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**ERRATUM**

In the Canadian submission to the former issue of “the link.” (Issue 9, Market access, National Broadband Task Force Report), the amounts were in Canadian, not US dollars.

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## NEWS

### 1. CONTRACT LAW

#### EU COMMISSION COMMUNICATION ON EUROPEAN CONTRACT LAW

The commission has addressed a Communication to the Council and the European Parliament (COM(2001) 398 final), which is intended to broaden the debate on European contract law involving consumers, businesses, professional organisations, public administrations and institutions, the academic world and all interested parties.

The Commission is currently gathering information to determine whether some degree of harmonisation might be needed in the area of contract law, to the extent that a case-by-case approach may not solve all issues.

The Commission is looking at whether sector-by-sector approach to harmonisation could lead to possible inconsistencies at EC level, or to problems of non-uniform implementation of EC law and application of national transposition measures.

If concrete problems are identified, the Commission would also like to receive views on what form solutions should or could take. Possible solutions are given, but the Commission welcomes other solutions.

Some of the solutions put forward include letting the market react to identified problems, promoting development of non-binding common contract law principles, reviewing and improving existing legislation or adopting a new regulatory framework at EU level.

The full text of the communication can be found at:  
[http://europe.eu.int/comm/consumers/policy/developments/contract\\_law/cont\\_law\\_02\\_en.pdf](http://europe.eu.int/comm/consumers/policy/developments/contract_law/cont_law_02_en.pdf)

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

### 2. COMPUTER CRIME

#### US COURT AFFIRMS JUDGMENT AGAINST INTERNET GAMBLING OPERATION

In a decision that could have broad implications for e-commerce jurisdiction and liability considerations, an appellate court recently affirmed a lower court decision holding that a bookmaking entity located and licensed in Antigua violated a United States gambling law by accepting bets on sporting events from United States citizens.

In this case, the defendant established the World Sports Exchange (the "WSE") in Antigua. WSE permitted individuals to open accounts with WSE and then contact WSE by phone or the Internet to place wagers on sports events. WSE would place the wager on

behalf of the United States citizen, and would debit or credit the customer's WSE account depending on the outcome of the wager.

Federal prosecutors argued that WSE illegally used interstate telephone lines to take online wagers, thus violating United States law. In response, the defendant claimed, among other things, that the two-prong safe harbor provision of the Wire Wager Act protected WSE operations from violating the statute. Under the safe harbor provision, the Act is not violated if (1) betting is legal in both the place of origin and the destination of the transmission and (2) the transmission is limited to mere information that assists in the placing of bets, as opposed to including the bets themselves.

To satisfy the first condition, the defendant argued that betting is legal in Antigua and is also legal in New York because the placing of bets is not a crime in New York. Then, to satisfy the second condition, the defendant argued that the transmissions between WSE and its customers contained only information that enabled WSE itself to place bets entirely from customer accounts located in Antigua.

The court, however, rejected this defense, stating that neither of the two safe harbor conditions were satisfied. First, the court concluded that New York law expressly prohibited betting. Accordingly, because the first prong of the safe harbor provision applied only in situations where betting was permissible in both jurisdictions, this prong was not satisfied.

Then, the court noted that the second condition of the safe harbor provision was not satisfied because it was clear that WSE had accepted customers' bet instructions. Because WSE could only book the bets that its customers requested and authorised it to book, the court found that WSE customers were placing bets, not just transmitting information.

The criminalisation by one country of activities that are legal under the laws of a second country where they physically occur raises important issues for both United States entities that interact globally on the Web, as well as foreign entities that knowingly deal with United States residents.

Although this decision focused on statutory construction issues, it raises broader questions as to the balance that will be reached in the application of potentially conflicting national laws in the Internet environment.

The court's decision is available at:  
<http://law.touro.edu/2ndCircuit/July01/00-1574.html>  
For more information contact: [VartaTh@ffhsj.com](mailto:VartaTh@ffhsj.com) or [LedigRo@ffhsj.com](mailto:LedigRo@ffhsj.com)

### 3. CONSUMER PROTECTION

#### THE NETHERLANDS DISTANCE CONTRACTS DIRECTIVE FINALLY IMPLEMENTED

On 1<sup>st</sup> February 2001 the law on the protection of consumers in respect of distance contracts entered into force (the "Law"). This Law implements Directive 97/7/EC on distance contracts (the "Directive").

The Law is set forth in a separate division of The Netherlands Civil Code, i.e. Book 7, division 9A, which contains rules relating to special types of contract. The Netherlands has chosen not to adopt any provisions other than those strictly necessary for implementing the Directive.

There are minor differences between the Law and the Directive. We note the following with respect to:

- the definition of distance contract. The English language version of the Directive states that the contract must be concluded under an organised distance sales or service-provision scheme run by the supplier. The Law states, in accordance with the Dutch language version of the Directive, that the contract must be concluded within the scope of a distance sales or service-provision scheme organised by the supplier.
- the period of seven days for exercising the right to rescind the transaction on the part of the consumer is calculated in the Directive from the day of receipt of the product or from the day of conclusion of the contract for the services. According to the Netherlands Civil Code, this period is calculated from the day after the receipt of products or conclusion of such contract for services. In addition, according to Dutch law any notice, for example of rescission, only takes effect upon receipt of such notice by the other party. The Directive is silent on this point.

For more information see:

[http://www.justitie.nl/a\\_beleid/fact/e-commerce.htm#richtl](http://www.justitie.nl/a_beleid/fact/e-commerce.htm#richtl), and

<http://www.kennedyvanderlaan.nl>

or contact: [martine.de.koning@kvdl.nl](mailto:martine.de.koning@kvdl.nl)

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

### CANADA INTERNET GAMBLING

On 17<sup>th</sup> August 2001, World Gaming plc. (formerly Starnet Communications International Inc.) pleaded guilty to possessing a device (namely computer servers hosting online casino software) that facilitates betting. The guilty plea, which came one day after charges were laid in the case, wrapped up an investigation dating back to early 1998.

The company was fined CAD 100,000 for its involvement in Internet gaming and was ordered to forfeit CAD 6 million, deemed to be the proceeds of crime. The money forfeited by the company will become the property of the province of British Columbia under federal Proceeds of Crime legislation. No company officials were personally charged.

The fact that the company's servers were located in Antigua, where online gambling is legal, was not a sufficient defence against the charges. The authorities determined that with 120 employees in Canada and only 3 in Antigua, the company's operations were

based in Canada and were in violation of Canadian laws that permit only Canadian provincial governments to run gambling operations.

The company indicated that it would no longer take bets from residents of Canada or the United States. This is believed to be the first Internet gambling case of its kind in Canada and will likely bring about a chill in online gaming activity here.

For more information contact: [cmorgan@mccarthy.ca](mailto:cmorgan@mccarthy.ca) or see:

<http://www.nationalpost.com/search/story.html?f=/stories/20010821/658062.html&q=Starnet>

## 5. DATA PROTECTION

### SWEDEN PERSONAL DATA AND THE INTERNET: FIRST RULING FROM THE SUPREME COURT

On 12<sup>th</sup> June 2001, the Swedish Supreme Court ruled in the first criminal case concerning the use and processing of personal data. The ruling is considered to be of great importance since it indicates the extent to which provisions concerning freedom of the press and freedom of expression in the Freedom of the Press Act and Fundamental Law on the Freedom of Expression prevail over the provisions in the Personal Data Act.

The Swedish Personal Data Act, based on the 1995 EEC Directive, came into force in 1998. Since then the Act has been heavily criticised, *inter alia*, for limiting the freedom of expression. Much of the criticism has concerned the consequences of the Act involves on the use and publication of personal data on the Internet.

Since distribution of personal data to third countries (i.e. countries outside the EEC) is not allowed, all publishing of personal data on a public website is generally to be considered a violation of the Act.

The setting for the case was a public Internet website on which a Swedish person (X) listed and named a number of individuals, several of them politicians and bank directors at Swedish banks.

On the site X criticised several of the named individuals and accused them, among other things, of plundering. X also argued that some of them were responsible for the bankruptcy of X's company. The prosecutor claimed that the publishing of personal data constituted an unlawful distribution of personal data to a third country.

The website was held by the defence to be a "forum" that threw light on the damage caused by Swedish banks, financial institutions and private capitalists during the Swedish bank crisis in the late 1980s and early 1990s.

X further held that the personal data had been published solely with a journalistic purpose and that the aim of the website was to provide people in general and society as a whole with knowledge, experience and advice in order to prevent a similar crisis in the future.

The Personal Data Act allows for exemption from the law with respect to the provisions concerning freedom of the press and freedom of expression in the Freedom of the Press Act and Fundamental Law on the Freedom of Expression. An exemption

also applies to the processing and publication of personal data undertaken solely with a journalistic purpose.

There has been a fair amount of confusion concerning the extent of the last-mentioned exemption. Does it, for instance, apply to people in general or primarily only to the traditional mass media companies? Another issue has been whether deprecating or offensive remarks can be said to be a normal part of journalistic activity.

The Court of Appeal found that part of the purpose behind the publishing of the personal data was to spread knowledge of the deprecating remarks on the site. Accordingly, the purpose behind X's listing of the personal data had not been solely journalistic.

The Supreme Court clarified the law concerning the exemption granted to journalistic publication stating that it applies not only to professional journalists and media enterprises, but to the ordinary citizen as well. The court also identified a journalistic purpose underlying X's website and furthermore made it clear that the presence of deprecating or offensive remarks must be considered a normal part of the public debate.

Consequently the Supreme Court found that the publishing of the personal data did form part of a solely journalistic activity and thus was not a criminal offence under the Personal Data Act.

To read the case go to: <http://www.notisum.se>

For more information contact: [Erik.Bergenstrahle@lindahl.se](mailto:Erik.Bergenstrahle@lindahl.se)

## THE NETHERLANDS NEW PRIVACY ACT

On 1<sup>st</sup> September 2001 the Personal Data Protection Act (the "New Act") took effect. The New Act aims to implement Directive 95/46/EC and replaces the current Data Protection Act. The New Act differs from the Data Protection Act in various respects.

The Act's area of application is broader than that of the Data Protection Act, since the New Act does not relate only to registering personal data, but also to the processing of such data. As a result, the New Act covers almost every conceivable act involving personal data, including storage, removal, alteration and destruction of data.

Furthermore, under the New Act the obligation to inform customers of what happens to their personal data has been extended. If such data are used for direct marketing purposes, it is obligatory to point out to customers their right to object to such use.

A last important change relates to the supervision of compliance with the Act. Under the New Act, the Registration Chamber (the body charged with enforcing privacy laws in The Netherlands) has wider powers to enforce compliance with the obligations pursuant to the New Act.

The full text in Dutch can be accessed at:

<http://www.lns.nl/lns/doc/stb2000-302.pdf>

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

## US INFORMATION SECURITY STANDARDS

On the 7<sup>th</sup> August 2001, the Federal Trade Commission (the "FTC") published an information security standards proposal for

public comment. The standards are required by law to protect the security and confidentiality of customer records and information, protect against threats or hazards to the security or integrity of such records and protect against unauthorised access to or use of records or information that could result in substantial harm or inconvenience to any customer.

The proposal is based in part on a September 2000 notice and request for public comment. The proposal would affect financial institutions subject to the FTC's jurisdiction. These institutions include non-depository lenders, consumer reporting agencies, data processors, courier services, retailers that extend credit by issuing credit cards to consumers, personal property or real estate appraisers, check cashing businesses, mortgage brokers and other entities that are significantly engaged in financial activities.

As proposed, these financial institutions would have to develop, implement and maintain a comprehensive written information security program that included administrative, technical and physical safeguards appropriate for their size, the complexity of their activities and the sensitivity of their customer information.

According to the proposal, a financial institution's written security program should designate an employee or employees to co-ordinate its information security program; identify reasonably foreseeable internal and external risks to the security, confidentiality and integrity of customer information; design and implement information safeguards to control the identified risks through risk assessment; oversee service providers; and evaluate and adjust information security programs in light of any material changes to its business that affect its safeguards.

Comments on the FTC proposal must be made by 9<sup>th</sup> October 2001.

The proposal is available at:

<http://www.ftc.gov/os/2001/07/stansafecustinfofrm.htm>

For more information contact: [VartaTh@ffhsj.com](mailto:VartaTh@ffhsj.com) or [LedigRo@ffhsj.com](mailto:LedigRo@ffhsj.com)

## 6. DIGITAL SIGNATURES

### BRAZIL DIGITAL SIGNATURE AND ELECTRONIC CERTIFICATION RULES

Numerous bills of law dealing with the proper standing and validity of commercial transactions carried out on the Internet are being reviewed by the Brazilian Congress, with a view to setting clear-cut and effective rules for digital signature, electronic certification and other aspects of e-commerce.

While these bills of law on e-commerce are being discussed by the Congress, the government has issued certain measures and rules on the matter, including Provisional Measure n° 2200 of 28<sup>th</sup> June 2001 – subsequently reissued as Provisional Measure n° 2200-1 of 27<sup>th</sup> July 2001 and Provisional Measure n° 2200-2 of 27<sup>th</sup> August 2001 – which created the Brazilian Public Key Infrastructure (*Infraestrutura de Chaves Públicas Brasileiras – ICP-Brasil*), providing the foundation for a certification structure to ensure the legal validity of electronic documents certified through this mechanism.

The organization of the ICP-Brasil still relies on specific regulation.

However, it has already been determined that the ICP-Brasil will be composed of (i) a Directive Committee – linked to the Chief of Staff of the Office of the Presidency of the Republic – formed by civil society representatives and responsible for setting the certification and licensing policies; and (ii) a chain of certification formed by the Main Certifying Authority (AC-Raiz), Certifying Authorities (AC) and Registration Authorities (AR).

The Main Certifying Authority is the National Institute of Information Technology of the Ministry of Science and Technology (*Instituto Nacional de Tecnologia da Informação do Ministério da Ciência e Tecnologia*) while the Certifying and Registration Authorities may be private or public entities.

Provisional Measure n° 2200 furthermore allows for the use of other means to prove the authorship and integrity of electronic documents, including those which use certificates not issued by the ICP-Brasil.

Although the public generally acknowledges the need for clear-cut and effective rules on e-commerce, the government has been criticized for laying down such rules through provisional measures i.e. without a public hearing, since under Article 62 of the Federal Constitution these measures should only be adopted by the President of the Republic when there is an important and urgent matter, since they are of a provisional nature and become ineffective 30 days after issuance unless converted into law or reissued.

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

## **EU EUROPEAN COMMISSION CLEARS IDENTRUS , A NETWORK FOR THE AUTHENTICATION OF ELECTRONIC SIGNATURES**

Identrus is a joint venture, originally composed of 8 European and non-European banks, that has created a global network for the authentication of electronic signatures and other transactions related to electronic commerce or finance.

Competition exists among Identrus participants, as they are free to develop their own applications using the Identrus infrastructure and to set their own prices for their authentication services. The end-user may choose any of the participants and is not obliged to opt for the services provided by its habitual bank.

The Commission noted that there is no important risk of restriction of competition, as:

- other systems, developed by other ventures will compete with the Identrus system;
- all qualified financial institutions can participate in the Identrus system provided they meet objective requirements;
- Identrus participants may join other authentication systems;

The Commission stressed that there are no adverse effects on input markets and that it is improbable for a single company to gain control over Identrus, as every equity owner possesses only a small share.

For more information, see:

[http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/11650|RAPID&lg=En](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/11650|RAPID&lg=En)

or contact: [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

## **INTERNATIONAL DIGITAL SIGNATURE LAW SURVEY**

The Digital Law Survey is a Website where a brief overview of existing and proposed legislation with respect to electronic signatures can be found.

It is regularly updated. It is possible to register for e-mail updates and information on new entries.

Even if the Survey does not pretend to be exhaustive or legally reliable, it is a good starting point for those who are looking for information about digital signatures in a specific country. The site also provides references and links to general background articles and Websites as well as to other law surveys. The reader is also invited to send comments, corrections, updates and additional information to help the author keep the survey up-to-date.

The site can be found at: <http://rechten.kub.nl/simone/ds-lawsu.htm>

## **7. ELECTRONIC COMMERCE**

### **ARGENTINA NEW BILL ON ELECTRONIC MESSAGES PROTECTION**

On 12th September 2001 the Secretariat of Communications published a new bill related to electronic messages protection (the "Bill") in Argentina's newspaper for legal publications and invited interested parties to submit their opinions following the procedure described below.

In addition, it sent the Bill to public and private law schools, bar associations and chambers specialized in Internet, telecommunications, software, electronic commerce, so as to canvas a very wide range of opinions.

To centralise the gathering of suggestions and opinions, a single e-mail address has been set up to which they should be sent:

[proyectoemail@secom.gov.ar](mailto:proyectoemail@secom.gov.ar). All suggestions and opinions received can be read at [www.secom.gov.ar](http://www.secom.gov.ar). There is no due date for sending in or restriction as to who can collaborate.

Basically the Project, (i) defines what constitutes an electronic message, (ii) assimilates electronic messages to regular mail (letters), (iii) provides that the employer is the owner of the e-mail system provided to an employee, and that former can access and control the information circulating through its e-mail system, and (iv) modifies the Criminal Code adding as a new crime the wrongful opening, deviation, seizing or deleting of electronic messages, as well as the disclosure of the contents of electronic messages by any means.

The Bill states that the scope of protection comprises the creation, transmission and storage of electronic messages. The commission responsible for drafting the Bill defined a broad scope of protection,

having in mind the importance of electronic commerce and the privacy of e-mail contents.

Finally, note that the Bill's rule of thumb is that the contents of electronic messages are protected in the same way as regular mail, except insofar as such contents can be controlled by employer. We understand that this could raise an important exchange of ideas and discussions, in particular because of the sensitive nature of the employer/employee relationship.

For more information see: <http://www.secom.gov.ar/>  
or contact: [gonzaloz@mille.com.ar](mailto:gonzaloz@mille.com.ar)

## EU THE ICC DENOUNCES THE COUNTRY-OF-DESTINATION CRITERION IN CROSS-BORDER E-COMMERCE DISPUTES

In a policy statement dated 25<sup>th</sup> July 2001, the International Chamber of Commerce (the "ICC") stated that the application of the country-of-destination criterion deters companies from engaging in B2C online selling. This criterion consists in giving jurisdiction to the courts and applying the laws of the country of the consumer in cross-border disputes.

The principal impediments denounced are that:

- companies are not willing to subject themselves to the costs of investigating the consumer law of the countries targeted;
- it is very difficult to comply with the laws of every potentially relevant jurisdiction;
- the potentially applicable laws may be contradictory;
- the country-of-destination criterion places severe limitations on emerging entrepreneurial ventures in developing economies; and
- where consumers use "infomediaries" to purchase goods or services, a business would never know the law and forum to which it subjects itself as the "infomediary" prevents a company from knowing the identity and location of the consumer making the purchase.

The ICC encourages governments to reconsider their position on the application of the principle of party autonomy and on the country-of-origin criterion (application of the law of the country of the seller) in contracts regarding consumers.

The ICC also indicates that the alternative solution of self-regulation deserves to be considered and that an effective repression of fraud and crime on the Internet is in the interest of both businesses and consumers.

The ICC also pleads in favour of a systematic approach to resolving disputes. First, consumers should seek redress through a company's internal customer satisfaction mechanism.

If this initiative is not successful a further step would be to have recourse to an online alternative dispute resolution mechanism. If the dispute persists, the parties could then resort to legal proceedings.

For more information see:

[http://www.iccwbo.org/home/statements\\_rules/statements/2001/jurisdiction\\_and\\_applicable\\_law.asp](http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp)

or contact: [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

## 8. ELECTRONIC DEMOCRACY

### EGYPT E-GOVERNMENT

Egypt is taking first steps towards E-Government aiming at the automation of the entire work process of the Ministry of International Cooperation. This project represents a shift that will make the Egyptian government one of the first in the Middle East to take full advantage of the Internet to improve government services. Egypt is now in phase 1 of this project funded by the African Development Bank.

The Ministry of International Cooperation project is aimed primarily at enhancing the availability of the Ministry's information and services to businesses and the general public through information and technology that require limited staff intervention.

The said project includes a number of websites containing information relevant to each of the Ministry of International Cooperation sectors, as well as the available loans and funds, areas of competence, and services provided.

This project is expected to considerably enhance the availability of the Ministry's information beyond the normal hours of operation and will also allow the various parties dealing with the Ministry of International Cooperation to access the Ministry's Information Network and obtain information on the International Agreements and the loans and funding it provides.

This project will hence help the Ministry of International Cooperation to save time and effort in its offices.

For more information contact: [kmlaw@kamelaw.com](mailto:kmlaw@kamelaw.com)

### FRANCE THE TAX AUTHORITIES OPEN UP TO INTERNET

The French tax authorities have recently implemented several measures intended to modernise the VAT declaration and collection system for businesses.

As of 1<sup>st</sup> May 2001, the General Tax Division (*Direction Générale des Impôts* or DGI) offers French businesses new means for declaring and paying their VAT: the TéléTV@ system. Henceforth, businesses can, by way of a simple computerised exchange, "teledclare" and "telepay" their VAT whilst benefiting from a high level of security, both upon issue (declarations transmitted via TéléTV@ are certified) and receipt (receipt notices are issued) of VAT declarations.

Open to all businesses, this procedure is however rendered mandatory (Article 41 of Amended Finance Law (*Loi de Finance Rectificative* n° 991173 of 30<sup>th</sup> December 1999) for businesses whose turnover before tax for the previous fiscal year exceeds EUR 15,24 million. As of 1<sup>st</sup> January 2002, non-compliance with such provisions entails a 0.2 % surcharge on the VAT amounts declared or paid.

- Teledclaration: two alternative technical procedures are proposed. The choice of procedure for transfer of data is left to the taxpayer's discretion.

Æ Computerised Form Exchange via Internet (*Echange de Formulaires Informatisé* or EFI): particularly suited to individual declarations, this simple and economical service is accessible from the TéléTV@ server of the Ministry of Finance (*Ministère de l'Économie, des Finances et de l'Industrie* or MINEFI). EFI enables the payer of VAT to complete a dematerialised form online. Security of exchange is guaranteed by the use of a digital certificate.

Æ Computerised Data Exchange (*Echange de Données Informatisé* or EDI): this procedure is intended more specifically for professionals such as accounting firms or organisations that draw up and transmit a large number of declarations on behalf of their clients. The professional client appoints an EDI partner, approved by the DGI, which transmits the declaration data to the DGI on the client's behalf.

- **Telepayout**

Æ Telepayout substitutes the payment of VAT by bank transfer. It is performed through direct debit of the amount of VAT from the account(s) specified by the payer of VAT on his TéléTV@ registration form. The taxpayer chooses the account or accounts it wishes to have debited for all or part of the VAT amount due for payment. The debit is validated by way of a digital certificate.

Æ The MINEFI has attempted to render telepayout attractive to businesses by endowing it with certain advantages in relation to traditional means of payment. Firstly, whatever the date on which the taxpayer issues his debit order, the DGI agrees to not debit the amounts payable prior to their due date of payment. Secondly, the date of payment is the date on which the teledeclaration and the telepayout are received by the DGI (date of deposit). The new system enables taxpayers using telepayout to benefit from a cash flow advance of several days. Lastly, telepayout is free of charge, whereas bank transfers include a charge.

In conclusion, this is an encouraging new step towards the legal recognition of the particular needs of French businesses, and follows on from the recent French laws and decrees relating to electronic signatures and the Information Society.

To consult the text of the Law see:

[http://www.legifrance.gouv.fr/citoyen/jorf\\_nor.ow?numjo=ECOX9900133L](http://www.legifrance.gouv.fr/citoyen/jorf_nor.ow?numjo=ECOX9900133L)

For more information contact:

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

## GERMANY ABROGATION OF DISCOUNT ACT AND ITS EFFECTS

With effect from 25<sup>th</sup> July 2001 in Germany both the *Rabattgesetz* (the "Discount Act") and the *Zugabeverordnung* (the "Free Gift Act") were abrogated without replacement. As a result the granting of bonuses and discounts to customers will become easier under German law, a move which will also affect e-commerce.

Both acts date back to the early thirties when the German Government intended to establish greater price transparency in the consumer market. Since then both acts have been criticised by

merchants and consumers and there has been a long standing debate on the usefulness of both acts.

With a growing Internet economy and intensifying borderless commerce the *RabattG* and *ZugabeVO* were increasingly called into question due to their anti-competitive character. Especially the *RabattG*, which only allowed price discounts of up to 3 %, with the effect that certain types of e-commerce were entirely prohibited in Germany.

Just recently, in March 2001, German courts had cautioned the so-called powershopping-sites *letsbuyit.com* (LG Hamburg) and *primus.online* (OLG Koeln) on the grounds of these acts.

Reform finally became necessary when Germany was obliged to implement EEC Directive 2000/31/EC on the regulation of e-commerce. This directive introduced the "country of origin" principle according to which the Internet offerer has to abide by the legal rules of his home country or domicile regardless of the country in which the offer is targeted.

Thus, on-line sellers from outside Germany were not bound by the strict, existing German rules and therefore gaining advantages over German Internet companies. One would expect that the consequence of abrogating these rules would be to make innovative and creative forms of Internet business available on the German market as well.

However, these or other strict competition regulations in place, such as the fixed book pricing rules, are still restraining online business, and it remains to be seen whether the German courts will not reintroduce the rules of the *RabattG* and *ZugabeVO* on the grounds of general German competition law.

For more information see:

[www.bundestag.de/aktuell/bp0107/0107019b.html](http://www.bundestag.de/aktuell/bp0107/0107019b.html)

## NEW ZEALAND ELECTRONIC FORMS OF COMMUNICATION IN PLACE OF TRADITIONAL PAPER-BASED METHODS

In a previous edition of "the l.i.n.k.", we commented on New Zealand's Electronic Transaction Bill which, amongst other matters, deems a number of statutory references to "paper" and "in writing" to include electronic forms of communication.

Already, New Zealand's legislation allows electronic forms of communication in place of traditional paper-based methods. Examples include the method of holding shareholder meetings under the Companies Act 1993 (the "Companies Act"), and offering securities under the Securities Act 1978 (the "Securities Act").

### Shareholder Meetings

Proceedings at shareholder meetings are governed by the Companies Act except where modification by the company's constitution is permitted. The First Schedule to the Companies Act provides for shareholder meetings to be held either :

- by a number of shareholders, who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or
- subject to the constitution of the company, by means of audio, or audio and visual, communication by which all shareholders

participating and constituting a quorum, can simultaneously hear each other throughout the meeting.

Therefore, the default position is that shareholder meetings require, at least, audio. It would be acceptable for shareholder meetings to take place “over the internet” so long as audio communication was available.

### **Offering Securities**

The Securities Act regulates public offerings of securities in New Zealand. Broadly, the Securities Act requires registration of a prospectus and distribution of an investment statement to investors before they subscribe for securities.

In the Securities Act, the definitions of “document”, “distribute”, “send”, and “receive” all contemplate electronic means of communication. Similarly, the definition of “writing” includes “the display of words by any form of electronic or other means of communication”.

Accordingly, provided a number of important Securities Act safeguards are complied with, offer documents may be distributed via the Internet. At least two New Zealand companies have used the Internet as the primary source of their prospectus and investment statement. In one case, online subscriptions were solicited.

Not all Securities Act requirements are able to be met in a paperless manner. The Securities Act requires a copy of the prospectus to be registered. This must have endorsed or attached to it various specified documents and be signed by or on behalf of the issuer and promoter. It is possible the Electronic Transactions Bill, when finalised and enacted, will change this situation.

For full text of the Companies Act 1993 and Securities Act 1978 see:

<http://rangi.knowledge-basket.co.nz/gpacts>

For further information on the Electronic Transactions Bill see:

<http://www.med.govt.nz/irdev/elcom/transactions/index.html>

For more information contact: [david.boswell@bellgully.com](mailto:david.boswell@bellgully.com)

## **9. FINANCIAL SERVICES**

### **LEBANON ELECTRONIC BANKING AND FINANCIAL TRANSACTIONS**

In a first attempt to modernise, regulate and organise the Lebanese electronic banking sector, on 30<sup>th</sup> March 2000 the Lebanese Central Bank, issued a Circular (Circular n° 1810) to banks, financial institutions and institutions dealing with electronic banking and financial transactions.

According to the above mentioned Circular, all operations and activities that are concluded, carried out, or promoted through electronic or photo-electric means (telephone, computer, Internet, ATM, etc.) by banks, financial institutions, financial intermediaries, mutual funds, or any other institution or entity shall be considered “electronic financial and banking transactions”.

This definition shall also apply to operations undertaken by issuers or promoters of payment and credit cards and by institutions involved in electronic transfers. It also applies to institutions involved in offer, purchase and sale operations, and in the provision

of other electronic services related to financial instruments, as well as to their settlement and clearing centres.

Among other provisions, the Circular laid down some principles of conduct which any entity that undertakes “electronic financial and banking transactions” shall follow: honesty, integrity and transparency, adopting adequate procedures for ensuring maximum security, and taking all necessary measures to define and restrict various responsibilities.

Digital signatures are accepted only when they meet the following conditions (there should be a clear agreement between the parties concerned): the signatory should use a personal identification code; the institution implementing the transaction should confirm it within 24 hours by electronic mail, and within one week by regular mail, unless the client requests its mail to be kept with the said institution; and the implementing institution should provide the client with a detailed monthly statement of account, to be sent to an address of the client’s choice.

Violations of these and other provisions contained in the said Circular may be sanctioned by administrative penalties.

In order to amplify and complete the legal framework for the regulation electronic banking in the country, the Central Bank has formed a Committee among its members and legal consultants for the drafting of laws and regulations concerning electronic banking, the “Committee on Modern Banking & Financial Techniques and Information Technology” (COBTI).

The Central Bank also organised a very successful conference in June 2001 entitled “eLebanon, e-banking, e-payments, and financing MICT projects,” which attracted enormous interest from national and international industry representatives, bankers and professionals in the media, information and communications technology sectors.

For more information see: <http://www.bdl.gov.lb/e-lebanon/press.htm>

or contact: [leila@alemlaw.com](mailto:leila@alemlaw.com)

## **10. INTELLECTUAL PROPERTY**

### **EU AGREEMENT WITH THE US IN THE COPYRIGHT DISPUTE**

In the context of the Copyright dispute, the European Union and the United States have recently reached an agreement regarding the procedure to follow in order to compensate European performers and composers for the economic losses caused by the so-called “business exemption” provided by the US Copyright Act.

This provision allows bars, restaurants and shops that meet certain requirements to broadcast radio and TV music without paying any fees to collecting societies. Considering that the “business exemption” is inconsistent with the provisions of the Trade in Intellectual Property Rights (the “TRIPs”), the EU resorted to the WTO Dispute Settlement Procedure. The WTO enjoined the United States to amend the US Copyright Act on that point.

The deadline for the amendment of the Copyright Act has been postponed until the end of the US Congressional session. Until this amendment is passed the US and EU will negotiate in order to agree upon a solution that permits the compensation of European composers and performers for the losses caused by application of this exception.

For more information see:

[http://europa.eu.int/comm/internal\\_market/en/intprop/news/01-1098.htm](http://europa.eu.int/comm/internal_market/en/intprop/news/01-1098.htm)

or contact: [LE.GOUEFF@vocats.com](mailto:LE.GOUEFF@vocats.com)

## EU THE EC REFERS UNITED KINGDOM TO COURT OF JUSTICE

The European Community reproaches the United Kingdom with incomplete implementation of Council Directive 92/100/EEC concerning the rental and lending rights and certain rights related to copyright in the field of intellectual property dated 1<sup>st</sup> November 1992.

This Directive provides for the payment of royalty fees to the producers of phonograms each time their music is broadcast in a place accessible to the public.

The United Kingdom considers that the payment of these fees is not required in cases where the broadcasting is free of charge for the public, as is the case in shops, where music is played in the background.

The Commission considers that this situation does not match any of the limitations set forth by the Directive concerning the payment of these royalty fees. It also underlines that the Directive must be read in regard to its international context, as the EU and/or its Member States are parties to international conventions that oblige them to provide equitable remuneration for performers and producers of phonograms as set out in the Directive.

For more information see:

[http://europa.eu.int/comm/internal\\_market/en/intprop/news/01-1108.htm](http://europa.eu.int/comm/internal_market/en/intprop/news/01-1108.htm)

or contact: [LE.GOUEFF@vocats.com](mailto:LE.GOUEFF@vocats.com)

## GERMANY TWO LEADING DECISIONS OF FEDERAL SUPREME COURT END DISPUTE ON DOMAIN NAMES

In the first decision the highest German court defined the standards for examining the registration of domain names. Legal action had been brought against DENIC, the society of Internet providers responsible for awarding domain names ending in “.de”, by Messe Frankfurt AG which claimed the registration of the domain name “ambiente.de” for a private user should be cancelled. Messe Frankfurt AG argued that it has prevailing rights to this expression.

The court held that there generally is no duty imposed on DENIC to ascertain whether a third party has any rights over a name to be registered.

When informed about an alleged prevailing right, DENIC may refer the person presenting the motion to the owner of the domain name for negotiations or – if necessary – legal proceedings. Only in cases

where a breach of law is easily ascertainable, must the registration objected to be immediately cancelled.

The second decision was the final one in the Mitwohzentrale.de case, the outcome of which had been feverishly awaited since it was expected to set a precedent for a number of other cases. Ruling that the use of generic terms as domain names does not violate competition law, the court reversed prior decisions of lower instances, thus ending the controversy.

According to the decision the user of a generic term such as *Buch* (book), *Geld* (money) or *Auto* (car) simply takes advantage without acting unfairly. Furthermore, the court reasoned that the use of a domain name does not establish an exclusive right equivalent to a trademark and therefore a competitor is not restrained from using the expression for advertising or in the firm’s name.

The lower courts had argued that the use of a generic term as domain name misleads the Internet-user and immorally canalises the stream of customers, since it leads them to believe that the found website is the only such site available. However, the Supreme Court rejected this main argument referring to the model of the average informed, reasonable and heedful Internet user who will realise that it is not the sole offer.

Though generally the use of generic terms as domain names is admissible, some limits were set out; e.g. in cases where a term is not only used as the top-level-domain (.de), but also prevents the same expression from being written differently or being used for other top-level-domains or where the consumer might be misled. In the latter case a link to other competitors must be given on the user’s website.

For more information see:

[www.uni-karlsruhe.de/~BGH/PressemitteilungBGH/PM\\_042\\_2001.htm](http://www.uni-karlsruhe.de/~BGH/PressemitteilungBGH/PM_042_2001.htm)

## HONG KONG THE DEATH OF COPYRIGHT IN THE DIGITAL ERA

### Copyright and its Relevance

Copyright is the principal intellectual property right that legal systems use to protect intellectual property such as music, software, art and literature. The core of copyright protection is the right to prevent another person “copying” the original work (although in practice copyright protection goes beyond this in most jurisdictions).

However recent technological developments permit distribution of work without the making of a large number of copies. As a result copyright may decline in importance as a method of protection. The new safeguard will not be preventing the making of copies but preventing access to or use of the original work.

### Digital Technology and the Internet

Owners of copyright raise revenue through exercising their exclusive rights to make copies of their work. Copyright is also licensed in return for royalties based on the number of copies made and/or sold by the licensees.

Today, anything that is reduced to a digital format can be transmitted across any platform that can read and record digital data. Digitised work can be transmitted via the Internet, the switched telephone network or wireless transmission.

The transmission of digitised work is not constrained by fixed points of transmission and receipt. Publication of work is not based on delivery of physical copies that contain the work. As a result the right to control copying of work may not prevent the exploitation of that work.

#### **Access to Copyright Protected Work on the Internet**

Instead of buying the physical copies that contain the work, purchasers can now pay for access to the work (which is encrypted) in digital form by purchasing the key for unlocking and downloading the work from the Internet. Many keys can be sold for any given work with different levels of rights of access.

There is no copying of the work that is merely being accessed (although depending on how access is achieved, there may be temporary copies made). Accordingly the end-user will be paying for the access key, rather than for his own copy.

Another example of this trend is the emergence of application service providers (“ASPs”). The application (i.e. software) is held by the ASP off-site and can be accessed by the customer using an Internet connection. The ASP raises revenue by charging application users for the right to use the software remotely.

The ASP is responsible for all maintenance and software updates. Again there is no copying of the application involved in this form of distribution – which is why so many software licensors prevent the licensee from acting as an ASP. The conventional copyright licensing is of lesser relevance.

#### **A Shift from Copyright to Access Control**

Where intellectual work is published by way of physical copies, the relevant law is copyright law. Where it is transmitted in digital form over the Internet, control of access is the key. From the physical copy market to the Internet or wireless access market, the relevant legal and contractual basis shifts from copyright to access control.

The right to copy no longer carries the value in view of the new technology. The focus today has shifted to control of authorised access of data to the work by way of encryption key.

#### **Conclusion**

In order to protect the owner or creator of original works, which is essential in order to encourage the creation of such work, “copyright” legislation has in many jurisdictions been extended to include restrictions on use of copyrighted material far beyond mere restriction on copying.

For example under current Hong Kong legislation, making copies available for use over the Internet is expressly considered an infringement under Section 26(2) of the Copyright Ordinance. It is to be expected that as technology continues to develop legislation will need to be adapted so that appropriate protection continues to be given to those who create original work.

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

## 11. MEDIA

### ITALY DIGITAL TV REGULATION

On 11<sup>th</sup> July 2001 the Italian Communication Authority issued a Draft Regulation on licensing for earth digital broadcasting for content, service and network providers.

Under this Draft, in order to broadcast Digital TV programs on earth frequencies, content providers must apply for authorisation and are held liable for the content and the nature of the programmes under the general principles governing the protection of minors, advertising and competition. Service providers may submit a declaration to the Communication Ministry for the activation of services, whilst network operators must apply for an individual license for broadcasting across the whole national territory or in smaller territorial areas.

The license is issued for a term of no longer than 12 years and is renewable. The applicant must be incorporated under the form of a joint-stock company. The total subscribed capital may not be less than 1/10 of the amount of the investments to be performed and the unit number of employees may not be lower than 100 units (national license) or 20 units (regional license).

The licensee, already a holder of a national license for the offering of telecommunication services, is obliged to set up a different company for broadcasting activity (national license) or to separate the accounts by activity (regional license).

With the aim of preventing a dominant operator from exerting too much influence, draft Article 27 provides that the commercial agreements between network operators and content or service providers must comply with the non-discriminatory and transparency principles.

The Draft Regulation also provides for a transitory regime for broadcasting operators using earth frequencies by means of satellite or cable systems, entitled them to apply for the awarding of a transitional authorisation for digital earth broadcasting. The Communications Authority is currently evaluating amendments to the Draft Regulation and the definitive version is expected shortly.

For more information see the Italian Communications Agency’s website:

[www.agcom.it/provv/sch\\_rtv\\_digitale.htm](http://www.agcom.it/provv/sch_rtv_digitale.htm)

## 12. TELECOMMUNICATIONS

### BELGIUM COST-ORIENTED IC TRAFFICS FOR BELGACOM MOBILE

On 25<sup>th</sup> July 2001, the Belgian Institute for Post and Telecommunications (the “BIPT”) published a document with respect to the adaptation of the interconnection tariffs of Belgium’s first mobile telecommunication operator, Belgacom Mobile (Proximus).

The document follows the designation in October 2000 of Proximus by the BIPT as having Significant Market Power ("SMP") in the National Interconnection Market and the Market of Mobile Communication Services.

Within the framework of the obligation of cost-orientation for mobile operators having SMP in the National Interconnection Market, the BIPT has advised Proximus to reduce its current average mobile termination rate by 10 % to EUR 0.1567 per minute with effect from October 2001.

Together with the decrease Proximus has already applied since its designation as operator with SMP in the National Interconnection Market, Proximus' total cut in the mobile termination rate would amount to approximately 21%.

To determine the recommended mobile termination rate, the BIPT refers to benchmarking rather than to a pure cost-oriented calculation method. The BIPT further recommends a set of complementary measures such as a tariff rebalancing by the other Belgian fixed and mobile operators.

The BIPT advice can be accessed at: [www.bibt.be/ibpt.htm](http://www.bibt.be/ibpt.htm)  
For further information contact: [g.vandendriessche@dbmlaw.be](mailto:g.vandendriessche@dbmlaw.be)

## BRAZIL THE BROADCAST LAW AND THE COMMUNICATIONS MODEL

The Ministry of Communications submitted for public comment proposed regulations under a new broadcast services law. Due to several requests by members of the industry, the deadline for the submission of comments was postponed to 18<sup>th</sup> August 2001.

Among the main modifications proposed is the creation of a National Communications Board (*Conselho Nacional de Comunicação*) whose task will be to advise the Ministry of Communications on the establishment of policies and guidelines for the exploitation of broadcast services and the review of the bidding process for the granting of broadcast licenses.

There has been some discussion between Anatel and the Ministry of Communication regarding the authority to regulate broadcast services in Brazil, since it has been argued that according to the model created by the late Ministry of Communications, Sergio Motta, Anatel should become an effective agency for the communications sector as a whole.

Under the bill of law, broadcast services are deemed to be a public service subject to universalisation and continuity obligations.

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

## BRAZIL SATELLITE AUCTION

On 21<sup>st</sup> August 2001 the National Telecommunications Agency ("ANATEL") issued Invitation to Bid n° 003/2001/SPV/ANATEL for the auction of up to three different rights to exploit Brazilian satellites for Conveyance of Telecommunications Signals using geostationary satellites.

Each right will be granted for a period of 15 (fifteen) years (renewable only once) in orbital positions that are in the process of co-ordination or notification in the name of Brazil or resulting from

cases of co-ordination to be started at the International Telecommunications Union (the "ITU").

The procedure will be carried out in three steps, with each step granting a new Right to exploit Brazilian satellites. The Bidder awarding each step will be entitled to choose an orbital position and the corresponding frequency bands for implementation of its satellite system project. Each Bidder may award up to two rights to exploit Brazilian satellites.

According to the Invitation to Bid, ANATEL will receive the bidder's documentation on 10<sup>th</sup> October 2001 and the procedure will be judged according to the criterion of the highest price. The minimum price for each right established in the Invitation to Bid is BRL 3,330,000 (three million, three hundred and thirty thousand Brazilian Reals).

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

## CHILE SUBTEL ANALYSES STRUCTURAL AMENDMENTS TO TELECOMMUNICATIONS REGULATION

In July 2001, the Chilean Undersecretariat of Telecommunications ("Subtel") officially started a preliminary analysis of structural amendments to the General Law on Telecommunications (the "GTL") and its main ancillary regulations, seeking to adapt such law and regulations to the environment of continuous development that currently influences the telecommunications industry in the entire world.

According to the Subtel, the main objectives that the amendments should pursue are as follows:

- promote competition in the Chilean telecommunications market;
- promote the implementation of Universal Access in Chile; and
- grant better and more efficient protection to the subscribers to telecommunication services in our country.

Likewise, the Subtel has determined that the amendments should address the following structural issues and specific problems<sup>1</sup>:

- proper administration of limited resources in the telecommunications sector:
  - Æ establishment of an efficient numbering allocation system;
  - Æ establishment of an infrastructure sharing system; and
  - Æ determination of the most efficient policy for the distribution of the radio-electric spectrum (including an analysis of the convenience of changing the free-of-charge distribution of the spectrum policy currently used in our country).
- mandatory services that should be provided between telecommunication operators:
  - Æ determination of an efficient methodology to fix access charges;
  - Æ enactment of better interconnection regulation;
  - Æ establishment of "unbundled access to the local loop" system; and
  - Æ improved regulation of the "calling party pays" system.

<sup>1</sup> Each specific problem is directly related to one of the referred structural issues.

- preparation of a regulatory framework that avoids information asymmetries between the authority, the operators and the subscribers and protects the confidentiality of proprietary information.
- preparation of a regulatory framework for the different subsidies that may or may not operate in the market:
  - Ædetermination of the subsidies that should be granted by the authority in order to promote access to telecommunications services by the subscribers (Universal Access);
  - Æelimination of crossed-subsidies between related operators; and
  - Ædetermination of the convenience of imposing a “mandatory subsidiary role” on telecommunications operators.

The Subtel has also proposed that the following solution models be adopted to solve the structural issues and specific problems referred to:

- establishment of a single type of telecommunications license system, authorising the different operators to provide all the services that their technology may allow;
- enactment of a new method for regulating subscriber claims n;
- promotion of self-regulation in the industry and limiting the role of the authority mainly to supervision activities;
- establishment of a system that allows the authority and the public to access as much market information as possible;
- establishment of an efficient dispute-resolution method for conflicts among operators; and
- establishment of a long-term regulatory generation process including the participation of operators and subscribers through hearings or similar procedures.

The Subtel is currently discussing the main aspects of the amendments with representatives of the main players in the domestic market. The authority will also analyse this subject matter with several experts encompassing the different aspects of the Chilean telecommunications market. All these discussions and analyses should converge in the preparation and publication of a “White Paper” that will set the basic framework for the amendments.

The proposed amendments have been widely perceived in the market as part of an adequate and necessary initiative to promote and improve the development of telecommunications in Chile that will allow it to maintain its leading position in Latin America.

For more information contact: [asilva@carey.cl](mailto:asilva@carey.cl) or [emartin@carey.cl](mailto:emartin@carey.cl)

## EU NEW SAFETY STANDARDS FOR MOBILE PHONES

Mobile phone manufacturers have to comply with strict limits set forth by a new electromagnetic safety standard, defined by the European Committee for Electrotechnical Standardisation (“CENELEC”). The standard was set out by the Council of Ministers in consideration of the limits proposed by the International Committee on non-Ionising Radiation Protection (“ICNIRP”).

The standard relies on new measurement methods based on “dummy heads” filled with test devices. Mobile phones manufactured to this standard will not expose users to excessive electromagnetic waves.

Every mobile phone marketed in the European Union must meet the new standard. Phones complying with this standard will meet the requirements of the Radio and Telecommunication Terminal Equipment Directive (1999/5/EC).

A recent report (European Parliament, note n° 05/2001 PE no. 397.563, February 2001) states that on average, mobile phones’ Specific Absorption Rate (“SAR”) values are largely below those recommended by the Council. Manufacturers have promised to publish the SAR values of their phones.

Further standards to be adopted by CENELEC will cover other product types, such as GSM base stations or antennas, anti-theft ports (used in shops) and low-power radio devices.

For more information see:

[http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/1190/0/RAPID&lg=En](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1190/0/RAPID&lg=En)

or contact : [LE\\_GOUEFF@vocats.com](mailto:LE_GOUEFF@vocats.com)

## IRELAND SIGNIFICANT MARKET POWER IN THE IRISH TELECOMMUNICATIONS SECTOR

On Friday 27<sup>th</sup> July, the Irish telecoms regulator, the Director of Telecommunications Regulations (“the Director”), announced the names of those entities which she has calculated as having Significant Market Power (“SMP”) in the Irish telecommunications market.

The last review of SMP designations was in 1999 and these newly published designations are based on the answers to a questionnaire which was sent by the Director to all licensed operators and which covered the twelve month period to December 2000.

The former State-owned incumbent, eircom continues to have SMP in the market for fixed networks and services and the leased line market. However, eircom’s designation in the national market for interconnection has been removed and instead, Digifone and Eircell (the two larger mobile telecommunications providers in Ireland) have been designated with SMP in that market.

Due to its continued designation of SMP in the markets for leased lines, fixed network and services, this change in designation does not affect eircom’s current obligations in relation to interconnection.

Digifone and Eircell both remain designated as having SMP in the mobile public telephony market.

The full text of the Director’s decision 00/57 may be viewed on the ODTR website: [www.odtr.ie](http://www.odtr.ie)

## ITALY INTERNET SERVICES

On 9<sup>th</sup> August 2001 the Italian Communications Authority issued a public consultation on the topics related to costs and tariffs applied to the offering of Internet access and services.

The consultation follows requests by Internet Service Providers concerning alleged violations of EU proportionality principles by the dominant operator Telecom Italia and sets the foundations for the introduction in Italy of a Flat Rate Access Call Origination fee (“FRIACO”).

On this issue, several operators have requested the Authority to suspend Telecom Italia's Internet wholesale flat fee to be introduced as of 3<sup>rd</sup> September 2001 at a flat rate of ITL 20 per minute, on the assumption of dominant behaviour.

At the moment, Telecom Italia offers both access and termination in favour of ISPs. As a consequence of the introduction of FRIACO, operators would pay a flat rate for each connection irrespective of the volume of traffic collected from ISPs.

The Authority is also suggesting that the numbering code "7" for all communications executed by means of the Internet is expeditiously implemented. The Authority has fixed a 45-day deadline for submitting comments.

For more information see the Italian Communications Agency's website:

[http://www.agcom.it/provv/d\\_20\\_01\\_CIR.htm](http://www.agcom.it/provv/d_20_01_CIR.htm)

## LUXEMBOURG AMENDMENT TO THE TELECOMMUNICATIONS ACT

As of 13<sup>th</sup> August 2001, an amendment to Section 3 of Title IV of Telecommunication Act (*Loi du 21 mars 1997 sur les Télécommunications*) was published in the Luxembourg official journal (*Mémorial A, n° 95*).

The amendment increases the powers of the Luxembourg Telecom regulatory authority, the *Institut Luxembourgeois des Télécommunications*, in order to overcome eventual unbalanced negotiation between the dominant telecommunications operator and the entering operator, and to ensure fair competition in the telecommunications market.

This amendment of the Luxembourg law on telecommunications follows a motivated opinion of the European Commission dated 20<sup>th</sup> September 2000, which estimated that the powers of the Luxembourg Telecom regulatory authority were insufficient.

The amended of article 27 (1) provides that the Luxembourg regulatory authority may organise, by means of an administrative decision, a constraining procedure:

- for the achievement of any negotiation of a network access agreement and/or any interconnection agreement;
- in order to fix access or interconnection conditions and financial conditions if no agreement is reached within a certain delay or if negotiations have failed;
- in order to require an amendment of existing agreements, including financial conditions of such agreements, in the case of the breach by either party, of competition rules, interoperability requirements of the services and/or accounting obligations.

The amendment of article 27 (2) settles the submission procedure before the Luxembourg Telecom regulatory authority regarding the points provided above.

As the Luxembourg Telecom regulatory authority is an independent administrative authority, the decision adopted may be subject to an invalidation recourse before the administrative courts.

For more information see: <http://www-etat.lu/ILT/legal/art27.htm>

or contact: [LE.GOUEFF@vocats.com](mailto:LE.GOUEFF@vocats.com)

## MEXICO DISCUSSIONS OF THE AMENDMENTS TO THE FEDERAL TELECOMMUNICATIONS LAW DELAYED

Despite promises by Mexico's Congress to review the proposal to the amendments to the Federal Telecommunications Law as of September 2001, the lack of consensus in key aspects of the reform, such as foreign investment participation and the Mexican Federal Telecommunications Commission role as a regulatory agent, have led Congress to defer the review of the new law until the beginning of 2002.

There is concern at all levels that the amendments to the law will be overshadowed by other more pressing matters already scheduled to be reviewed by Congress in such period, such as the budget for the year 2002.

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

## MEXICO THE ROLE OF THE FEDERAL TELECOMMUNICATIONS COMMISSION

One of the main issues to be settled by the amendments to the Federal Telecommunications Law will be the role that the Federal Telecommunications Commission ("COFETEL") will play as a regulatory agent for the industry. For several years COFETEL's role has been restricted in some areas to that of mere advisor to the Ministry of Communications and Transportation ("SCT").

While SCT wants COFETEL to become a supervising entity, COFETEL seeks greater autonomy. This position is backed by members in Congress who are willing to give COFETEL complete autonomy from the SCT.

Other voices within the private sector believe that the SCT should retain the power to implement long term policies in the industry, thereby granting broader powers to COFETEL, specially in technical areas, where COFETEL would no longer need SCT's sanction.

As to the role played by COFETEL's commissioners, the private sector is suggesting that the commissioners be appointed for periods of 9 years, with the possibility of being re-elected. It is expected that both the Minister of the SCT and President Fox will play a major role in settling this matter.

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

## MEXICO FOREIGN INVESTMENT UNDER THE NEW FEDERAL TELECOMMUNICATIONS LAW

We have previously reported that one of the most sensitive issues in the amendments to the Federal Telecommunications Law was the proposal by the Federal Government to completely open up the telecommunications market to foreign investment.

Since then, the private sector has strongly lobbied the Ministry of Communications and Transportation, the Federal

Telecommunications Commission and Congress with their opinions. As expected, *Teléfonos de México, S.A. de C.V.* ("Telmex") has been the proposal's fiercest opponent.

Opening the telephony market to foreign investors could certainly have an impact on Telmex's operations in Mexico. This matter has been strongly politicised in Congress by two clear tendencies.

On the one hand, there are those who believe that full investment in the market will be beneficial to the country as it will accelerate the development of the telecommunications industry in Mexico; while on the other hand, the old school of Mexican politics believes that the telecommunications area should be left under the control of Mexicans.

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

## MEXICO PROJECT E-MEXICO

Project E-Mexico, one of the most ambitious programmes announced by President Fox's administration since it took office, seeks to bring telecommunications services to rural areas through the Internet. It is expected that this programme will have a positive impact on the development of those areas by bringing much needed investment to Mexico's remote areas.

The first step has already been taken through the establishment of the Technical Committee of the E-Mexico System. The Committee comprises several specialists in the wire and wireless networks as well as public officials.

The challenges that lie ahead are many considering that Mexico still lags behind technologically, which affects the coverage and quality of transmission signals. There are many in the private sector interested in participating in the project.

Hewlett Packard has already announced that it plans to visit President Fox in October to present a specific project to participate in E-Mexico, which includes an investment offering.

Like many others (including Microsoft), HP is seeking to gain massive access to the Mexican market, by helping to link Mexicans through the Internet.

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

## PORTUGAL BLOCKED ACCESS TO AUDIOTEXT SERVICES

As a result of the enactment of Law 95/2001 dated 20<sup>th</sup> August 2001, access to Audiotext numbers is now blocked by default, requiring users who wish to access such services to specifically request them from the relevant operators.

The rule of blocked access applies to almost all numbers starting with the relevant Audiotext codes. An exception is made to the code corresponding to tele-voting services, for which access is maintained and will only be blocked if users so request.

These new requirements automatically apply to fixed telephone service contracts to be executed as from the date the above law enters into force. For existing contracts, the relevant telephone

service operators have a 90-day deadline in order to implement the blocking of access.

When blocking access to audiotext services, operators must inform customers of the means whereby they can request general or selective access to such services.

Customer information obligations of audiotext services are maintained. Audiotext services providers must include an initial 10-second message informing users of the price to be charged, the nature of the service, and whether it is for adults only; and must also include a beep every minute, so that customers are aware of the duration of the call.

Failure by audiotext services providers to comply with the above information requirement will entitle ICP to suspend the use of the prefix codes granted for a maximum period of 2 years, or to revoke the relevant registration as Audiotext Services Provider.

For more information see: <http://www.icp.pt/press/indexuk.asp>

## UK LOCAL LOOP UNBUNDLING: DISCRIMINATION COMPLAINT

OFTEL has published a statement of its findings following investigations undertaken into complaints made by a group of LLU operators alleging an abuse by BT of a dominant position in the local access market (specifically, allowing access to BT's local exchanges to co-locate operator equipment).

In particular the operators argued that, by rolling out its DSL business independently of the other operators and providing itself with access to sites from which these other operators were excluded, BT had unfairly favoured its own business to a material extent and thus abused a dominant position, or breached the undue discrimination prohibition in its licence.

Whilst accepting the possibility that BT might be dominant in a given local market, OFTEL concluded that in view of the insufficiency of evidence, it would not be justified to find that BT had a dominant position in the relevant market for the provision of space for DSL equipment across the UK.

However, despite this, OFTEL still felt it necessary to impose on BT both regulatory and contractual measures, including accounting transparency, so that OFTEL could be in a better position to review whether or not BT was in breach of its obligations.

Further information contact: [Cdl@olswang.co.uk](mailto:Cdl@olswang.co.uk)

## UK INITIAL COMPETITION REVIEW OF INTERNET CONNECTIVITY

Following a request by BT to reduce the regulatory obligations that apply to its generic wholesale dial-up Internet services, OFTEL has conducted an initial review of the Internet connectivity market in the UK.

Specifically, BT had requested that the Director General exercise his discretion to remove its licence obligation to notify, publish and adhere to prices, terms and conditions for these services and that he confirm that any discrimination in the provision of the services

encompassed by OFTEL's review would be unlikely to be deemed 'undue' (and therefore prohibited under BT's licence).

OFTEL is currently reviewing the markets for call origination and Internet call termination in its 2000/01 effective competition review of dial-up Internet access published in July 2001.

However, to consider fully BT's request, OFTEL decided that a review of the UK market for Internet connectivity would be worthwhile. Internet connectivity is a wholesale service that provides ISPs with access to one of the backbone networks that comprise the Internet.

OFTEL has opened its initial review to comment and consultation from industry (response are due by 30<sup>th</sup> October 2001), and acknowledged that its initial conclusion was based on limited information and was insufficient to reach a decision on BT's request.

Many operator customers of BT will be keen to question OFTEL's market analysis, and in particular the link between different access problems encountered with BT and which affect the Internet connectivity market.

For further information contact: [Cdl@olswang.co.uk](mailto:Cdl@olswang.co.uk)

## COMMENTARIES

### AUSTRIA

#### THE NEW CONCEPT OF MARKET DOMINANCE IN THE PROPOSED EU TELECOMMUNICATIONS FRAMEWORK (PART II)

by Dr Stephan Polster, M.A. and Matthias Brandl, LL.M.  
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The following is the second part of the commentary "The new Concept of Market Dominance in the Proposed EU Telecommunications Framework. The first part was published in the previous issue of "the i.n.k."

#### THE NEW CONCEPT FOR CALCULATION OF SMP

Under the proposed Art. 13 of the Framework Directive, an undertaking shall be deemed to have SMP if, "either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately Consumers".

This definition of SMP is consistent with the European Court of Justice's and the Commission's definition of market dominance under general EC Competition law. The Commission thus decided to align the definition of SMP under the ONP-Directives with the ECJ's definition of dominance within the meaning of Art. 82 of the EC Treaty.

By replacing the broader SMP-definition as applied so far under the ONP-Directives with the closer general definition of dominance, the Commission significantly reduces the threshold for regulatory interventions by the NRAs.

The Commission in this way is responding to increasing competition in the markets and with a view to introducing a concept that can be applied more flexibly to a rapidly changing market environment.

As to the criteria to be considered when determining market power, the Commission, in line with the principles developed by the ECJ, particularly refers to market shares of the undertaking concerned. In the Commission's decision-making practice, the threshold for market dominance is usually set at about 40%, while a company with 50% market share is usually regarded as dominant, save in exceptional cases.

Since under the previous concept of SMP under the ONP-Directives, the threshold for market dominance was, in principle, a market share of 25%, it is evident that under the new regime fewer operators will be deemed to have SMP.

However, the Commission states that the fact that an undertaking with a strong position on the market (such as an incumbent) is gradually losing market share might indicate that the market is becoming more competitive, but does not by itself preclude the existence of SMP of the operator concerned.

Fluctuating market shares over a longer period may indicate, on the other hand, a lack of market power.

The Commission stresses that not only market shares, but also other criteria will be taken into account when determining SMP. Such criteria are, for instance, the overall size of the undertaking, its technological advantages, control of infrastructure, its vertical integration, the existence of barriers to market entry and the absence of potential competition.

The Commission acknowledges that it is eventually for the NRAs to decide upon the most appropriate criteria for determining SMP in a given market. It is interesting to note that the Commission obviously excludes the application of the "essential facilities" doctrine to the ex-ante assessment of SMP within the meaning of Article 13 of the Framework Directive. The Commission argues that this doctrine is only relevant in Art. 82 cases, but not with respect to the imposition of ex-ante obligations on TOs.<sup>2</sup>

This view seems to be somewhat inconsistent with the concept of aligning assessment of SMP with the notion of dominance under Art. 82 of the EC Treaty. It remains to be seen whether the Commission will in fact adhere to this position in its future case law.

In its draft Guidelines the Commission emphasises that the principle of leverage of market power from one market to a closely related market is likely to have a wide field of application in the telecommunications sector. For instance, an operator who has SMP in an infrastructure market and is also present in the downstream (service) market may be considered by NRAs to have SMP in both markets.

This concept will apply, in particular, to vertically integrated telecom operators providing both infrastructure and services which might be found dominant in both the infrastructure and service market, even though their position in either of these markets taken alone would not be strong enough to trigger SMP.

In its Guidelines, the Commission thoroughly analyses the application of the concept of joint dominance. It seems that the Commission intends to rely on this concept more frequently in the future in telecommunications cases.

The Commission stresses that recent case law of the ECJ and the Court of First Instance<sup>3</sup> clarified that the existence of structural or economic links between two or more undertakings in a given market is not a mandatory condition for collective dominance to exist. The existence of an oligopolistic or highly concentrated market might suffice, provided that the structure of such market alone is conducive to anti-competitive behaviour on the relevant market.

The Commission will particularly be prepared to establish joint dominance on a given oligopolistic market, if such market has certain characteristics favouring co-ordinated behaviour, such as few market players, moderate growth on the demand-side, homogeneous products, similar cost structures and market shares of the participants, transparent market conditions, mature technology, high barriers to entry, lack of potential competition, informal or other links between the market participants, retaliatory mechanisms and a lack or a reduced scope for price competition.

<sup>2</sup> Guidelines, page 73.

<sup>3</sup> Joint cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge and Others v. Commission* (2000) ECR I-1365; case T102/96, *Gencor v. Commission* (1996) ECR II-753.

It is evident that the above criteria might match markets in the telecommunications sector and in particular mobile markets (which often involve elements of an oligopolistic market structure). In its recent case law, the Commission has already identified joint dominance of market players in the German and Belgian mobile market.

In *Vodafone/Airtouch*<sup>4</sup>, however, the Commission's concerns were finally removed after it was established that at least three large mobile operators were present on the market. However, in the Guidelines, the Commission points out that markets with more than three players may also, under certain circumstances, be considered as being conducive to oligopolistic dominance.

### IMPOSITION OF EX-ANTE OBLIGATIONS ON SMP OPERATORS

Pursuant to Art. 14 of the proposed Framework Directive, NRAs may only impose ex-ante obligations on SMP operators if the market in question is not effectively competitive.

It is for the NRAs to assess whether such effective competition exists. In its Guidelines the Commission does not expressly examine the notion of "effective competition" in terms of Art. 14 of the proposed Framework Directive.

Consequently, it appears that the Commission equates the criterion of effective competition with the lack of SMP in a given market. If, on the other hand, a TO is deemed to have SMP in a market, effective competition is excluded and the NRA may impose ex-ante obligations on the operator concerned.

When imposing ex-ante obligations, the NRA must comply with the principle of proportionality and must only impose such obligations which relate to the market in which the TO concerned has SMP. According to the Commission, NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP.

Under the current proposal for the Framework Directive, the Commission shall be entitled to require NRAs to amend or withdraw any imposition or withdrawal of ex-ante obligations, if such measures are incompatible with the objectives of the new framework.

The Council, however, wants to reduce the Commission's powers in this respect to a right to issue mere non-binding opinions. From today's point of view, it is therefore rather unlikely that the Commission will be granted a right to change decisions taken by the NRAs.

Finally, it is interesting to note that pursuant to recital 20 of the proposed Framework Directive, ex-ante regulatory obligations shall be justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights or are vertically integrated entities (owning network infrastructure and also providing services over that infrastructure to which the competitors necessarily require access).

In effect, this would mean that ex-ante obligations could be imposed only on ex-monopolists and vertically integrated operators. However, since recital 20 is not mirrored in the main text of the proposed directive (which does not provide for a respective limitation of potential ex-ante obligations), it will probably serve as a mere interpretative guidance on the application of Art. 14.

<sup>4</sup> Case n° IV/M.1430 *Vodafone v. Airtouch*.

Thus, it is likely that the Commission and NRAs will particularly be aware of the market power of ex-monopolists and vertically integrated operators when exercising their regulatory functions.

## IRELAND MVNOS: WHAT'S GOING ON?

by Damian COLLINS  
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### INTRODUCTION

The recent High Court case involving Meridian/Cellular 3/Imagine and Eircell and its aftermath led to discussion about MVNOS and the role they might play in mobile telecommunications in Ireland.

The purpose of this article is not to enter into the debate on whether or not MVNOS are good for competition and for an investment-rich telecommunications sector. Instead, the article will try to address three basic questions concerning MVNOS in the Irish context.

Those questions are: first, what is an MVNO? Secondly, is there any example of an MVNO currently in operation? Thirdly, what is the attitude of the Office of the Director of Telecommunications Regulation ("ODTR") to MVNOS?

### WHAT IS AN MVNO?

There is no internationally accepted definition of a Mobile Virtual Network Operator ("MVNO"). This may be because very few, if any, MVNOS actually exist.

From the mobile telephone subscriber's point of view, a MVNO would offer an identifiable brand, issue a SIM card and send out bills. The subscriber would not expect the MVNO to have its own dedicated network like existing mobile network operators ("MNOs"), such as Eircell, Digifone and Meteor in Ireland.

For the network aspects of the mobile service, the MVNO would "piggyback" on the network of an existing MNO.

On a more technical level, both the ODTR and the UK telecommunications regulator, OFTEL, have defined the term MVNO to apply to an entity which, although not having a mobile radio access network, operates a mobile switching centre (MSC), a location register (HLR) and an authentication centre (AUC).

### IS THERE ANY EXAMPLE OF AN MVNO CURRENTLY IN OPERATION?

With the possible exception of one operator in Denmark, no entity defined as an MVNO in the terms used by the ODTR and OFTEL has yet begun to offer MVNO services in any EU Member State.

Confusion can arise on this point because the term "MVNO" has been used widely in the media to refer to telecommunications operators providing simple airtime resale services to subscribers without issuing SIM cards or maintaining the type of equipment mentioned in the ODTR and OFTEL definitions.

The term "MVNO" is also sometimes used to cover the situation in which the owner of a well-known brand allows a MNO to sell its mobile services under that brand without the brand owner itself becoming involved in any significant way in the provision of telecommunication services.

There is currently no MVNO in operation in Ireland. From time to time, firms engaged in telecommunications service provision have

indicated an interest in (and some have even announced an intention of) providing MVNO services.

However, as yet none of the three licensed MNOs has granted network access to an MVNO and no specific legislative or regulatory measures have been adopted to promote or compel MVNO access. There has not been any active market intervention by the ODTR in support of MVNOs.

#### WHAT IS THE ATTITUDE OF THE ODTR TO MVNOS?

This is certainly the most difficult of the three questions to answer. There seems to have a number of shifts in the attitude of the ODTR towards MVNOs during the last 12 months.

A range of often conflicting views have been expressed in the papers published by the ODTR with the result that it is now quite difficult to reconcile the various ODTR positions or to syncretise them into a single position. Under the circumstances, the most satisfactory way in which to present the ODTR's approach is to review its various statements chronologically.

#### The Access Consultation Paper

The ODTR first addressed the MVNO issue in a Consultation Paper published in May 2000 entitled "*The Regulatory Framework for Access in the Mobile Market*" ("the Access Consultation Paper").<sup>5</sup> That consultation was not limited to MVNO access, but also covered airtime resale, other forms of indirect access and national roaming. The Paper contains some descriptions of how the ODTR envisages MVNO operating.

The tone of the Access Consultation Paper suggested that the ODTR was well disposed towards a broad category of service providers who sought to provide their services on the basis of access to the networks of MNOs; the Paper included a statement of the ODTR's belief that "*access to the mobile networks has the potential to enhance competition in the mobile market*".

It seems that, in the ODTR's assessment, this category of service providers should include but is not limited to MVNOs. An indication of the likely direction of the ODTR's thinking on the particular type of access required for MVNO services was provided by its comment in the Paper that MVNO access was analogous to unbundled access to the local loop of the incumbent fixed operator.

This is a peculiar statement because, while there is only one fixed local loop network operator in Ireland, there are three competing MNOs. By basing its approach to MVNO access on a supposed analogy between the situations in the fixed local loop and in the mobile sector, the ODTR may have sown the seeds of the confusion which becomes apparent in its later Papers on the MVNO issue.

#### The Access Report Paper

Following the submission of comments by interested parties, the ODTR published a Report on the Access Consultation ("the Access Report Paper")<sup>6</sup> in July 2000. In this Paper (which does not include any legally binding conclusions), the ODTR adopted positions explicitly favourable to MVNO access.

<sup>5</sup> Document No ODTR 00/32, "The Regulatory Framework for Access in the Mobile Market – Consultation Paper". This Paper, together with all other ODTR documents, may be viewed on the ODTR's website : [www.odtr.ie](http://www.odtr.ie).

<sup>6</sup> Document No ODTR 00/53, "The Regulatory Framework for Access in the Mobile Market – Report on the Consultation".

The ODTR explained that MVNOs, in order to provide their services, would require both interconnection and access to roaming services on mobile networks. In relation to interconnection, the ODTR explained that under the EC Interconnection Directive (and the domestic Irish legislation implementing that Directive) MNOs with significant market power ("SMP") in the mobile market are obliged to negotiate interconnection with "*qualifying operators*".

The ODTR's intention seems to have been to imply that MVNOs are included in this "*qualifying operators*" category. However, it did not seek to explain what it meant by the term "*qualifying operators*", which is not a term used in the Interconnection Directive or in domestic Irish legislation.

The ODTR also noted that the Interconnection Directive requires mobile operators designated as having SMP in the national market for interconnection to provide interconnection on a cost oriented basis.

In addition, the ODTR said that where commercial negotiations on interconnection fail, it will provide dispute resolution to ensure that appropriate interconnection is put in place to "*facilitate interoperability and maximise benefits to end users as speedily as possible*".

In relation to roaming, the ODTR explained in the Access Report Paper that, in its view, operators are also free to negotiate the roaming access required for the provision of MVNO services. The ODTR said that it saw its role as being to encourage parties who are interested in this form of access to commence commercial negotiations "*as quickly as possible*".

The ODTR explained that, in the event of a failure of commercial negotiations, it would, consider taking action to "*facilitate competition*", on a case by case basis, under dispute resolution procedures "*or otherwise*".

In summary, therefore, the ODTR's objective in the Access Report Paper seems to have been to convince MNOs that it was prepared to intervene on the basis of its existing powers to compel MVNO access.

It must be said that for such an important regulatory initiative the level and detail of the legal analysis in the ODTR's Access Consultation and Report Papers are very disappointing.

There is, for example, no detailed analysis in these Papers of the central issue of whether or not the EC Interconnection Directive mandates the elements of network access required for MVNO services. The Papers contain only general statements on the desirability of commercial negotiation and an adumbration of the ODTR's powers in relation to interconnection disputes.

There is no express statement that the ODTR has the power to impose MVNO access and no significant reflection on whether it is appropriate to compel such access on a case by case basis using powers granted under the Interconnection Directives but not specifically intended for that purpose.

#### The 3G Consultation Paper

The absence of any detailed reflection in the ODTR's Access Report on the availability of a legal base for compelling MVNO access can probably be explained by the contemporaneous

appearance in July 2000 of the ODTR's Consultation Paper on the licensing of 3G mobile services ("the 3G Consultation Paper").<sup>7</sup>

The 3G Consultation Paper seems to reflect a view held at that time within the ODTR that the 3G licensing process could be used to secure the acquiescence of the MNOs to MVNO access. In the 3G Consultation Paper, the ODTR indicated that it favoured a "beauty contest" to award the four 3G licences it intended granting.

It also stated that it was considering requiring, as a pre-qualification criterion, an undertaking from all applicants for 3G licences to provide MVNO access to their networks. From the language used by the ODTR to describe this commitment, it was possible to gain the impression that the ODTR intended it to cover not only 3G networks but also existing 2G networks.

The ODTR said that it would also invite applicants to offer commitments on inter-operator access pricing (and presumably, although this was not explicitly stated, mark those commitments competitively). The prospect that the 3G licensing process might be used to extract concessions on MVNO access produced strong protests from Irish MNOs (and parties interested in acquiring a mobile operation in Ireland).

However, rather than posing a threat to network operators, the 3G Consultation Paper may instead have revealed a fundamental weakness in the position on MVNOs adopted in the ODTR's Access Report Paper. Put simply, if the ODTR had the power under existing legislation to compel MVNO access, why should it need to use the 3G licensing process to extract commitments from mobile operators in relation to MVNO access to 2G or 3G networks?

#### **The 3G Response Paper**

The next stage was the publication, in December last year, of the ODTR's Response to the 3G Consultation Paper ("the 3G Response Paper").<sup>8</sup> In that Paper, the ODTR provides details of the terms on which it will offer the four 3G licences available in Ireland. The ODTR's position on MVNO access seems to have changed considerably during the consultation process.

The requirement that all participants in that 3G licensing process should give a prior commitment to MVNO access is abandoned. Instead, the ODTR now proposes including, as a voluntary evaluation criterion for one of the four licences, the provision of air interface access for MVNOs on a "retail minus" basis. A bidding party may extend that voluntary commitment to its 2G network.

The ODTR also explains that, in order to qualify for access, an MVNO operator will be required to operate certain dedicated network elements (a mobile switching centre, a home location register and an authentication centre), have its own unique mobile network code and issue its own branded SIM cards.

#### **CONCLUSION**

Last summer, the issue of network access for MVNOs appeared to be a central plank in a broad ranging ODTR mobile access policy and a key element in its proposals for the 3G licensing process. Now, it seems to be no more than the basis for a voluntary

commitment which may enhance a bidder's chances of being awarded one of four 3G licences.

The other three 3G licences will be offered free of any MVNO access commitments. Furthermore, despite the views expressed in the earlier Papers on the topic and despite requests for regulatory assistance from firms claiming to propose MVNO services, there has not been any active market intervention by the ODTR in support of the provision of MVNO services in Ireland.

The changing signals emanating from the ODTR on MVNO access during the past twelve months have inevitably caused some confusion among those interested in mobile telephony regulatory issues in Ireland.

However, since the 3G Response Paper, it seems clear that the ODTR has effectively conceded that it lacks the power under current legislative provisions to compel MNOs to grant networks access to MVNO service providers.



<sup>7</sup> Document No ODTR 00/52, "Extending Choice – Opening the Market for Third Generation Mobile Services (3G Mobile) – Consultation Paper"

<sup>8</sup> Document No ODTR 00/92, "Extending Choice – Opening the Market for Third Generation Mobile Services (3G Mobile) – Response to the Consultation".

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