission considered that the tax regulation did not comply with Community law.

Mr. De Coster disputed the levy of the tax for 1998.

- The judgement:

The Court held that the broadcast and transmission of television signals are regulated by the rules relating to the provision of services. It held that a tax on the reception of television programmes transmitted via satellite had the effect of dissuading the residents of a municipality from watching programmes broadcast by satellite from other Member States, because the tax regulation did not apply to the reception of programmes transmitted by cable, as used by Belgian channels and to which they have unlimited access. The Court also noted that the satellite operators established in other Member States were disadvantaged compared to the cable operator in Belgium.

With regard to the protection of the environment, the Court estimated that this could be achieved by regulating the positioning and the size of satellite dishes.

For further information see: <http://europa.eu.int/cj/en/cp/aff/cp0161en.htm> or contact: [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

## MEXICO

### NEW TAX ON TELECOM SERVICES

On 1<sup>st</sup> January 2002, the Mexican Congress passed a tax reform package which includes the imposition of a special tax on telecommunications and related services. Although it is not clear exactly which services are intended (as some contradictions exist in the text approved by the Congress), they will almost certainly include:

- cellular services and fixed and mobile wireless access services;
- paging services;
- trunking services;
- restricted or "paid" television;
- any other telecommunications service that is to be rendered as a final telecommunications service (excluding some basic telephone and long distance services); there are, some specific exemptions to the new tax, including, for example, rural telephony, public telephony, collocation, administration or domain services, Internet services and services among telecommunications companies (e.g. interconnection, provision of capacity, etc.).

This tax has not only been extremely controversial within the industry for its unconstitutionality, but also highly criticised due to the fact that many of the terms of the tax reform itself are contradictory.

Telecommunications companies from all fields, ranging from the incumbent *Teléfonos de México* (Telmex) to all new long-distance and local concessionaires, have joined forces to fight the application of the new tax before the Mexican Federal Courts. As of 1<sup>st</sup> January 2002, the new tax imposes a 10% tax on telecommunications services. It is expected that many telecommunications companies obtain *amparos* (similar to *habeas corpus* in other jurisdictions) and challenge the constitutionality of the tax. Meanwhile however, there are many players within the industry that are looking to benefit from the clear contradictions within the tax package itself, in order to seek exemption.

For more information see: <http://www.reforma.com.mx> and <http://www.cdhdcd.gob.mx> or contact [aam@bstl.com.mx](mailto:aam@bstl.com.mx)

## 12. TELECOMMUNICATIONS

### CHILE

#### CHANGES TO MOBILE TELEPHONE SERVICE NUMBERING STRUCTURE

As of 1<sup>st</sup> July 2002 a new numbering structure will be in force for the mobile telephone services currently operating in Chile (there are two different mobile telephony services currently operating in Chile, the cellular service, which operates in the 800 MHz band, and the PCS service, which operates in the 1900 MHz band).

On 31<sup>st</sup> December 2001, the Chilean Ministry of Transportation and Telecommunications ("MTT") issued Supreme Decree N° 559. Through this supreme decree, the MTT amended the Fundamental Numbering Plan in order to double the numbering block assigned to the mobile telephone services currently operating in our country.

From a practical point of view, the Supreme Decree states that, as of 1<sup>st</sup> July 2002, the current seven-digit numbering structure for mobile telephone services would be replaced by an eight-digit numbering structure. This would mean that any person wishing to call a Chilean mobile telephone subscriber would have to dial the digits 9 or 8 (depending on whether the corresponding target subscriber acquired his line prior to 1<sup>st</sup> July 2002 or not) before dialling the number of the subscriber with whom he wishes to communicate.

The above-mentioned regulatory amendment has become necessary because of the boom in mobile telephony in Chile in the last five years. Chile has almost exhausted the five million mobile telephone numbers that the current numbering structure allows. This amendment would allow the incorporation of another seven million numbers in the system, a change that would guarantee that the numbering requirements of the country's mobile telephone companies would be adequately covered for at least another five years.

For further information on this topic please contact: [asilva@carey.cl](mailto:asilva@carey.cl) or [emartin@carey.cl](mailto:emartin@carey.cl)

### EU

#### RESULTS OF THE TELECOM COUNCIL

The Telecom Council of Ministers met in Brussels on 6<sup>th</sup> December 2001.

The main results of the meeting are as follows:

#### Implementation of the Telecommunications Regulatory Package

The Commissioner presented the Commission's Seventh Report on the implementation of the Telecommunications Regulatory Package highlighting the regulatory bottlenecks that persist in the Member States.

#### Electronic Communications Package

The Electronic Communications Package includes:

- directive on a common Regulatory Framework for electronic communications networks and services;
- directive on access to, and interconnection of, electronic communications networks;
- directive on the authorisation of electronic communications networks and services;
- directive on universal service and users' rights relating to electronic communications networks and services; and
- decision on a Regulatory Framework Spectrum Policy.

### **Directive on the processing of personal data and the protection of privacy in the electronic communication sector (the "Directive")**

The Council agreed on the following:

- a harmonised "opt-in" solution for unsolicited commercial e-mail;
- the introduction of harmonised conditions for the use of cookies and similar devices, information about the cookies and possibility to refuse;
- modification of article 15 and recital of the Directive regarding measures that Member States may take to safeguard public security interests or that are necessary for criminal investigations.

### **Council Resolution on "a common approach and specific actions in the area of network and information security"**

The Council adopted a Resolution on "a common approach and specific actions in the area of network and information security". The Resolution provides a number of measures to secure networks and information systems.

### **Exploitation of Public Sector Information**

A short explanation was made by the Commission in its 23<sup>rd</sup> October Communication which provides relevant information to improve the use of public sector information by removing the barriers encountered by content companies.

### **Internet Security**

The Commission explained the progress achieved through the Safer Internet Action Plan against illegal and harmful content on the Internet. It is intended to propose a 2-year extension of Safer Internet Action Plan (2003-2004).

### **eGovernment**

Discussions were held on the contents and outcome of the eGovernment Conference that took place in Brussels on 29<sup>th</sup>-30<sup>th</sup> November 2001 and during which a Ministerial Declaration was adopted. The Declaration highlights the importance of social inclusion and therefore of telecommunications regulation that will enable all Europeans to access services. The Declaration also calls for more competition in the telecommunications sector and for the reinforcement of commitments to the security of networks and safe access to services.

For more information contact: [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

## **HONG KONG LICENSEES FINED FOR LICENCE BREACH**

Hong Kong's telecom regulator, the Office of the Telecommunications Authority ("OFTA"), recently handed out a HKD 150,000 fine to a mobile operator for use of incorrect frequencies.

OFTA has the power under Section 36C of the Telecommunications Ordinance to fine telecom licensees for breach of conditions of their licences.

On 21<sup>st</sup> November 2001, OFTA fined Mandarin Communications Limited (which operates the Sunday mobile phone brand) HKD 150,000 for using unauthorised frequencies in two base stations. The maximum fine that OFTA could have imposed was HKD 200,000. However, OFTA took into account certain mitigating factors including admission of the breach by Sunday, their co-operative behaviour as shown by timely cessation of operating the base stations and their adoption of corrective measures. This case serves as a reminder that OFTA does test for unauthorised use of frequencies and will take action to enforce licence conditions. It is also noteworthy that the licensee appears to have minimised its fine by co-operating in full with OFTA.

For more information contact: [dae@jsm.com.hk](mailto:dae@jsm.com.hk)

## **HONG KONG UNLICENSED MOBILE SERVICE**

Despite the lack of a licence China Telecom has launched a mobile service in Shenzhen, China. China Telecom, China's dominant fixed wire telecommunications carrier, has quietly started a mobile telephone service in Shenzhen without obtaining a licence to do so from the Ministry for Information Industry ("MII"), the industry regulator in China (and incidentally, the owner of both China Telecom and the leading mobile carrier, China Mobile). This is despite indications that the MII had planned to withhold a licence from China Telecom at this stage.

The new service has been in quiet operation for a few months and has already attracted some 70,000 subscribers in Shenzhen. Calls cost the same as fixed line calls (less than half the rates of the licensed mobile carriers, China Mobile and China Telecom) but the service is limited in that users cannot call outside Shenzhen. China Telecom has presumably managed to reach some sort of accommodation with officials (short of an actual licence) within the ministry to enable the service.

This highlights that apart from the licensing requirements there are other considerations which should be borne in mind when seeking to enter China's lucrative, booming telecoms market, not the least of which is sufficient local knowledge and presence. JSM will continue to monitor the situation closely regarding the outcome of China Telecom's application for a mobile licence, and its entry into the mobile telecoms market.

For more information contact: [dae@jsm.com.hk](mailto:dae@jsm.com.hk)

## **LUXEMBOURG 3G / DCS 1800 LICENCES: INVITATION TO BID**

The *Institut Luxembourgeois de Regulation* ("ILR") is currently establishing a invitation to bid for the 3G/DCS 1800 licences in the Grand-Duchy of Luxembourg.

The governmental decree fixing the minimum conditions for the establishment and operation of mobile telecommunication services networks has been published on 14<sup>th</sup> December 2001 (the "Decree"). It describes the objective of these services, the scope of the licences and the operators' obligation to preserve order and State security. The Decree also sets forth rules for networks access, interconnection and roaming. It lays down the expenses, including in case of suspension or withdrawal of the licence.

Finally, the Decree abrogates certain government decree concerning the specification for the establishment and operating of mobile telecommunication services network.

The Decree can be found at: <http://www.etat.lu/ILR/tele/legal/rqd-3g.htm>

For more information please contact: [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

## **NEW ZEALAND NEW TELECOM LEGISLATION**

In previous editions of the LINK, we commented on the New Zealand Government's Ministerial Inquiry into Telecommunications and on the Government's resulting policy package.

Completing the reform process, the Telecommunications Act 2001 (the "Act") came into force on 20<sup>th</sup> December 2001. The Act follows the same basic principles first suggested by the Ministerial Inquiry and prescribes regulatory intervention only when market participants fail to reach commercially-negotiated agreements.

The Act establishes the Telecommunications Commissioner within the existing Commerce Commission. The Telecommunications Commissioner is responsible for resolving industry disputes over regulated services.

There are two categories of regulation under the Act:

1. Designation – suppliers of designated services must provide them within prescribed commercial and pricing principles. The services designated immediately are:

- interconnection with Telecom New Zealand Limited's fixed telephone network (Telecom is the incumbent operator);
- number portability;
- wholesaling of Telecom's fixed network services (including residential lines); and
- fixed-to-mobile carrier pre-selection from Telecom's fixed network.

2. Specification – suppliers of specified services must provide them within prescribed commercial principles, but no pricing principles are set. The services specified immediately are:

- mobile roaming;
- mobile cell-site co-location; and
- co-location on Broadcast Communications Limited's sites (BCL is a subsidiary of the state-owned broadcaster Television New Zealand Limited, and provides transmission services to TVNZ and third parties).

The Act also:

- establishes a new regime for allocating between prescribed classes of telecommunications service providers those losses incurred by complying with government-mandated universal service obligations;
- establishes an Industry Forum for telecommunications industry participants. The Industry Forum will create industry codes applying to the designated and/or specified services. These codes specify requirements and procedures for the implementation of access principles.
- removes the regime requiring registration as on "overseas operator" of persons providing certain telecommunications services to or from New Zealand; and
- provides rights of access to property for the rollout and maintenance of networks and other related issues.

In conjunction with passing the new Act, the Government has also entered into a deed with Telecom putting in place updated "Kiwi Share" obligations. The Kiwi Share contains the universal service obligations and minimum service levels required of Telecom by the Government in order to meet certain social objectives. The most significant amendment is that Telecom is now required to supply basic data access to specified areas.

For the full text of the Act see:

<http://rangi.knowledge-basket.co.nz/gpacts/public/text/2001/an/103.html>

For the full text of the Kiwi Share Deed see:

<http://www.med.govt.nz/pbt/telecom/deed/index.html>

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## PORTUGAL TELECOM REGULATOR'S NEW LEGAL FRAMEWORK

Recent relevant changes in the structure and functioning of the Portuguese Telecommunications Regulator – known as *Instituto de Comunicações de Portugal* ("ICP") and now designated ICP - *Autoridade Nacional de Comunicações* ("ICP-ANACOM"), were introduced by Decree-Law nr. 309/2001, of 7<sup>th</sup> December 2001 (that came into force on 7<sup>th</sup> January 2002), which approved its articles of association.

This entity was created back in 1981 and was formally qualified as the national telecommunications regulatory authority in 1997, further to the enactment of Law 91/97 of 1<sup>st</sup> August (Telecoms Legal Framework, *Lei de Bases das Telecomunicações*) and as the national postal regulatory authority, further to the publication of Law 102/99 of 26<sup>th</sup> July.

As its legal capacity and scope of activity were regulated by scattered legislation the Decree-law 309/2001 was essentially aimed at gathering the provisions contained in such legislation in one sole document, strengthening ICP-ANACOM's supervision and regulatory powers, establishing a politically independent status for ICP-ANACOM and at setting out some new functioning rules.

On the other hand, the board of directors of ICP-ANACOM is now made up of a president and two or four members, appointed by the Council of Ministers for a non renewable period of five years, their role being subject to a specific regime of incompatibilities.

For further information please see:

<http://194.65.125.126/legisuk/lei.asp?item=282>

## UK

### OFTEL TO SETTLE INTERCONNECTION DISPUTE

On 17<sup>th</sup> December 2001, OfTel issued a draft direction relating to a dispute between a number of operators and BT over the latter's provision of Partial Private Circuits ("PPC"), or leased line local tails. A number of terms which formed part of the standard agreement offered by BT for interconnection of PPCs proved unacceptable to the operators, who then complained to OfTel.

The draft direction is the start of a process for resolution of the issues which include whether there should be a 12 month minimum term contract between BT and each operator together with forecasting requirements. More complex issues such as service levels and arrangements for migration of customers as part of the PPC offering will be dealt with by OfTel under a second phase 'as soon as reasonably practicable.'

Further information on partial private circuits in the UK can be found at:

<http://www.olswang.com/telecoms>

## UK

### OFTEL TO SETTLE BROADBAND ACCESS DISPUTE

On 21<sup>st</sup> December 2001 OfTel published a draft direction to resolve a dispute between BT, Energis and Thus concerning operators' access to BT's broadband DSL network.

Until the draft direction was announced, the only ways in which an operator could offer DSL services to customers would be either to buy BT's wholesale broadband products at BT's prices or to install its own DSL equipment in BT's local exchanges through local loop unbundling. The implementation of both methods of allowing operators access to the local loop have been the subject of a number of complaints to OfTel during 2000/2001.

OfTel acknowledged that allowing operators to use a combination of their own and BT's Asynchronous Transfer Mode ('ATM') DSL network would be a significant new method to provide high speed services to consumers over the local loop. Therefore, it has proposed that BT should provide to the operators interconnection to BT's network at BT's parent ATM switch and then to any other switch in BT's ATM network, effectively enabling the operator to pass its DSL traffic over BT's ATM network and through to its customer.

Further information on the local loop unbundling process in the UK can be found at <http://www.olswang.com/telecoms>

## 13. WEB SITES

### COLOMBIA JUDGEMENT ABOUT ORIGIN OF INTERNET SITES

The Colombian Constitutional Court, in its judgement C-1147 of 31<sup>st</sup> October 2001, determined that web pages containing the abbreviation using the initials .co are not the only ones of Colombian origin, but that sites of Colombian origin also exist as web pages opened by a Colombian national with a specified domain name terminating in .com, and as pages lodged in a server located in Colombia, or in Internet sites abroad, whose investment may involve Colombian capital in an exclusive manner or through some predominance criterion.

The preceding pronouncement was issued when defining compatibility with the Constitution with respect to a provision that orders Internet sites of Colombian origin to be recorded in the mercantile register and authorises tax authorities to request information concerning electronic transactions.

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## COMMENTARIES

### BRAZIL RULES FOR OPENING UP OF THE LOCAL AND LONG-DISTANCE TELEPHONY MARKETS

by Raphael de Cunto,  
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The master plan for reorganisation and redefinition of the telecommunications sector that was idealised by the late Minister Sérgio Motta and implemented over the last few years in Brazil is based on two fundamental principles: the universalisation of services and the competitiveness of the market for the offering of telecommunications services.

Denationalisation of the companies in the Telebrás system in 1998 entailed a gradual opening-up of the Fixed Telephony sector with regard to competition for fixed telephony ("Fixed Telephony"), that was supposed to culminate in the complete opening-up of the market as from 31<sup>st</sup> December 2001. If, on one hand, the announcement regarding anticipation of the fulfilment of the coverage commitments by a majority of the Fixed Telephony service incumbents demonstrated implementation of the principle of universally available telephony services, on the other hand there was some serious questioning as to the possibility of implementation of competition on the Fixed Telephony market, especially the local market, in light of the difficulties encountered by mirror companies in achieving a minimum subscriber base, as well as in attaining the goals set forth in their own business plans.

In addition to these very concrete concerns related specifically to the telecommunications sector, there are other time-sensitive economic problems of some importance and a consequent lack of financial resources on the market for investments in businesses in the information technology sector, not merely for Internet companies as earlier, but affecting in a daunting manner the entire telecommunications industry.

In light of this scenario, the Brazilian Telecommunications Agency ("Anatel") was unable to overlook certain market concerns in regard to the future of telecommunications in Brazil, nor could it afford to fail to review and adapt the model that was originally set out in the General Grant Plan, according to which as from 31<sup>st</sup> December 2001 there would be no further limits on the number of companies offering Fixed Telephony, provided that the market was fit for such liberalisation.

The General Grant Plan created great expectations for the sector and for Anatel as well, in light of the possibility of new players in the Fixed Telephony market in Brazil, as well as among the existing Fixed Telephony incumbents (Brazil Telecom, Telefónica, Telemar, and Embratel), which viewed this possibility as a way to expand their current coverage area, leading in many cases to expansion nation-wide.

In light of this, on 28<sup>th</sup> August 2001 Anatel offered its Public Consultation No. 308, dated 27<sup>th</sup> August 2001, for comments. This document proposed the Regulations for Issuance of Authorisation for Fixed Telephony Provision for the public at large ("Public Consultation No. 308").

Public Consultation No. 308 was received with great surprise by the players in the telecommunications market, and was the target of severe criticism in light of its (i) obligation to offer local telephony services as a

pre-requisite for the grant of long-distance authorisation; and (ii) minimum commitments of coverage that would be quite costly for new players, regardless of whether they were incumbents, licensees or providers of other telecommunications services in another service area.

The concern of Anatel when imposing conditions for those companies that were to enter the Fixed Telephony services market was to avoid 'cherry picking' that is having companies enter specific markets (such as the corporate market) or selected cities with the firm intent of taking part in markets known to be highly lucrative, while disregarding the markets that were not so lucrative (but no less important from an universal availability of telephony services prospective). Some of the most telling suggestions made on Public Consultation No. 308 included those we set out below:

- the price for acquisition of authorisations would be too high, if a criterion similar to that used for Personal Mobile Services was adopted. In light of the high cost of implementation of the network for new players, it was mentioned that the price of the authorisations should be merely *pro forma*, and not a means of fundraising by the federal government;
- the authorisations for commercial offering of Fixed Telephony services should be granted in an independent manner, meaning that local, national long distance and international long distance should be handled under completely independent authorisations;
- the lack of clarification as to the guidelines for interconnections and the offer of the infrastructure for local access created concern;
- the possibility of granting authorisations on the national level that are not restricted to certain geographic areas should be contemplated;
- the lack of minimum coverage commitments for new players would be an important motivation; and
- the need for adoption of regulatory measures on competition, as set out below.

Still in regard to the comments made to Public Consultation No. 308, various comments suggested that Anatel should adopt certain regulatory action, including: development and adoption of strict guidelines on interconnection, sharing of infrastructure, unbundling and portability of access code, as well as a review of the tariffs for use of the interconnection network, and development of a model for administrative conflict resolution that was efficient, among myriad other matters.

Three months after Public Consultation No. 308 was issued, Anatel disclosed the definitive version of the Regulations for Issuance of Authorisations for Fixed Telephony Provision (the "Market Opening Rules"), which we will now examine. The Market Opening Rules was published in the Official Gazette as Anatel Resolution No. 283.

#### WHO MAY REQUEST AUTHORISATION

Authorisation for provision of Fixed Telephony on a local, national long-distance and international long-distance basis will be granted to anyone interested, upon the payment of the respective license fee.

Authorisation for provision of Fixed Telephony on a national long-distance basis includes the rendering of services for calls originating in the service area of the authorised party that are directed towards anywhere in Brazilian territory (even if located in an area where the authorised party does not provide services).

In principle, Anatel will not limit the number of authorisations to be granted, but it may establish certain future restrictions in light of technical unfeasibility or should there be an excessive number of competitors which might negatively affect the provision of Fixed Telephony by the incumbents.

The price to be paid for such authorisation has not yet been defined by Anatel, and does not include the public price to be paid for the right of use of the radio frequency and for the assignment of the Provider Selection Code (e.g. 21 for Embratel and 15 for Telefónica).

### GEOGRAPHICAL AREAS FOR THE SERVICES

According to the Market Opening Rules, authorisations for provision of Fixed Telephony can be granted to cover the regions of the General Grant Plan, namely, the areas equivalent to those currently exploited by Brazil Telecom, Telefónica and Telemar, or by numbered areas defined in the General National Code Plan ("Numbered Areas").

There are in all 67 areas set out for the Brazilian territory, as exemplified by the numbered area 11, which includes the city of São Paulo, the cities in the area known as ABC (Santo André, São Bernardo, and São Caetano), Barueri, Itú, among others).

Until 31<sup>st</sup> December 2005, granting of authorisation for provision of Fixed Telephony on an international long-distance basis will be conditioned to the render of the services on both national long-distance and local levels. Likewise, the exploitation of national long-distance services requires that services also be provided on the local level. Should it so desire, a company may exclusively offer local Fixed Telephony.

The obligation for new players to take part in the local Fixed Telephony market constitutes yet another attempt by Anatel to make this market competitive and to avoid at all costs formation of a private monopoly, which would continue to be a threat in light of the timid business performance of the mirror companies.

According to surveys carried out by the Yankee Group and published in *Revista Teletime* in July 2001, "in the most desirable market in Brazil – the state of São Paulo – local competition does not account for more than 2 %, as Telefónica has 98 % of the subscribers. Telemar dominates 97 % of the local market in the 16 states where it is located, and the market share held by Brazil Telecom is 99 %".

### COVERAGE COMMITMENTS

The main argument of the critics to Anatel's proposal to establish minimum commitments for coverage suggested in Public Consultation No. 308 is that the local telephony market already requires hefty facilities investments, and in addition presents a series of obstacles to new players, in light of the lack of clarity in the regulations on quite controversial topics such as unbundling.

According to some companies, compliance with the minimum commitments suggested by Anatel in Public Consultation No. 308 was being construed as an obstacle to the entry of new competitors in the local telephony market, as it would entail a duplication of an infrastructure on the local network and inefficient use of the resources in fact available.

As seen in the table below, Anatel heeded well the comments raised by companies in the sector, and reformulated all minimum commitments that had been defined in Public Consultation No. 308.

General Grant Plan REGION	Commitments as per Public Consultation		Commitments according to Final Regulations	
	Capitals and Municipalities > 200 thousand		Capitals and Municipalities > 500 thousand	
	Number of Municipalities	Population Benefited (in millions)	Number of Municipalities	Population Benefited (in millions)
I	51	34.928	22	25.877
II	27	13.250	10	8.281
III	25	20.946	8	15.489
TOTAL	103	69.124	40	49.647

Source: Anatel

Should the licensee provide Fixed Telephony in the regions established in the General Grant Plan, the licensee will have to render services in its service area, in the capitals of states, the Federal District, and the municipalities with a population equal or superior to:

- 500.000 inhabitants, when authorisation is granted for just 1 service area;
- 700.000 inhabitants, when authorisations are granted for at least 2 service areas; and
- 1.000.000 inhabitants, when authorisations are granted for 3 or more service areas.

The offer of services in the municipalities should occur within the following time frames:

- 25 % of the total number of municipalities in no more than 12 months;
- 50 % of the total number of municipalities in no more than 24 months;
- 75 % of the total number of municipalities in no more than 36 months; and
- 100 % of the total number of municipalities in no more than 48 months.

Licensees for the Numbered Areas mentioned in the General National Code Plan will have to undertake to offer access in a quantity equivalent to 1 % (one percent) of the total population of the capitals of the state, Federal District, and the municipalities with a population equal or superior to 500.000 (five hundred thousand) inhabitants in their service area.

The access offer should occur as follows:

- 25 % of total accesses in no more than 12 months;
- 50 % of the total accesses in no more than 24 months;
- 75 % of total accesses in no more than months; and
- 100 % of total accesses in no more than 48 months.

In any service area that does not include the capital of the state, Federal District or municipality with a population equal or superior to 500.000 inhabitants, the licensee should offer accesses in a quantity equivalent to 1 % of the total population of the municipality with the greatest population, with due regard for the time frames set forth above.

The companies authorised to provide Fixed Telephony for both national and international long distance in the regions under the General Grant Plan are obligated to provide long distance services throughout their entire service area.

Moreover, the companies authorised to provide Fixed Telephony on the national and international long-distance levels in one of the 67 Numbered Areas set out in the General National Code Plan are obligated to provide such services at least in the areas where they provide local Fixed Telephony.

The striking diminution of the minimum commitments as to coverage of Fixed Telephony locally was one of the changes most welcome by the current incumbents, in light of their position that the minimum commitments set by Anatel would make it unfeasible for them to enter new regions under the General Grant Plan, given that all their funds had already been used to anticipate the coverage commitments schedule for the end of 2003.

Furthermore, Anatel also established in the Market Opening Rules that the providers of Fixed Telephony exclusively for local services will not have any coverage commitments.

#### Provision of Fixed Telephony by the Current Service Providers

The Fixed Telephony incumbents (Telefónica, Telemar, Brazil Telecom, and Embratel) as well as their controlling, controlled or affiliated companies can only request authorisation for provision of Fixed Telephony in the service areas equivalent to the regions under the General Grant Plan, provided that such request is for a distinct area than from the region where such incumbent is already providing services. These companies can also request an authorisation to provide Fixed Telephony in the area that complements its region (namely, in order to provide services in the sectors where the independent incumbents are currently offering services).

The Fixed Telephony licensees other than the incumbents, namely the mirror companies (such as Vésper, GVT and Intelig), may ask for authorisation to provide Fixed Telephony both in the service areas equivalent to the regions under the General Grant Plan or in those equivalent to the Numbered Areas defined by the PGCN.

Please note that both incumbents and mirror companies can request, upon the payment of the license fee the right to provide national and international long-distance Fixed Telephony services, which will make it feasible for them to make calls originating in their concession or authorisation areas that are directed towards anywhere in the Brazilian territory, even if outside their service area. In this case, they should enter into an addendum to their current concession contract or authorisation instrument, as the case may be, and the requirement as to compliance with the obligations regarding universal availability of the services by the incumbents must be observed in order to obtain new authorisations to provide telecommunications services, as set out in the General Grant Plan.

#### Selection code for the service provider

The companies providing national long-distance Fixed Telephony services that already had an exclusive Service Provider Selection Code should use this code when providing the Fixed Telephony under its new authorisations, as may have been issued by Anatel.

Anatel can, at its discretion, assign the same Service Provider Selection Code to various companies, provided that they belong to the same economic group, based on control or affiliation relationship, in order to optimize the use of the numbering system. When doing this, Anatel should also take into consideration the competitive environment for the services being provided.

Please note that the Service Provider Selection Code will only be assigned to a licensee for providing Fixed Telephony in the regions covered by the General Grant Plan. For the Fixed Telephony providers in the Numbered Areas defined in PGCN, a specific code will be assigned.

#### Unbundling

One of the severest criticisms addressed at Public Consultation No. 308 was in regard to the fact that it did not regulate the unbundling of the local loop, which entails the offer for sharing of each of the elements of the network of the local incumbents.

The long-distance Fixed Telephony providers, along with certain of the potential new players, maintain that access to the local incumbent network on an unbundled basis and setting of prices by the regulatory agency that target remuneration of the cost of the holder of local access are both fundamental for market equilibrium and diminishment of the enormous competitive edge between the local incumbent and new entrants, so as to make it feasible for new competition to actually enter the telecommunications market.

The regulations were well received as they represent the first concrete incursion of Anatel for regulation of unbundling, which has been one of the clarion calls of both the national and international long-distance Fixed Telephony providers, namely Embratel and Intelig.

The Market Opening Rules establish that the grant of authorisation for provision of Fixed Telephony, pursuant to the regulations, imposes on the incumbents (holder of the infrastructure for local access) and ensures the licensee the use of the local and long-distance networks of the incumbent, with due regard for the maximum amounts set for remuneration, which are those mentioned in Guideline No. 30 for Industrial Use of a Dedicated Line, approved by Ordinance of the Ministry of Communications No. 2506 of 20<sup>th</sup> December 1996, until replacement regulations have been issued.

The table below sets out the maximum amounts set out in Guideline No. 30 for industrial use of a dedicated line:

#### Value of EILD intra- and interarea tariffs

BITS RATE	Up to 50 km	>50 up to 100	>100 up to 200	>200 up to 300	>300 up to 500	>500 up to 700	>700 up to 1000	>1000
Up to 14.4 Kb/s	132	159	242	377	466	533	610	673
64 Kb/s	298	357	545	850	1.049	1.202	1.373	1.516
2.048 Kb/s	3.775	4.531	6.915	10.782	13.313	15.246	17.420	19.235

Source: Anatel

#### Value of Local EILD

<b>ANALOG SIGNALS</b>	R\$ 52.00
<b>DIGITAL SIGNALS</b>	
<b>BITS RATE</b>	<b>R\$</b>
UP TO 14.4	67.00
64 Kb/s	287.00
2.048 KB/s	3.636.00

Source: Anatel

Guideline No. 30/96, which establishes the criteria, procedures, and amounts for remuneration of industrial use of a dedicated line (meaning commercial offer of a dedicated line by the incumbent for provision of services to another provider of telecommunications services) already applies to local incumbents holding the much-envied local access, and there is no need for Anatel to mention these guidelines in other regulations.

Nevertheless, given that Guideline No. 30/96 was issued prior to entry of the various providers of specialised limited services on the telecommunications market, which then began to offer dedicated circuits at prices significantly inferior to those mentioned in Guideline No. 30/96. In face of such reality, the maximum amounts mentioned in Guideline No. 30/96 are excessively high, so that the provision so highly vaunted to "make unbundling feasible" will in all probability prove to be quite innocuous, and actual implementation of unbundling will await a more concrete stance to be taken by Anatel.

#### CONCLUSION

The definitive version of the regulations was substantially modified in relation to the version submitted for public comments. According to a statement from the President of Anatel to the press "the market has been subject to some import variations that affect the cost of capital for any company. This led us to be less strict and to make some changes".

International experience makes clear that implementation of competition for local and long-distance telephony services is still a huge challenge, and only viable when there are clearly detailed rules and regulations coupled with a consistently flexible interpretation on the part of the regulating agency, along with firm involvement of the regulator in the sector.

Now, the market has to wait and see whether the rules issued by Anatel, as well as the role that Anatel will play with regard to construction and application of these guidelines will suffice to make the Fixed Telephony market in Brazil attractive to new investors or whether we have been confronted with a new PCS Band C scenario.

## CANADA

### AN ACT TO ESTABLISH A LEGAL FRAMEWORK FOR INFORMATION TECHNOLOGY (QUEBEC)

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#### INTRODUCTION

Quebec's Act to establish a legal framework for information technology (the "Act") came into force on 1<sup>st</sup> November 2001, except for Section 104 of the Act (with respect to the designation of the Minister responsible for the application of the Act) which came into force on 17<sup>th</sup> October 2001.

#### PURPOSE AND SCOPE OF APPLICATION

The Act is very ambitious and is intended initially to ensure:

- the legal security of documentary communications between persons, associations, partnerships and the State, regardless of the medium used;
- the coherence of legal rules and their application to documentary communications using media based on information technology, whether electronic, magnetic, optical, wireless or other, or based on a combination of technologies;
- the functional equivalence and legal value of documents, regardless of the medium used, and the interchangeability of media and technologies;
- the linking of a person, an association, a partnership or the State with a technology-based document, by any means allowing them to be linked, such as a signature, or any means allowing them to be identified and, if need be, located, such as certification; and
- concerted action for the harmonisation of the technical systems, norms and standards involved in communications by means of technology-based documents and interoperability between different media and information technologies.<sup>1</sup>

The Act contains very few restrictions as to its scope of application. Indeed, the Act undertakes to redefine the notion of document in order to encompass any document containing information inscribed on a medium, where the information is delimited and structured, according to the medium used, by tangible or logical features and is intelligible in the form of words, sounds or images. Hence, for the purposes of the new Act, both a videotape and software might be considered to be documents. Databases could be deemed to be documents if they meet certain criteria.<sup>2</sup> This new definition of document has a significant impact on the entire body of legislation which, in many cases, will not be adapted for the integration such an expansive definition of document.

The Act introduces the additional concept of "technology-based documents", namely any document based on information technology, whether electronic, magnetic, optical, wireless or other, or based on a combination of technologies, and contains specific rules in respect thereof.

In Act also amends, this time directly, existing rules set out in the Civil Code of Québec regarding the law of evidence. Section VI with respect to media for writings (Articles 2837 to 2839) as well as Section VII with respect to the reproduction of documents (Articles 2840 to 2842) of the Title dealing with evidence are replaced in order to better reflect the purposes of the Act. Articles 2855 and 2874 of the Civil Code of Québec as well as other provisions of various statutes (including An Act respecting access to documents held by public bodies and the protection of personal

<sup>1</sup> Section 1 of the Act.

<sup>2</sup> Section 3 of the Act provides that "a database whose structuring elements allow the creation of documents by delimiting and structuring the information contained in the database is considered to be a document".

information, the Archives Act and the Code of Civil Procedure) are also amended in order to include explicit references to the principles laid down in the Act.

#### INTERCHANGEABILITY OF MEDIA AND FUNCTIONAL EQUIVALENCE

The Act is intended, among others, to ensure the legal security of documentary communications, regardless of the medium used, the functional equivalence and legal value of such documents, as well as the interchangeability of media and technologies.

Indeed, the Act provides that, except where a document is required by law to be in a specific medium or technology, any medium or technology may be used.<sup>3</sup> This decision made as to the use of a medium or technology will, in addition, be required to comply with any other requirement provided for by another applicable statute, including those set out in the Civil Code of Québec. Hence, media used to inscribe documentary information are interchangeable and the requirement that a document be in writing does not entail the use of a specific medium or technology.

Where the Act requires the use of a document, this requirement may be satisfied by a technology-based document if its integrity is guaranteed. The integrity of a document is ensured if it is possible to verify that the information it contains has not been altered and has been maintained in its entirety. The integrity of a document must be maintained throughout its life cycle. The medium used must furthermore provide stability and the required perennity to the information.

As a result, 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. A document whose integrity is ensured in the manner described in the preceding paragraph has the same legal value whether it is a paper document or a document in any other medium insofar as, in the case of a technology-based document, it otherwise complies with other legal requirements.

It is important to note that, since the Act is in force, there are currently two legislative sources governing the admissibility and legal validity of electronic documents, namely those to which we referred above and the provisions of the Civil Code of Québec. The Act does not specify which set of legal rules takes precedence.

#### TRANSFER, RETENTION, AND TRANSMISSION OF INFORMATION

##### Transfer

As in the case of the previous provisions of the Civil Code of Québec with respect to the reproduction of documents, the Act provides that the information contained in a document that must be retained for evidentiary purposes may be transferred to another medium based on a different technology, provided that such transfer is documented in the manner prescribed by the Act. All prescribed documentation must therefore be attached to the transferred document, failing which it will not be received into evidence.

No rules of evidence may be set up against the admissibility of a document resulting from a transfer effected in compliance with the provisions of the Act following the destruction of the source document reproduced. One significant change, as opposed to the provisions previously in effect, is noteworthy: the ability to reproduce a document is no longer reserved to bodies corporate and to the State but rather applies to any person.

##### Retention

Every person must, during the period a document is required to be retained, ensure that its integrity is maintained and see to it that equipment is available to make the document accessible and intelligible and usable for

<sup>3</sup> Section 2 of the Act.

the purposes for which it is intended. Such documents may be destroyed if they have been transferred, subject to compliance with certain duties by the person responsible for destroying them.

#### **Transmission**

A document may be transmitted, sent or forwarded by any means appropriate to the medium, unless the exclusive use of a specific means of transmission is required by law. A person may not be required to acquire a specific medium or technology to transmit or receive a document, unless such requirement is expressly provided by law or by an agreement. Similarly, no person may be required to receive a document in a medium other than paper, or by means of technology that is not at the person's disposal.

### **LIABILITY**

The Act provides for different degrees of liability for service providers, depending on the type of services they offer (communication network services, hosting or retention services, reference services, transmission services, non-Web hosting services). The guiding principle underlying the various degrees of liability is that the service providers are not liable for acts performed by service users. Liability may nonetheless be "incurred" if the service providers do not comply with the duties under the Act. The Act does not specify, in any of the cases provided, whether the liability in question is purely civil or also criminal in nature.

For instance, if a service provider, acting as an intermediary in offering *reference services* to technology-based documents, has knowledge that the services which he provides are used in the performance of an illegal activity and if he does not promptly cease providing his services to persons which he knows are involved in such activity, he could be held liable. The service provider acting as a intermediary to provide "communication network services exclusively for the transmission of technology-based documents on such network" may be held liable for the acts performed by third parties by way of documents transmitted by him if he is involved in the third-party action by being the source of the transmission of the document, by selecting or modifying the information therein, by selecting the person transmitting the document, receiving the document or having access thereto or by retaining the document longer than is necessary for its transmission.

The Act also provides for special liability in the case of providers of certification services as well as subscribers to such services.

### **LINKING**

Chapter III of the Act focuses on linking a person and a technology-based document, which may be established by any process that allows the identity of the person making the communication to be confirmed as well as that person's link with the document, and that permits the document to be identified. One of these processes is the signature.

The intent of these provisions is to clarify the debate surrounding the interpretation of Article 2827 of the Civil Code of Québec, namely whether the definition of signature used in the latter could encompass certain "electronic signature" mechanisms. From now on, all signature mechanisms complying with the criteria set out in the Act may be used to establish a link between a person and a technology-based document. Incidentally, Article 2827 of the Civil Code of Québec is amended to provide that a distinctive mark may be affixed "to a writing" and no longer merely "on a writing" in order to reflect the practical aspect of the use of new mechanisms relating to technology-based documents.

This Chapter also provides for modes of identification and location of persons, associations, partnerships or the State as well as of documents and other objects.

### **CERTIFICATION**

Even though the legislator has removed from the Act any reference to asymmetric cryptography (which appeared in an early draft bill) in order to

achieve its goal of technological neutrality, the Act nevertheless contains a certain number of provisions with respect to the certification of identity and of attributes which, traditionally, fall within the purview of such technology. Indeed, the Chapter on certification contains details as to the functions of the certificate and the directory, but mostly a certain number of requirements as to the content of the certification practice statements and directory services and as to the contents of the directories themselves. The Act also contains provisions for the accreditation of such service providers according to standards established by the government.

### **HARMONISATION AND REGULATORY POWERS**

Among the objectives of the Act is the taking of concerted actions to promote harmonisation of technical systems, norms and standards enabling communication by way of technology-based documents and the interoperability of media and information technology. To this end, the Act provides for the establishment of a multidisciplinary committee chaired by a representative of the *Bureau de la normalisation du Québec*. The mission of the committee is to examine a certain number of problems and to make recommendations as to the application of the Act. The Act further provides that the committee shall develop guidelines and practices reflecting the consensus reached. These guidelines, which are to be published by the *Bureau de la normalisation du Québec*, shall determine the common technical standards selected, such as formats and mark-up language, signature algorithms, encryption methods or communications links. The *Bureau* is required to report annually to the Minister on the proceedings of the committee and on the voluntary implementation of the guidelines. If the guidelines are not implemented voluntarily, in whole or in part, the government may substitute compulsory regulatory provisions for the guidelines.

### **CONSUMER PROTECTION**

The provisions of the *Consumer Protection Act*, which require a writing, have always been perceived, despite the protection which they afford, as a significant obstacle to retail e-business. Yet, the Act has chosen to exclude the *Consumer Protection Act* from its scope of application. The provisions of the Act even reinforce the notion of paper by amending the wording of Section 25 of the *Consumer Protection Act* so that the provision reads as follows: "The contract must be drawn up clearly and legibly, and at least in duplicate and in paper form." Consequently, it is now clear that all contracts to which Section 25 of the *Consumer Protection Act* applies must be in paper form.

However, some progress has been made with respect to credit charges: for the purposes of receipt by a consumer of his statement of account in respect of credit charges due by him, where the consumer has so requested expressly in writing, his address includes the address where the consumer accepts the receipt of technology-based document within the meaning of the Act. Before the Act, so long as the consumer has not received a statement of account at his address, the merchant could not require the payment of credit charges on the unpaid balance, except in respect of cash advances.

### **ENTERING INTO CONTRACTS**

In spite of the fact that it would have been desirable for the Act to have addressed various issues relating to the entering into of electronic contracts, no provision thereof deals specifically with questions as to jurisdiction and the making and acceptance of contracts. Therefore, the existing rules of the Civil Code of Québec continue to apply to Internet contracts or contracts entered into by other electronic means in the absence of guidelines in this respect.

### **CONCLUSION**

The aims of the Act, in their scope, are such that the Act is likely to have an impact and to raise questions which are unforeseeable at this time. Firstly, for all those entities which use electronic means, even if such use does not

represent its core activities, verifying compliance of such activities with the requirements of the Act will be a short-term necessity. Thereafter, it will be necessary to proceed with the implementation of remedial action in order to comply with the provisions of the Act.

The Act is not an answer to all the issues raised by the ever-increasing use of information technology, however its coming into force represents an acknowledgement by, and formal support on behalf of, the Government of Québec that it intends to promote e-business and the use of information technology generally. An in-depth understanding of the Act is therefore requisite in order to take full advantage of the potential which it offers.

## **FINLAND NEW RADIO ACT**

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Finland's newly enacted Radio Act entered into force with effect from 1<sup>st</sup> January 2002. The new Act replaces previous legislation of the same name dating from 1988, when Finland embarked on the liberalisation of its telecommunications laws. The new Act is designed to promote the efficient and sufficient interference-free use of spectrum, secure the non-discriminatory availability of spectrum, establish the prerequisites for the free movement of radio equipment, and promote telecommunications market efficiencies in public telecommunications. The new Act covers radio equipment and its marketing, commercialisation, possession, and usage as well as spectrum use planning and allocation. While the new Act differs very little in principle from the former legislation, appreciable differences do nonetheless exist.

Pursuant to the new Act, the Finnish Communications Authority ("Ficora") allocates spectrum, bearing in mind the relevant international regulations and recommendations. Finland's Council of State confirms the spectrum plan for TV and radio broadcasting activities and for licensed telecommunications activities such as public mobile network infrastructure provision. The allocation of spectrum for other uses is determined by Ficora.

Under the Act, the possession and use of An operable radio transmitter is subject to a radio permit. This implies that the use and possession of receive only equipment is not subject to permit requirements in Finland. Additionally, the possession and use of radio transmission equipment is not subject to the permit requirements, if such equipment operates only on common frequencies set aside by Ficora. As under the previous legislation Ficora is empowered to set the terms and conditions for the use of radio equipment that are necessary to ensure the efficient use of spectrum and to prevent and remove radio interference. Under the new legislation, it will be possible to reserve spectrum if the design and implementation of a radio system so requires or if the procurement of a radio transmitter presupposes advance information as to spectrum availability.

Radio permits are granted for a maximum of ten years. It is expected that in accordance with present practice the actual duration of a radio permit will be approximately five to six years. Radio permits granted for TV and radio broadcast transmitters and mobile network base stations are to be granted for 20 years at a time. Spectrum reservations will be granted for one year at a time. Permits and reservations are to be granted provided that the use of the spectrum is in accordance with Ficora's allocation plan, sufficient spectrum is available, and Ficora has no grounds to suspect that the applicant will breach the applicable laws and regulations. Permit reservations for TV and radio broadcasting or public mobile network infrastructure provision will require that the necessary operating permits have been obtained. In the event that a radio permit or a spectrum reservation can be granted to only some of the applicants due to spectrum scarcity, Ficora must grant the spectrum to those applicants whose

operations best promote the purpose of the new Radio Act. This provision differs from recent practice regarding, for instance, wireless local loop spectrum where spectrum was granted on a first-come first-serve basis. Under the new Act radio permits may be assigned among companies belonging to the same group. However, the assignment of radio permits outside a group of companies will continue to require the consent of Ficora unless the terms and conditions of the radio permit specify otherwise. In the event of the bankruptcy of the permit holder, the permit will transfer to the bankruptcy estate provided the bankruptcy estate continues the business of the permit holder.

Under the new Act, Ficora may, upon application, issue decisions on measures designed to protect fixed radio receivers from interference, if such decision does not cause unreasonable financial or other damages to other spectrum users. Such decisions may remain in force for a maximum of ten years at a time and Ficora may include terms as to the use, location, and construction of the site to be protected.

The new Radio Act provides that only a radio equipment which fulfils the requirements of the law and the essential requirements and which has the necessary markings, purpose of use notification, and compliance certification may be brought into Finland for the purpose of sale or further transfer. The essential requirements and compliance certification requirements set forth in the new Act mirror the requirements of the applicable EU directives.

Similarly to Finland's 1999 Telecommunications Privacy and Data Security Act, the new Radio Act stipulates that a radio communication is deemed to be confidential unless it is intended to be received by the public. As the wording of the new Act is similar to the 1999 Telecommunications Privacy and Data Security Act it follows that when determining whether a radio communication has been intended for public reception the intention of the sender is determinative. The new Act also provides that anybody receiving or otherwise obtaining information about a confidential radio transmission that was not intended for them may not unlawfully disclose or exploit such information with respect to the contents or the existence of such transmission.

## **MEXICO FOREIGN INVESTMENT IN THE TELECOMMUNICATIONS INDUSTRY: PERSPECTIVE UNDER THE WTO AND MEXICAN LAW<sup>4</sup> (PART II)**

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### **CURRENT FOREIGN INVESTMENT RESTRICTIONS IN MEXICAN LAW**

The FIL has defined "foreign investment" as:

- the participation of foreign investors,<sup>5</sup> in any proportion, in the capital stock of Mexican companies;
- the investment made by Mexican entities whose capital stock is owned in its majority by foreign investors;

<sup>4</sup> IBA Conference, CM and Z Committees joint session World Trade Organisation (WTO) and Telecommunications in the Americas; Mexico and Spain, the regulatory challenges in Telecommunications under WTO obligations and disciplines, Cancun, Mexico, 31st October 2001.

<sup>5</sup> "Foreign investor" has, in turn, been defined by the FIL as: a non-Mexican individual or entity.

- the participation of foreign investors in the activities and acts referred to under the FIL. (Article 2, II FIL).

Consistent with Mexico's list of commitments under the WTO, the FTL imposes a 49% foreign investment limitation on all Mexican entities holding a license to install, operate and exploit:

- "public" telecommunications networks (i.e. networks used to "commercialise" telecommunications services to the public);
- the radio-electric spectrum;
- Mexican orbital slots and its associated frequencies; and
- frequency bands associated with foreign satellites.

In our opinion the reasoning behind the foreign investment limitation shows traces of the protectionist policies established by the Mexican government some decades ago. We should not forget, after all, that the debate over sovereignty prior to and after the expropriation of the oil industry and the creation of *Petróleos Mexicanos* ("Pemex") was to do with the Government's triumph in preventing foreign investors (and for that matter, Mexican investors) from participating in such lucrative activity. Although not specifically addressed as such under the statement of purposes (*exposición de motivos*) of the FTL, it is clear from certain paragraphs that the Government identified the opening of the telecommunications market as a mission by the Mexican government to "strengthen Mexico's sovereignty and national security".<sup>6</sup>

Under the FTL, the 49% investment limitation may only be exceeded, by way of exception, in the case of cellular telephony, provided that the corresponding authorisation from the Mexican National Commission on Foreign Investment is secured. The legal reasoning behind such an exception can only be justified under the WTO's list of commitments.

The FTL also governs the provision of value added services and re-sellers. In those cases, no foreign investment limitations exist.

Even though the value added service market could be an important source of foreign investment in Mexico, the interpretation given to the term by the Federal Telecommunications Commission (COFETEL) has substantially limited the market's potential. Services like VOIP (without owning or possessing telecommunications infrastructure), otherwise considered to be value added services in other countries, are, under Mexican law, deemed to be basic telecommunications services for which a concession title is required and, hence, foreign investment limitations apply.

As to the re-seller market, six years after the enactment of the law regulations have still not been issued to open the market (except for re-sellers of public telephony). The apparent reasoning behind such reluctance to open the market has been the Mexican government's urgent need to promote the laying out of telecommunications infrastructure. We wonder whether it would not be better to open the re-seller market, promote competition between concessionaires and re-sellers, thereby benefiting the general public and creating a need for consumer access to the service in areas where no infrastructure has yet been laid.

We have thus far discussed the main provisions governing foreign investment restrictions in the telecom sector. We have said that in certain areas there is a 49% foreign investment restriction. The "49%" criteria has not been set by chance. Rather, it is based on another principle of the FIL: "control" under Mexican hands.

Neither FIL nor the FTL define how "control" should be interpreted. Nonetheless, generally speaking, it is a commercial practice to consider that control of a company can be held at two levels:

- control of the majority of the voting shares in the company; and
- control over the administration of the Company.

<sup>6</sup> Statement of Purposes (*exposición de motivos*) of the Federal Telecommunications Law.

### Shareholding control

According to the FTL "*foreign investment cannot exceed 49%*". The interpretation for the telecom sector clearly is that the 49% refers to the capital stock of a company holding a concession title.

It is evident that the levels of investment required to install, operate and exploit public telecommunications networks (in the broadest sense of term) must be obtained, in the majority of cases, from foreign rather than Mexican investors.

Mindful of this reality, the FIL recognises two mechanisms that will allow foreign investors to increase their "net" participation in the capital stock of the concessionaire, without affecting the 49-51% restriction established under law: (a) "neutral investment", and (b) pyramiding.

Neutral investment can be made in two ways:

- direct investment in "neutral" shares: neutral shares are not considered as foreign investment for foreign investment purposes as such shares have limited voting rights (i.e., among others, right to vote on fundamental aspects of the company such as increase or decrease in the company's capital stock, transformation of the company, spin-offs, mergers and change of nationality) but full economic rights. For a company to issue Series "N" shares, an authorisation from the Mexican Commission on Foreign Investment must be secured in advance. In our experience, the Commission usually allows Series "N" shares to represent up to 80 % of the "net" capital stock of a concessionaire company (although a higher percentage has been authorised in some cases). The practical effect is that, if required, the investment made by the Mexican investor *vis a vis* the investment of the foreign investor, can be substantially lower, while preserving Mexican control of the company.
- investment through a neutral trust: the Commission can further authorise the establishment of a trust that will issue neutral certificates or instruments that will grant its beneficiaries limited voting rights in the concessionaires while enjoying the company's full economic rights.

According to article 7 FIL, the 49% limitation applicable to the telecom sector cannot be exceeded directly, or through trusts, agreements, pyramiding schemes or any other mechanism granting control to the foreign investor or a higher percentage participation in the capital stock of the company, except in the case of the neutral investment mechanisms discussed above. This rather straightforward limitation was indirectly modified in 1996 as a result of an amendment to article 4 FIL.

Article 4 provides that for the purpose of determining the foreign investment percentage in those activities subject to maximum limits on foreign participation, any indirect foreign investment participation made through Mexican entities where the majority of its capital stock is held by Mexicans, shall not be considered. This amendment to FIL effectively allowed foreign investors to participate in restricted activities through pyramiding schemes. Hence, foreign investors can indirectly participate in telecommunications concessionaires one level above the concessionaire, by holding a minority participation in the capital stock of the Mexican investor's vehicle for participating in the capital stock of the concessionaire. There is no limitation on the number of levels above the concessionaire in which foreign investors can participate. Again, the end result is the dilution of the "net" participation of the Mexican investor in the capital stock of the concessionaire while preserving Mexican control of the company.

Certainly, supermajority vote provisions (or negative control) can be incorporated into the by-laws of the Company to protect the interests of foreign investors. How far such supermajority vote provisions can actually go is a rather grey area and is subject to the discretionary power of the authority.

### Administrative control

The practical "control" approach at the administrative level of the concessionaire is that the Board of Directors of corporations holding

telecom concession titles needs to be comprised in its majority by members appointed by the Mexican shareholder so that control can be effectively be deemed to lie in the hands of the Mexican investor.

Even if the member of the Board appointed by the Mexican investor is considered to be an independent (external) Board Member, there is an assumption that control still lies in the hands of the shareholder that appoints them. However, since there is no legal definition of "control", taken to the extreme, there is no limitation whatsoever on the Mexican investor appointing non-Mexican board members.

At Board level it is also possible to include veto rights or supermajority provisions to protect the interests of the foreign investor (i.e. any transfer of assets beyond an amount "x", shall always require the vote of at least 1 board member appointed by the foreign investor).

### REQUIRED CHANGES

Having analysed the approach that the Mexican government has adopted towards foreign investment, particularly with respect to the telecommunications area, we believe it is now time for the Mexican government to get rid of the foreign investment entry barrier and allow 100% foreign investment in the telecommunications area.

Mexico has gradually opened its borders and its markets. For many years it fostered Telmex's monopoly, but when Mexico finally decided to join the globalisation process, it gave Telmex six years to prepare for the transition. Six years have now lapsed since the enactment of the FTL. For some time now the industry has been insisting on the market being fully opened to foreign investment. Now that the Executive Branch and Congress are working together on a new Federal Telecommunications Law, we believe this is the perfect opportunity to finish the process of opening the markets.

For those worried about Mexico's sovereignty, we can only say that clear rules regarding network operations such as interconnection rules and dominant carrier regulations, should suffice for the Mexican government to maintain the necessary control within the industry. Additionally, clear rules will give foreign investors legal certainty and they will be able to invest in the Mexican market knowing that the Mexican government has set rules to level the playing field.

The main guidelines against interconnection abuses and monopolistic practices have already been set forth under WTO's Telecomm Reference Document (dated 24<sup>th</sup> April 1996) and to some degree have been also outlined under the FTL.

The challenges by Telmex to the Dominant Carrier Regulations published by COFETEL back in September 2000, need, in turn, to be challenged by the Mexican government through the establishment of clear rules under the FTL on the processes to which the dominant carrier will be subject.

The new law will finally have to determine whether it will seek to regulate the holders of the transmission means as it currently does under the FTL or whether it will opt instead to regulate those entities which, irrespective of whether they own telecoms infrastructure, actually provide the services.

Additional changes to promote the entry of foreign investment into the market are:

- transparency in proceedings involving COFETEL and SCT; and
- limitations on the discretionary power of the authorities when it comes to the interpretation of the FTL and the granting licenses and permits.

By way of example, proceedings that should normally take 120 days which is already a long period in itself, can take 60 or 90 days longer, even when all the proper documentation has been filed on time. It can take as long as 6 months for the forms of contracts necessary for carriers to be able to commence or modify its operations to be approved when, in our opinion, COFETEL should not have to give its approval. According to the law, the provision of value added services merely requires registration with COFETEL. What should be a fairly simple process has, in many cases, turned out to be cumbersome, discretionary (as to what should be

considered a value added service) and slow. Finally, the re-seller market needs to be opened.

Naturally, these problems will not automatically be resolved through the amendment of the FTL. There also needs to be a clear definition by both SCT and COFETEL on what their regulatory role will be. Will COFETEL finally become an autonomous agency with rule-making powers or will its decisions, in many cases, still be subject to the scrutiny and analysis of the SCT?

In our opinion, the most important challenges that the Mexican government faces today in promoting foreign investment in Mexico's telecoms sector are to get rid of the "sovereignty taboo" and allow 100% foreign investment into the telecom sector, to set clear rules for dominant carriers and interconnection whilst resolving the role that COFETEL and the SCT will play in the regulation of the industry.

## SPAIN NEW ELECTRONIC SIGNATURE ACT DRAFT

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### INTRODUCTION:

The Spanish Ministry of Science and Technology has published on its official web site the first draft of the new Electronic Signature Act (hereinafter, referred to as "the Draft"), which will substitute current regulation included in Royal Decree 14/1999.

Nevertheless, and before being submitted to the Spanish Parliament, the Draft will be available for public consultation during January 2002.

Any comments referred to the Draft must be sent to the following e-mail address [anteproyecto.firma@setsi.mcyt.es](mailto:anteproyecto.firma@setsi.mcyt.es).

### Pre-existing situation

Legislation on electronic signature in Spain was formed by Royal Decree-Law 14/1999 of the 17<sup>th</sup> September approved early on, even before the EC Directive 1999/93 of the 13<sup>th</sup> December.

The Draft reinforces the legal framework for the electronic utilisation of firms and the legal regime of the services of certification, extending the regulation to distinct aspects of the relations based on the use of certificates and electronic firms that the Real Decree-Law 14/1999 did not outline, due to the urgency of its approval before the referred EC Directive.

To this respect, the Draft precisely determine the minimum requirements to carry out activities related to certification of electronic signature and also the due diligence and responsibility for the providers of certificates.

### Main aspects

The main aspects of the Draft, are the following:

- the consideration of the electronic signature equivalent to the regular signature under certain conditions indicated in the Draft for private transactions but also for relations with the public administration;
- to give an electronic signature the same legal consequences as a regular signature according to the already existing civil and litigation Spanish Laws in force;
- to create a personal electronic signature not only for the individuals but also for companies;
- to create a new electronic Spanish National Identity Card for electronic identification of Spanish citizens; and
- to regulate the certification services to be provided by private and public entities (incorporated in Spain or having permanent presence in Spain) and their responsibilities and compulsory insurance.

### **Electronic signature vs. advanced electronic signature**

The Draft maintains the distinction created under Royal Decree 14/1999 between the "electronic signature" and the "advanced electronic signature", the difference being that the second allows the identification of the individual or company who signs, and has been created under systems that the signatory can maintain under his or its exclusive control and exclusively related to him, allowing any modification of the elements and data incorporated into the signature to be detected.

### **Certificate v/ recognised certificate**

There is also an important distinction between the terms "certificate" and "recognised certificate" which basically refers to the number of elements that are included in order to make identification of the signatory and his identity more accurate and give them greater precision.

For that purpose, the recognised certificate must include the following information:

- reference that it is issued as a recognised certificate;
- the unique identity code of the certificate;
- the identification of the certificate services provider and its business address;
- the advanced electronic signature of the certificate services provider;
- the identification of the signatory by his name and surnames or by pseudonym or company's name or other personal identification elements;
- the data, codes or cryptographic clues under the control of the signatory;
- the period of validity of the certificate;
- the general limits on issuing the electronic signature if applicable; and
- the amount limits on issuing the electronic signature if applicable.

### **Providers of electronic certificates**

The providers of recognised certificates are obliged to assume extra obligations fundamentally referred to its human and technical organisation.

Any provider of certificates is liable for all damages caused to any individual or company due to the breach of its obligations under the Draft, it being they, and not the individual or the company, who are obliged to prove that they have acted under the provisions of the Draft with the necessary due diligence.

The Draft also includes a list in order to limit the liability of the providers under extraordinary circumstances or under a previous breach of other provisions of the Draft by the signatory or any third party.

The providers of recognised certificates also have to subscribe a guarantee of no less than EUR 6.000.000 in order to cover possible liabilities arising by breach of the provisions included in the Draft.

The certification services to be provided by the providers are not subject to any special condition but special mention is made by the Draft to a future voluntary certification and accreditation system to be developed by the Ministry of Science and Technology, which will also include the conditions to be fulfilled by the entities that will certify the validity of the providers to carry out their activity.

The Draft also includes some provisions referred to the software used to create and verify the data incorporated into an electronic signature, which shall fulfil the resolutions issued by the EU or Spanish authorities in the near future.

### **Administrative control**

Control over providers and services is reserved for the Ministry of Science and Technology together with the Spanish Data Protection Agency with reference to the protection data matters.

Nevertheless, the Ministry of Justice will be in charge of the Register to record the identity of all service certification providers to be created in further developments of the Draft after its approval by Parliament.

Infringements and penalties

Finally, the Draft includes a provision referring to infringements and penalties for breach of the provisions under the Draft, together with the possibility of adopting interim measures by the administration under certain extraordinary circumstances.

### **UNBUNDLING OF THE LOCAL LOOP**

Recent information, referring to the unbundling of the local loop, state that the European Commission will not, after all, start the infringement procedure against Spain for non compliance of the EU regulation by the Government, due to the explanations given by the Spanish Ministry of Science and Technology to Commissioners Messrs. Monti and Liikanen in order to give information about the facts that caused only 10 lines to open last year 2001 in Spain.

However, and according to this recent information, the Commission may start the infringement procedure against some other Members and specifically against Germany, Greece and Portugal by sending the appropriate request letter.

The explanation by the Spanish Ministry of Science and Technology, referred to the impossibility of reaching the necessary infrastructure-sharing agreements between the incumbent (Telefónica) and all the other telecommunications operators as the reason for the situation caused, rather than an incorrect application of the EU rules.

### **LEVY FOR RESERVATION OF RADIO-ELECTRIC SPECTRUM**

Following the provisions added by way of amendments to the Spanish General Budget Law approved for the year 2002, during the period between 2002 and 2006 the levy for reservation of radio-electric spectrum will be maintained at EUR 240.400.000, increased by 5 % each year for the cellular operators and Local Multipoint Distribution System ("LMDS") operators and by 2 % for the remaining activities that will use the radio-electric spectrum, in both cases subject to any further adjustments due to the evolution of the telecommunications market.

The levy for the period 2002-2006, both inclusive, is reduced by 75 % of the amount fixed for the year 2001 which was not accepted by the operators. This was the subject of a claim submitted to the Spanish National Court against the provision by the majority of the operators involved.

Only the operators Telefónica Móviles and Vodafone have decide to pay their respective part of the total levy for year 2001, amounting to PTS 38.818.000.000 and PTS 37.996.000.000 respectively, but maintaining the claims submitted to the Spanish National Court.

### **NEW REGULATION FOR UNIVERSAL SERVICE**

The Ministry of Science and Technology approved a new Order dated 21<sup>st</sup> December 2001, to develop the regulation of certain aspects regarding universal services as announced in Title III of the Spanish Telecommunications General Act and of Royal Decree 1736/1998, 31<sup>st</sup> July.

### **Development of Universal Services**

According to the new Order, the developed aspects of Universal Services are referred to the following:

- the plan to implement the universal services;
- the quality conditions in its implementation;
- the maximum terms for the initial connection to the net and the guarantees for the continuity of the fixed telephony service available to the public;
- the criteria for the setting up, modification and updating of the data included in the telephone directories;
- the criteria for determining the number of payment telephone stations in the public domain;

- the criteria for facilitating access to fixed telephones for disabled individuals and people with special social needs; and
- the selection of the instruments achieve affordable prices for the universal service.

#### **Excluded matters and further developments**

All the above listed points are developed in the Order, except the reference to the data to be included in telephone directories, which will be the object of a specific further Order.

There is also an additional provision in the Order, referring to the possible future addition of connection to the public fixed telephone network for the transmission of data at a sufficient speed to allow functional access to Internet, if it is finally considered as a new universal service developed by the appropriate EU Directive in the near future.

#### **Quality standards**

Finally, the Order also modifies the provisions of Annex I of the Order of the Ministry of Science and Technology dated 14<sup>th</sup> October 1999, referring to standards of quality of the fixed telephony service available to the public.

### **ACT 24/2002, DATED 31<sup>ST</sup> DECEMBER 2001, REGARDING TAX, ADMINISTRATIVE AND SOCIAL MEASURES**

This Act is approved as a complement to the Spanish General Budget Law for the year 2002, in order to develop some additional provisions.

There are specific modifications of some already existing legislation, referring to:

- the modification of the General Telecommunications Act 11/1998 for the determination of the Levy for the reservation of radio-electric spectrum, as previously pointed out in our comments; certain provisions referred to the personal data to be included in telephone guides as also previously commented; and some provisions refer to the confidentiality of information provided to public administrative bodies by individuals and companies;
- the modification of the Legal Regime of the Public Administration and the Public Administrative Procedure Act 30/1992 in order to accept the reception and sending of electronic communications for certain administrative procedures;
- the modification of Royal-Decree Law 7/2000 of Urgent Measures in the Telecommunications Sector, according to which, the traffic conducted to the specific numeration range for the access to Internet determined by the Science and Technology Ministry, will be given by the dominant operators of fixed telephony service, separately from vocal telephony traffic, and in the same points of interconnection of existing voice connection. For that purpose, the operators will negotiate the corresponding agreements, and Telecommunications Market Commission will resolve the cases where the mentioned agreement are not reached; and

the modification of the Mortgage Act approved by Decree dated 8<sup>th</sup> February 1946 and the Notaries Act approved by Act dated 28<sup>th</sup> May 1862, in order to include some headline provisions referring to electronic communications and information with public Registers and electronic signature for Registers and Public Notaries to be developed by a future specific regulation.

### **U.S. COMPUTER CRIME PRESIDENT BUSH SIGNS ANTI-TERRORISM/ ANTI-MONEY LAUNDERING LEGISLATION**

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In response to the terrorist attacks on the United States on 11<sup>th</sup> September 2001, the Congress acted swiftly to pass, and the President signed into law H.R. 3162, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (the "USA PATRIOT") Act of 2001. The Act contains sweeping new provisions aimed at fighting terrorism and combating money laundering.

Title III of the Act, the International Money Laundering Abatement and Anti-Terrorism Financing Act, signals the government's belief that it is essential to prevent terrorists from using financial institutions and the payments system to support their activities and to enlist the resources of financial institutions in detecting and tracking terrorists. As a result of the requirements of the Act and the intense focus on this area that will certainly come from regulatory authorities, financial institutions must immediately and comprehensively re-evaluate their anti-money laundering, know-your-customer, account maintenance and customer verification procedures.

The implications of the new environment for the banking industry are discussed in an article by Tom Vartanian entitled *Sept. 11 Attacks Illustrated New Risks to Banking System*, which appeared in the 2<sup>nd</sup> November 2001 issue of the *American Banker*. They include:

- a cautionary note on government use of the payments system as a law enforcement proxy;
- a prediction that the current cloud over the mail system will jump start electronic bill presentment and payment in commercial and retail markets;
- a discussion of the need for better enforcement mechanisms to detect problems before a terrorist act is committed;
- an analysis of how "real time" bank supervision can help;
- a discussion of the need for a reevaluation of risk in the banking and payment systems and how identities can and should be verified; and
- some pointers on dealing with electronic theft of corporate and consumer data.

A summary of sections of the Act that are particularly significant for financial institutions is set forth below.

#### **Section 311 - Special Anti-Money Laundering Targeting Measures.**

The Secretary of the Treasury (the "Secretary") is given broad authority to require financial institutions to take "Special Measures" with regard to particular countries, institutions, transactions, or accounts that the Secretary determines to be a "primary money laundering concern." They include taking certain steps to: (i) maintain records and file reports; (ii) identify the beneficial ownership of an account opened or maintained in the United States by a foreign person (subject to certain exceptions) or a representative of such a foreign person; and (iii) either require additional identification with respect to users of payable-through or correspondent accounts or to prohibit, in certain circumstances, opening or maintaining such accounts.

#### **Section 312 - Special Requirements for Correspondent and Private Banking Accounts.**

Each financial institution that maintains a correspondent or private banking account in the United States for a non-United States person is required to establish due diligence policies and procedures. Financial institutions that hold correspondent accounts with institutions operating under an offshore banking license or operating in a country that has been found to be non co-operative with international anti-money laundering efforts must implement enhanced due diligence procedures. Financial institutions that maintain private banking accounts (accounts that require assets of at least USD 1 million) must meet certain requirements including identifying the nominal and beneficial owners of such accounts. The Secretary is required to issue regulations further delineating the necessary due diligence procedures within 180 days of enactment.

#### **Section 313 - Correspondent Accounts for Foreign Shell Banks.**

Subject to certain exceptions, financial institutions are prohibited from establishing, maintaining, administering, or managing correspondent

accounts for a foreign bank that does not have a presence in any country (the "shell banks"). This requirement takes effect 60 days from the date of enactment.

**Section 314 - Regulatory Agency Co-operation.** The Secretary is required within 120 days of enactment to promulgate regulations to encourage financial institutions to co-operate with the bank regulatory agencies and law enforcement authorities with regard to sharing information about individuals, entities, and organisations engaged in or suspected of engaging in terrorist acts or money laundering activities. The regulations may address the use of charitable, non profit and non governmental organisations to transfer funds for terrorists. The regulations may also require that each financial institution designate representatives to receive information regarding suspected terrorist individuals or organisations and to monitor the accounts of such individuals or organisations.

The section also opens the door to broad financial services industry initiatives to combat terrorism. It authorises two or more financial institutions and any association of financial institutions (upon notice to the Secretary) to share information regarding individuals, entities or countries suspected of possible terrorist or money laundering activities. Entities that share information under this provision will not be liable to any person except where such disclosure violates the provisions of section 314 or the regulations issued thereunder.

**Section 319 - Production of Records.** Financial institutions are required to make information regarding anti-money laundering compliance by the institution or a customer of the institution available to the applicable federal bank regulatory agency within 120 hours of a request by such an agency.

**Section 325 - Concentration Accounts.** The Secretary must promulgate regulations to ensure that concentration accounts are not used in a manner that allows the beneficial owner of the account to move money anonymously. Concentration accounts commingle related funds temporarily in one place pending disbursement or transfer into individual client accounts.

**Section 326 - Identification Verification.** The Secretary must prescribe regulations to set minimum standards for financial institutions to use to verify the identity of individuals who wish to open an account. This is particularly problematic since there is no simple and assured way in this country to verify an individual's identity since there is no uniform process for issuing, or requirement for an individual to hold, any document that is issued for the purpose of "verifying" his or her identity. This requirement could serve as a basis for an effort to initiate a national identification verification program.

These regulations will again raise questions about how accounts are initiated and generated on a remote basis, such as through the Internet, phone, fax, or mail. In that regard, the regulations may create a heightened interest in creating and using electronic forms of identification, including biometric techniques, in order to provide a trustworthy means to establish an individual's identity in a remote interaction.

**Section 327 - Bank Holding Company Act and Bank Merger Act Consideration of Anti-Money Laundering Records.** Federal bank regulatory agencies will be required to consider a bank holding company's and a bank's anti-money laundering record when making a determination on an application filed under the Bank Holding Company Act or the Bank Merger Act.

There are several issues that will arise here:

- What types of procedural, policy or operational defects will allow regulators to reject a merger or acquisition?
- Will an anti-money laundering rating system, similar to the Community Reinvestment Act rating system, be developed by the regulators?
- Will anti-money laundering deficiencies be the basis for public protests against a merger or acquisition?

**Section 352 - Anti-Money Laundering Programs.** Perhaps the most potentially significant provision of the Act from the perspective of financial institutions and their customers is the requirement to implement an anti-money laundering program that, at a minimum, includes internal policies, procedures and controls, the designation of a compliance officer, an ongoing employee training program, and an independent audit function to test programs. Within 180 days of the date of enactment of the Act, the Secretary must issue regulations to establish minimum standards for programs implemented under this section.

The requirement for the adoption of regulations could reignite the spirited controversy that surrounded the "Know Your Customer" proposal issued by the bank regulatory agencies in December 1998. That proposal would have required financial institutions to categorise the expected account activity of customers and to report activity that fell outside of such expectations to authorities. In a strong expression of consumer concern about financial privacy, a wide spectrum of organisations and a large number of individuals voiced their opposition to imposing such a broad quasi-investigatory responsibility on financial institutions. As a result of public and congressional pressure, the bank regulatory agencies withdrew the proposal in March 1999.

Since the regulations under this provision could have significant implications for United States citizens in regard to financial institution and government scrutiny of their financial affairs, it remains to be seen what impact the events of 11<sup>th</sup> September and the continuing threat of domestic terrorism will have on groups that would otherwise be likely to oppose more stringent "know your customer" type monitoring and reporting requirements.

**Section 356 - Suspicious Activity Reporting Requirements for Broker and Dealers.** The Secretary, after consultation with the Securities and Exchange Commission (the "SEC") and the Federal Reserve Board, must propose a regulation before 1<sup>st</sup> January 2002 to require brokers and dealers registered with the SEC to submit suspicious activity reports and must adopt a final regulation no later than 1<sup>st</sup> July 2002.

**Section 359 - Suspicious Activity Reporting Requirements for Underground Banking Systems.** There is an increasing awareness and concern regarding the ability of money launderers and terrorists to use informal money transmission vehicles to avoid detection and tracing of their activities. Section 359 attempts to address this concern by subjecting "any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system" to the same record keeping rules and the same penalties for violating those rules as above ground recognized money transmitters. In addition, it requires the Secretary to report to Congress within one year on the need for further legislation with regard to underground banking systems.

**Section 373 - Unlicensed Money Transmitting Businesses.** This section modifies the existing criminal prohibition on engaging in a money transmitting business that is not in compliance with state licensing

requirements or registration requirements with Financial Crimes Enforcement Network to also cover a money transmitting business that "otherwise involves the transportation or transmission of funds that are known to a defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity." The new provision may be significant to the extent that it might be interpreted to subject licensed and registered money transmitters to prosecution because of the nature of their funds transmission business. This provision may raise

many of the same issues that have been discussed in connection with proposals to prevent credit card and other payments system participants from being involved in the transmission of funds in connection with certain gambling activities.

For more information see:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf)



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