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Click on a table of contents entry to go directly to the desired title.
To return to the table of contents use Ctrl + Home or Ctrl + End.

JULY - AUGUST 2002

NEWS 2

1. ACCESS TO PUBLIC SECTOR INFORMATION 2

EU Directive on exploitation of public sector information 2

2. COMPETITION 2

PORTUGAL OniWay sues Vodafone before the EU Commission 2

SPAIN Resolution to adopt specific measures on pre-selection 2

SPAIN merger of the Pay TV Satellite Digital Platforms 2

SPAIN The new type “D” authorisation 3

3. COMPUTER CRIME 3

HONG KONG New restrictions on (assisting) gambling 3

NORWAY ISP liable for distribution of illegal pornography 4

THE NETHERLANDS Deutsche Bahn vs. XS4ALL 5

4. DATA PROTECTION 5

BELGIUM Control of on line communication of employees’ data 5

EU Compromise on data protection for e-communications 6

GERMANY Patient records online 6

LUXEMBOURG Act on personal data protection voted 6

5. DIGITAL SIGNATURE 6

GERMANY Federal Government supports digital signature 6

GERMANY Man as Key 7

6. DOMAIN NAMES 7

EU New regulation on .eu TLD implementation 7

7. ELECTRONIC COMMERCE 7

ARGENTINA Court of Appeal declares electronic receipts valid 7

BELGIUM DNS-BE takes last step in liberalising .be domain names 7

GERMANY Electronic Tickets 8

8. ELECTRONIC DEMOCRACY 8

EU E-government 8

GERMANY Finance Court hears a case using video-conference 8

9. INTELLECTUAL PROPERTY 9

FRANCE The use of registered corporate names in metatags 9

10. MEDIA 9

BRAZIL Communication Council members are approved 9

BRAZIL Foreign investment in journalistic and broadcasting firms 10

SPAIN Liquidation of Quiero TV 10

11. TARIFFS 10

CANADA CRTC releases price cap decision 10

12. TELECOMMUNICATION 11

AUSTRIA Operators contest costs for surveillance activities 11

EU Electronic communication regulatory framework 11

GERMANY Toll by satellite 12

INDIA TRAI draft sets time limit for interconnection 12

MEXICO SCT to cancel dominance rules issued against TELMEX 12

MEXICO Mexican legislator scrutinises COFETEL’s autonomy 13

PORTUGAL Access to digital technology for local radio stations 13

SOUTH AFRICA The introduction of needletime 13

SPAIN The adaptation of the Telefónica Cable legal title 14

UK New possibilities for wireless 14

UK OFTEL announces increased reliance on competition act 15

UK OFTEL’s conclusions on BT's retail prices 15

13. UNIVERSAL SERVICE 16

SPAIN Universal service comprises Internet access 16

EVENT 16

EDITOR / EDITORIAL BOARD 17

TABLE OF CONTENTS BY COUNTRY 18

Back issues of the l.i.n.k. are available at
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NEWS

1. ACCESS TO PUBLIC SECTOR INFORMATION

EU
DIRECTIVE ON EXPLOITATION OF PUBLIC SECTOR INFORMATION

On 5th June 2002 the European Commission has presented a proposal for a Directive on the exploitation of public sector information.

The proposed Directive aims to lower the barriers encountered by European companies which have developed information services and products based on public sector information.

Content companies collect and hold vast amounts of public sector information (e.g. financial, cultural and tourist information).

The value of information services and products based on public sector information is estimated at EUR 68 billion, which is comparable to industries such as legal services and printing.

It is the view of the European Commission that the economic potential of the public sector information has not been adequately realised, and that this is mainly due to legal and practical barriers, including:

- pricing;
- response times;
- exclusive arrangements; and
- general availability of information.

The proposed Directive will aim to achieve minimum harmonisation of the legal framework for the exploitation of public sector documents and will regulate fair trading, charges and response times and create new opportunities for European content companies to develop value-added information products. Additionally, the proposed Directive will aim to reduce the gap with the US where the public sector information market is five times larger than in the EU.

The proposed Directive will be submitted to the EU's Council of Ministers and the European Parliament.

For more information please contact: LE_GOUEFF@vocats.com

2. COMPETITION

PORTUGAL
ONIWAY SUES VODAFONE BEFORE THE EU COMMISSION

OniWay, a UMTS licensed operator, has filed a complaint with the European Commission on the grounds that Vodafone, another Portuguese UMTS licensed operator which also holds a GSM licence, is abusing its dominant position in the Portuguese mobile phone market.

OniWay complained that Vodafone is not only jeopardising the European Union's competitiveness in the mobile telecommunications market, but also discriminating against OniWay with regard to interconnection and roaming agreements. OniWay takes the view that Vodafone's behaviour constitutes a refusal to deal, a classical means used by dominant operators to either drive competitors out of the market or to prevent their entry to it.

OniWay believes Vodafone is abusing its dominant position and preventing it from entering the Portuguese mobile telecommunications market and has accordingly filed a complaint with the European Commission.

This complaint was lodged after the deadline set by the Portuguese National Regulatory Authority, ICP-ANACOM, for all the mobile phone operators to execute interconnection agreements had passed.

If the Commission upholds OniWay's complaint, heavy penalties could be imposed on Vodafone.

For more information please contact: mc@vieiradealmeida.pt

SPAIN
RESOLUTION TO ADOPT SPECIFIC MEASURES ON PRE-SELECTION

The Telecommunications Market Commission has passed a resolution imposing specific obligations on TESAU in order to guarantee the effectiveness of the Spanish pre-selection regulation currently in force.

In particular, the Telecommunications Market Commission obliges TESAU to modify its technical pre-selection system (named *SGO-Preselección*) in order to reduce the term for managing for pre-selection requests to a maximum of 5 working days.

Additionally the resolution includes an Annex which sets out the functionality and quality and service levels to be implemented by the *SGO-Preselección* system, giving TESAU a period of 21 working days to adapt its system.

For more information please contact: aam@gomezacebo-pombo.com

SPAIN
MERGER OF THE PAY TV SATELLITE DIGITAL PLATFORMS

On 9th May 2002, the media announced the merger of the only two existing Pay TV Satellite Digital Platforms in Spain (*Canal Satélite Digital and Vía Digital*), controlled by the competitors Sogecable and TESAU, respectively.

Neither the Spanish authorities nor the EU Competition Authorities have yet decided which jurisdiction is competent to analyse the operation. Nevertheless the EU Competition Authorities have already started to examine the merger under EU Competition Rules.

At the same time, the Spanish Authorities have requested that the EU Competition Authorities assume jurisdiction over the analysis of the operation, according to Article 9 of Council Regulation EEC

No. 4064/89 of 21st December on the control of concentrations between undertakings, due to the fact that the merger has its effects mainly in Spain.

Two main legal issues derive from the proposed merger: first, the limitations under Spanish legislation on the participation in any TV operator (in number and percentage), and second, the question of the strong market share and turnover of both participants in the Spanish broadcasting and production market.

The Private TV Act No. 10/1998 of 3rd May sets out the prohibition on all the companies participating in any of the 3 TV channels commonly named as "private channels" (Tele 5, Antena 3 and Canal +) or in any of the land digital TV channels (Veo TV, Net TV y Quiero TV) from participating in more than one of the aforementioned companies and from holding more than 49 % of their share capital.

For the companies that manage the satellite television concession, the only limit that applies is the 49% prohibition on the participation in the share capital of the channel's owners.

The problem arises due to the fact that the resulting company will have a stake in two companies subject to the prohibition of Article 19 of the Private TV Act num. 10/1998 of 3rd May (Antena 3 and Canal+), which will oblige Sogecable and Vía Digital to cease their participation in one of these companies.

According to recent media reports, the Spanish Government might modify the above mentioned limits, in order to allow the simultaneous presence in two or more TV channels, without limitation on the participation in the share capital of either company.

For more information please contact: aam@gomezacebo-pombo.com

SPAIN
THE NEW TYPE D AUTHORISATION

Pursuant to Order CTE/711 2002, of 26th March, (the "**Order**") the MST has specified the conditions for providing telephone information services regarding telephone numbers and related data of the users.

TESAU is currently the monopoly provider of this service (commonly known in Spain as "1003").

According to the new Order, entitlement to provide these services will be subject to a new type "D" general authorisation.

On obtaining this new type "D" general authorisation the telecommunications operators will be able to provide services consisting on the transmission and carriage of telephone calls made using public telephone networks to the corresponding telephone call centres. Once the call is received by the call centre it will proceed to inform the user about the telephone numbers requested.

Additionally users of this new service can ask the call centres for additional details related to subscribers (such as names, e-mails or home addresses).

It is important to point out that the new type "D" authorisation does not allow the operator to transfer incoming e calls to the requested telephone numbers. For that additional service the operator must obtain a legal title allowing it to make telephone calls to its subscribers (type "A" or "B" licences).

In a year's time all the operators that provide this service will use the same number "1003", which after this period will be dedicated to other uses according to the National Numbering Plan which has not yet been decided.

The granting of this new title includes the possibility of obtaining a specific "118" numbering followed by 2 additional numbers which will be used to distinguish each different operator.

The Telecommunications Market Commission is the body that will centralise the reception of all subscribers in order to facilitate the provision of the service by all the operators and to avoid any inconvenience in sharing the data.

For more information please contact: aam@gomezacebo-pombo.com

3. COMPUTER CRIME

HONG KONG
NEW RESTRICTIONS ON (ASSISTING) GAMBLING

The Hong Kong Jockey Club has long had a monopoly on taking bets on horse racing and lotteries (with limited exceptions) in Hong Kong. Most other forms of gambling (including soccer betting) are illegal in Hong Kong. The new legislation has been introduced because of grey areas which made it difficult to bring prosecutions under the old Gambling Ordinance.

For example, overseas bookmakers, notably from the United Kingdom, began marketing horse racing betting to Hong Kong residents. As the bets were placed overseas, it was not clear whether this constituted gambling in Hong Kong, and therefore it was not clear whether this activity was unlawful.

In addition, there has been a rise in the popularity of soccer betting in recent years. The Hong Kong Jockey Club is not allowed to conduct soccer betting activities itself. Accordingly, offshore soccer betting operators face much less competition in Hong Kong than those providing horse race betting. Since much soccer betting was conducted over the Internet, there was again difficulty in bringing prosecutions, as the old Ordinance was unclear as to the extent that it covered such activities.

The amendments now made to the Gambling Ordinance remove these doubts and as a result, offshore gambling operators have been closing down their premises in Hong Kong. The key amendments that have been made can be summarised as follows:

- the definition of "bookmaking" has been extended to include receiving bets over the internet. This is an offence under Section 7(1A) if the bet is placed from Hong Kong or the person making the bet is physically in Hong Kong when the bet is placed;
- it is now clear under Section 8 that betting with a bookmaker includes a bet that is received either within or outside Hong Kong. Accordingly, the place where the bet is actually received is no longer relevant under the legislation. However, for an offence to be committed the person placing the bet must be physically in Hong Kong at the time;
- a new offence has been added of operating a premises where bookmaking or betting is promoted or facilitated. A further

offence has been added of knowingly promoting or facilitating bookmaking (new Sections 16A and 16B);

- the new Section 16C spells out in some detail what counts as promotion or facilitation of bookmaking or betting with a bookmaker. It includes disseminating or exhibiting advertisements or providing the service of receiving a bet, transmitting a bet, receiving a deposit in respect of a bet or the transmission of winnings. Accordingly, banks could be liable if they knowingly transmit a bet or winnings on a bet on behalf of a client and newspapers and web sites could be liable for running advertisements that promote betting in Hong Kong;
- the broadcasting of forecasts, odds or tips relating to horse, pony or dog races within 12 hours before the conduct of the race is prohibited. This does not apply to races organised by the Hong Kong Jockey Club; and
- certain presumptions have been inserted under a new Section 19. For example, where gambling equipment is found in a premises or entry by the police has been delayed, it is presumed that the place is a gambling establishment. Where a person is found in a gambling establishment or it is shown that a person escaped from a gambling establishment then, in the absence of evidence to the contrary, that person shall be presumed to have been gambling there.

Under the old Ordinance, there were various offences relating to aiding and abetting the primary offences. This caused some confusion because, as a matter of general law, aiding and abetting any offence is itself an offence. Accordingly, all references to aiding and abetting have been deleted from the Ordinance and the general offence of aiding and abetting (which has a wider application) will apply instead.

The effect of the new Ordinance will make it illegal for offshore bookmakers to operate in the Hong Kong gambling market. It will also make it illegal for anyone to knowingly facilitate or promote betting in Hong Kong.

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

NORWAY
ISP LIABLE FOR DISTRIBUTION OF ILLEGAL PORNOGRAPHY

The Oslo City Court held in its judgement of 5th June 2002 that the Norwegian telecommunication company, Tele2 Norge AS ("**Tele2**"), was liable as an accomplice in the communication of illegal pornographic material hosted through news-groups offered byTele2.

In 2000, the prosecuting authority for Economic, Environmental and Computer Crime in Norway (*Økokrim*) issued a fine against Tele2 for being in violation of the Norwegian Criminal Code Section 211 (today Section 204). Pursuant to Section 211, cf. Section 48a, any person or company who publishes, offers for sale or hire or in any other way attempts to distribute or import, or who publishes with intent to distribute or import, indecent or pornographic writings, pictures, films, videograms or the like, may be fined or subject to imprisonment for a term not exceeding two years or both. An accomplice is liable for the same penalty as the perpetrator, and any person or company who negligently commits such act shall be liable for fines or imprisonment for a term not exceeding six months or both.

It was undisputed that:

- the material in question contained clearly illegal material in the form of pornographic pictures and videograms showing *inter alia* children, animals and violence, and
- the material was offered by a news-group hosted and communicated by Tele2 during the period July 1998 to May 1999.

The material was presented through alt.binary-groups named for example "alt.binaries.pictures.erotica.teensex", as well as "alt.binaries.pictures.utilities". The case concerned binary files stored on Tele2's own servers, not hyperlinks to binary files on servers hosted by third parties.

The main question addressed in the judgement, was whether Tele2 could be held liable as an accomplice based on negligence for not being more active in identifying and deleting news-groups within the alt.binaries-hierarchy when the name of such groups indicated clearly illegal pornography (e.g. "alt.binaries.pictures.erotica.teensex").

In its thorough review of the facts, the court emphasised that the scope of the penalty clause does not cover all communications of illegal material. Thus, for example postal services and broadcasting providers fall outside of the scope of the penalty clause.

The court held that, as a host, Tele2 had no influence on the material offered through its services and had as such, quite a different role from, for example, editors of newspapers, radio and television, at least to the extent that the company does not approve or sanction the material to be published beforehand.

The court held that due to the technical role of Internet service providers, one must refrain from establishing liability for lack of control over what is published. The court furthermore held that the provision of access to the World Wide Web could not establish liability even if it is commonly known that illegal content is offered through this service.

However, the court held that when illegal material is offered through news-groups, the content is more easily identifiable and accessible for users (even if it may be argued that this is just an appropriate way of sorting the material) and as such, news-group services differs from www-services.

In considering the EC Directive on electronic commerce 2000/31/EC ("Directive on electronic commerce") Section 15 (not yet implemented in Norway), the court held, with reference to, among others, preamble (48), that even though the Directive exempts service providers from liability, each country may set out its own requirements for limited liability and negligence in connection with the hosting of illegal material.

In principle, the court was reluctant to impose a duty of censoring on the service provider. As in such an instance not only illegal pornographic material would be subject to such liability, but also material contrary to other provisions of the law such as defamatory or blasphemous material and copyright infringements. The court also pointed out that there are limited practical possibilities of controlling the content of articles and messages, as well as difficulties in determining the illegality of the material and the unwanted consequences relating to censorship.

The court, in its judgement, held that the service provider could not be liable for not having monitored each single news-group. The court went on to state that even within the strict limits set out in the

EC Directive, there are exceptional situations and thus an opportunity for imposing punitive sanctions against services providers who do not uphold a minimum level of control and censorship in matters where there is clearly illegal material.

On this basis, the court held that Tele2 had acted negligently in not having controlled news-groups with certain names which identified clearly illegal material (e.g. "alt.binaries.pictures.erotica.teensex"), or having conducted spot checks of such, and which would have to easily led to the discovery that clearly illegal material was being offered. In this regard, the court also emphasised that Tele2 only hosted a limited number of news-groups (a couple hundred).

After considering the background of the case, which involved prior co-operation with the policy authorities to stop similar activities in relation to illegal material, the court held that Tele2 did not follow up on the identification and removal of similar groups, if at all. In this regard, the court held that Tele2 had acted negligently by not following up, on its own initiative, with the control and removal of similar news-groups.

The court sentenced Tele2 to a fine of NOK 500,000 (approx. EUR 66,000). As the matter raised principal issues that remain unresolved, court costs were not apportioned. Tele2 is expected to appeal the judgement.

For more information please contact: arne.ringnes@tkgl.no

THE NETHERLANDS
DEUTSCHE BAHN VS. XS4ALL

This case concerns web sites hosted by the Dutch Internet Service Provider XS4ALL and created by an organisation of activists informing visitors to the site on how to sabotage the Deutsche Bahn's railway network. Deutsche Bahn exploits the national railway network in Germany. Deutsche Bahn requested XS4ALL to remove or disable these web sites and provide the names and addresses of the content owners. XS4ALL did not comply with this request. Consequently, Deutsche Bahn started summary proceedings in the Netherlands against XS4ALL. Deutsche Bahn claimed that the web sites were unlawful and that it would suffer harm. The claim referred to a judgement of the district court of Den Haag of 9th June 1999 ("Scientology Case"). According to this judgement service providers are obliged to remove unlawful contents and to provide the names and addresses of the content owners.

XS4ALL's response, *inter alia,* was that the information provided on the web sites was not unlawful in respect of Deutsche Bahn. It disputed its liability on the basis of the Scientology Case. It stated that the judgement is only provisionally enforceable and, moreover, that the judgement has been superseded by the European E-commerce Directive and the Dutch Bill to implement this Directive. According to XS4ALL, an Internet service provider (ISP) is acting illegally if and insofar as the ISP has been notified that a user (subscriber) is acting illegally on its web site. If no notice has been received, there are no reasonable grounds for intervening. Furthermore, ISPs also need to take into account the right to freedom of speech. In this case, XS4ALL considered that a restriction on the right to freedom of speech was not necessary, as the content of the web sites was not indisputably unlawful. It referred to other manuals for terrorist organisations such as the Al-Quaeda manual that can easily be consulted by anyone through the Internet. Furthermore, XS4ALL invoked the protection of the right to freedom of speech and the privacy of its users.

In its verdict of 25th April 2002, the district court of Amsterdam decided that there might be information available through the Internet that is more dangerous or harmful than the contents of the disputed web pages. However, according to the court, this does not preclude the unlawfulness of the information on the web sites involved in this case. Furthermore, the district court decided that the claim was not directed against the right to freedom of speech as the sites contain information that might be harmful.

In brief, the district court of Amsterdam ordered XS4ALL to disable all access to the disputed web pages with immediate effect after service of the interim judgement and to keep such access blocked. Furthermore, XS4ALL was ordered to supply within 24 hours a list of the names and addresses of the operators of the web sites containing these pages. In the event of XS4ALL failing to comply with either of these decisions, it would forfeit a penalty per day of non-compliance.

XS4ALL has submitted an appeal against this decision.

For more information please contact: martine.de.koning@kvdl.nl

4. DATA PROTECTION

BELGIUM
CONTROL OF ON LINE COMMUNICATION OF EMPLOYEES DATA

On 12th June 2002, the Belgian government gave general effect to collective employment agreement No. 81 that was signed on 26th April 2002 within the National Labour Council, a body representing employers and employees at national level. This collective employment agreement sets forth the rights and obligations of employers and employees with respect to the control and individualisation, by the employer, of electronic on line communication employees' data (both internal and external electronic communication data).

The agreement distinguishes the monitoring of electronic online communication data at the workplace from the individualisation of electronic online communication data obtained pursuant to such control. It provides that the monitoring of electronic online communication data is only authorised for the following purposes:

- prevention of unlawful and unauthorised acts
- protection of confidential commercial and/or financial interests of the employer
- safeguarding the security and technical functioning of the employer's IT system
- checking compliance with the rules governing the use of online communication technologies by employees.

The agreement further provides that the employer must inform his employees when implementing a system that monitors electronic online communication data, that the information collected by the employer must be proportionate to the relevant purpose, and that any interference with the employee's privacy should be restricted to a minimum.

The immediate individualisation of electronic online communication data (i.e. linking such data to a specific employee) is only authorised for the purposes referred to in the bullets above. If the individualisation concerns other purposes, the employer must individualise such data. The collective employment agreement finally provides that the employer cannot consult the subject and the content of the electronic online communication data when such data appear to be of a private nature.

The full text of the collective employment agreement can be found at: http://www.cnt-nar.be/F1I.htm For more information please contact: gerrit.vandendriessche@altius.com

EU
Compromise on data protection for e-communications

On 30th May 2002, the European Parliament voted to accept a compromise on the proposed directive for the protection of personal data and privacy in the e-communications sector (the "**Directive**"). The Directive should, as a result, be adopted within a few months.

The Directive, part of the 'telecom package', will have several effects with respect to electronic mail. The most important of these is the opt-in choice for unsolicited commercial e-mail or short message service (SMS) as well as for any messages received through a mobile or fixed terminal.

This means that, in theory, everyone will have to give prior consent to receiving unsolicited content. This will also apply to cookies, those little tracking files installed on the user's computer.

For more information please contact: LE_GOUEFF@vocats.com

Germany
Patient records online

At the hospital of the University of Münster women being treated for breast cancer can keep their own electronic patient record via the Internet. Under the project title "*akteonline*" ("recordsonline") patients can manage their personal data about diagnosis, medication or appointments for precautionary examinations, online.

The health data will be safe from unauthorised access by third parties as the same security standards are used for connection to the server as in online-banking. Furthermore, the security system is conceived such that patients' data are stored in two different databases, the first of which contains personal data and the second exclusively medical data without identification. In addition, the data are encrypted in order to prevent unauthorised access by employees working for the "*akteonline*"-team.

The government intends to introduce the idea of electronic health records more widely. The ministry of health is planning to turn the conventional insurance card into a "health card". With this card physicians should gain a better overall view so that unnecessary double examinations can be avoided.

For more information please see: www.akteonline.de, www.bmgesundheit.de and medweb.uni-muenster.de

Luxembourg
Act on personal data protection voted

On 17th July 2002, the government approved the final draft of the act on the protection of individuals in relation to the processing of personal data (the "**Act**"). The Act implements Directive 95/46/EC of 24th October 1995 (the "**Directive**"). It replaces an initial draft act partially implementing the Directive, which, on expiry, gave way to a project, filed on 7th December 2000 by the Minister with the Communications portfolio, that was wider in scope and intended to implement the Directive in full.

The Act also replaces the Act of 31st March 1979 regulating the use of personal data in computing processes, which had already long been obsolete.

The Act will now be signed by the Grand duke and published in the *Mémorial* (The Grand duchy of Luxembourg's Official Gazette). The Act will enter into force three months after publication.

The final text of the Act will be made available soon on the legilux.lu web site.

It is to be noted that Directive 97/66/EC of 15th December 1997 on the data processing of personal data and protection of privacy in the telecommunications sector is to be implemented in Luxembourg. Proceedings have been filed against the Grand duchy for non-implementation before 4th June 2002.

The report of the Commission of Media and Communications, issued on 10th July 2002, can be viewed at:
http://www.chd.lu/servlet/DisplayServlet?id=17612&path=/export/exped/sexpdata/Mag/005/007/019246.pdf

For more information contact: LE_GOUEFF@vocats.com

5. Digital Signature

Germany
Federal Government supports digital signature

Germany's Federal Government is set to continue to foster the use of electronic signatures. On the occasion of the "Signature Days 2002" congress in Berlin, the Federal Government offered the economy an "alliance for electronic signature". Since the government and the economy would mutually profit from the use of electronic signatures, both sides should forge ahead to encourage greater use of electronic signatures, Brigitte Zypries, State Secretary of the Department of the Interior, said that if the government and the economy could bundle together several applications on one card by using a common standard, the market attractiveness of such signature-chip-cards would rise. The Federal Government is planning to handle income-tax returns completely via the Internet. To date citizens have only partly been able to submit their tax returns electronically.

For more information please see: www.heise.de, www.bmwi.de and www.bund.de

GERMANY
MAN AS KEY

The so-called biotrust-project implemented by TeleTrusT, an association for the promotion of security of information and communication technology, and supported by the ministry of the economy and technology examined the feasibility, economic efficiency and interoperability of biometric techniques.

There are three main methods by which an individual's identity can be authenticated. First, the iris-scan, which is one of the securest methods of identification. However, the scan requires expensive equipment and is therefore not practicable for use at money machines and other mass identification systems. Second, the fingerprint, which is, however, still too imprecise to be introduced as a mass authentication technique. Third, a person's signature; this technique requires the person to be identified to sign on a signature pad, which can be used e.g. at the counter of a bank as PIN-substitute. One of the most significant advantages of this method is its high affinity to other everyday forms of signing. Bank customers are used to signing without having to remember their PIN. In addition, this method is relatively secure. Up to 255 characteristic features of the signature such as the appearance, the manner of writing, the pressure and the speed of writing are compared. However, the installation of signature-pads at thousands of money machines would be very expensive. For this reason, according to representatives of the project, the signature technique will probably only be used in the field of internet banking.

For more information please see: www.biotrust.de, www.biometricgroup.com, www.gi-de.de and www.psylock.de

6. DOMAIN NAMES

EU
NEW REGULATION ON .EU TLD IMPLEMENTATION

Regulation 733/2002/EC of the European Parliament and of the Council establishes the conditions for the implementation of the .eu TLD, including the designation of a Registry and establishes the general policy framework within which the Registry will function. This Regulation will apply without prejudice to arrangements in Member States regarding national ccTLDs.

The Registry is designated by the Commission and will be a non-profit organisation formed in accordance with the law of a Member State and having its registered office, central administration and principal place of business within the Community. It will be in charge of organising, administering and managing the .eu TLD, as well as maintaining the corresponding database and the associated public query services, registering domain names, operating the Registry of domain names, operating the Registry of TLD name servers and disseminating the TLD zone file.

The Commission will adopt public policy rules concerning the implementation and functions of the .eu TLD and the public policy principles on registration, which will include an extra-judicial settlement of conflicts policy, public policy on speculative and abusive registration of domain names, policy on possible revocation of domain names, issues of language and geographical concepts and treatment of intellectual property and other rights.

For more information please see:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002R0733&model=guichett
or contact: LE_GOUEFF@vocats.com

7. ELECTRONIC COMMERCE

ARGENTINA
COURT OF APPEAL DECLARES ELECTRONIC RECEIPTS VALID

On 30th April 2002, the District Court of Appeal of Azul (Buenos Aires) rendered a decision, *Banco Galicia y Bs. As. S.A c/Lucero José s/ejecución hipotecaria*, that provides guidance as to the validity of a receipt issued by electronic means ("**Receipt**").

In this case the plaintiff, a bank, claimed that defendant had not paid a debt originating in a personal credit granted in favour of defendant, and defendant, in his defence, presented a Receipt electronically issued by plaintiff, as evidence that the debt had been partially cancelled.

The District Court ruled that the Receipt was not valid, but the District Court of Appeal overturned that decision, stating that, notwithstanding the fact that the Receipt was not signed, it is considered valid unless the plaintiff proves that the legends and contents of the Receipt are not accurate. Furthermore, the District Court of Appeal affirmed that the lack of a traditional receipt (in paper-form and signed by issuer) shall be considered on the basis of flexible evidence criteria, when payments are made by electronic means, proper to this computer era.

This decision could be the first to discuss the validity of an electronic receipt, and to recognise its enforceability and legality, along the lines of a certain doctrine that states that support material produced by a computerised information system can be used as evidence against the owner of such system, either in its original form or in the form of a paper printout, provided such material has been acknowledged by the owner or that ownership of such system is proved.

The decisions of the Argentine Courts are moving in the same direction as new acts of Congress with regard to solutions to the new problems arising out of information technology and. Although, they are not moving as fast as society might wish, they are providing instruments to protect technology users.

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

BELGIUM
DNS-BE TAKES LAST STEP IN LIBERALISING .BE DOMAIN NAMES

DNS-BE, the Belgian authority charged with the registration and management of domain names under the ccTLD .be, recently announced that it will abolish the current prohibition on the transfer of domain names registered under .be.

At the end of 2000, DNS-BE liberalised its rules for the registration of .be domain names by abolishing almost all restrictions on the registration of .be domain names (introducing a pure first come first served system), but maintained the prohibition on the transfer of registered .be domain names. Due to this prohibition, .be domain names could only be used by the individual or company that registered the domain name. With this prohibition, DNS-BE wanted to discourage cyber-squatters from improperly registering .be domain names and then reselling them at excessive prices.

Because the prohibition was perceived as a restriction of normal economic activity rather than as a protection against cyber-squatting, DNS-BE decided to lift the prohibition as of 15th October 2002.

For more information please see: http://www.dns.be
or contact gerrit.vandendriessche@altius.com

GERMANY
Electronic Tickets

In Germany, the "e-ticket" is on the advance. The technical basis for cash-less travelling by train, bus or tram is already well established. The idea is supported by the "Association of German Transportation Companies" (*Verband Deutscher Verkehrsbetriebe – VDV*) of which more than 500 transportation companies in Germany are members. The VDV has very recently agreed on a common technical standard which all members are willing to comply with. The aim of the project is to improve the comfort of the passengers and to win new customers who to this day are deterred from using buses and trains because of complicated procedure for ticket sales. Furthermore, the transportation companies expect savings since they will need to employ fewer counter employees and to move smaller amounts of cash.

There are two variations of e-ticket-systems available: The first system requires customers to show a chipcard to a small computer installed in the bus (train) whenever they board the bus (train). When getting off, customers show the chipcard again. The cards themselves are free of charge; there are no flat rates or minimum turnovers. The computer even calculates the most favourable rate. Anyone who, for example, has already paid an amount higher than the value of an annual ticket, can use the bus (train) without additional charge for the rest of the year.

The second system is even easier to use. The customer carries a chip card with him in his wallet, his suitcase, his trouser pocket – it makes no difference where the card is placed. Electronic gates installed in the bus or train register whenever the customer gets on or off. Accounts are settled at the end of the month.

Both systems are technically feasible and have already been tested. However, they require very high investment in the installation of computers and electronic gates respectively. Therefore, the availability of e-tickets in most parts of Germany will probably take a few more years.

For more information please see: www.vdv.de, www.heise.de and www.faz.de

8. ELECTRONIC DEMOCRACY

EU
E-Government

According to a European Commission recommendation dated 9th July 2002, public administrations in the Czech Republic, Latvia, Poland, Romania and Slovenia should be able to exchange data with EU member states on how to supply e-government services, apply EU legislation and enforce single market rules.

The Commission's recommendation is based on the "Pooling Open Source Software" study which recommends creating a clearinghouse for specific applications for the public sector and enabling the replication of good practice in e-government services. The software would probably have to be adapted to fit local requirements but would encourage the sharing of these e-government tools and lead to across-the-board improvements in the efficiency of the European public sector. The study suggests that software developed for, and owned by, public administrations should be issued under an open source licence. More than simply providing software, the pooling facility should thus make available expertise and help create a community of developers, users and policy makers, providing opportunities for increased co-operation, notably in software development and testing.

The Commission concluded that data exchange would accelerate candidate countries' take-up of EU legislation before they formally join the Union.

Bulgaria, Cyprus, Estonia, Hungary, Lithuania and Turkey are also expected to sign a similar e-government memorandum when national regulatory barriers are removed. Malta and Slovakia are also expected to join in the next months.

For more information please contact: LE_GOUEFF@vocats.com

GERMANY
Finance Court hears a case using video-conference

Since the beginning of 2001 the finance courts in Germany have been able hear cases by video-conference. After Hessen, Baden-Württemberg and Nordrhein-Westfalen, Brandenburg launched itself into the new age. The judges sat in a small room of the University of Cottbus with three cameras installed. In front of them there were two monitors showing plaintiff and defendant who were in a building of the University of Berlin. The chief judge opened the case by reading out the facts.

The video-conference will save the parties long trips to the place of the lawsuit and thus save them time and money. On the other hand, the costs of using the technique, amounting to about EUR 40,000 per conference location still have to be paid. However, this is just a one-off investment and the more often the technique is used, the more cost-effective it becomes

The parties have to agree on hearing the case by video conference. The video has to be deleted as soon as it has been evaluated. An employee of the court writes the minutes as usual. As in conventional lawsuits film and tape recording are not permitted..

Accordingly, the hearings may not be transmitted via the Internet, either.

For more information please see: www.heise.de

9. INTELLECTUAL PROPERTY

FRANCE
THE USE OF REGISTERED CORPORATE NAMES IN METATAGS

A web site including metatags using a registered corporate name may constitute an infringement of registered corporate name. In a summary judgement of the Paris Court of appeals (S.F.O.B. v. Notter GmbH, 13 March 2002), the use of a distinctive sign other than an industrial property right was considered illicit. The defendant, Notter GmbH, had included in its metatags the registered corporate name of a direct competitor, the French company S.F.O.B, and was ordered to suppress the litigious metatags. Users of an internet search engine could, by typing "sfob", automatically access the web site of Notter GmbH. Since the scope of the companies' businesses was comparable and the French company was operating on the German market the Court considered that S.F.O.B and Notter GmbH were competitors. Consequently the Court confirmed the lower Court's ruling on that point. However the Court of appeals overruled the lower Court's rejection of the claim for damages. The Court of appeals held that the fact of using the registered corporate name of its competitor for personal purposes constituted sufficient grounds for allocating a provision for damages.

However, the Court of Appeal, rendering a summary judgement, did not rule on the allegation that the metatags constituted an act of unfair competition and parasitism. The French company, suffering a fall in turnover of 69.94 %, argued that this fall resulted from the litigious metatags and alleged that the litigious metatags were the proximate cause of an actual injury.

Liability for unfair competition and parasitism is based upon general principles of tort law as enunciated by case law. In order to establish a cause of action and bring a suit, a party injured by an act of unfair competition must prove: that an act of unfair competition has been committed, such as confusion with the products and services of the injured party or discrediting of the competitor; that such act was the proximate cause of an actual injury; and the amount of injury suffered. On grounds of parasitism (similar to the common law remedy of "passing off"), persons or companies can be held liable where they have sought to benefit from the goodwill attached to another's product, in order to make a profit out of such goodwill: the web site owner must prove its goodwill and that a misrepresentation and a prejudice for her/him has resulted from such misrepresentation. The likelihood of confusion does not need to be demonstrated. Concerning these two remedies it seems to likely that the Courts will either find that a likelihood of confusion exists or that the German company sought to profit from the goodwill of the French company or even both. Here again the remaining issue will essentially be the evidence which has to be supplied by the French company, proving that the litigious metatags were the proximate cause of its actual injury.

Other remedies are or may be available in respect of the unauthorised use of another party's registered or unregistered trade mark, logo or other material in metatags or the hidden text of a web site

In the Distrimart case (13th March 2002), the Court of Appeal of Paris held that a metatag using the plaintiff's trademark constitutes an infringement of trademark on the grounds that this use created a likelihood of confusion. In addition, the reproduction of trademarks owned by Chanel in metatags located in the site of another company marketing luxury products was considered as an infringement by the Court of Appeal of Paris (3rd March 2000).

A person infringes a registered trademark if s/he uses or reproduces a trademark for products or services identical to those listed in the registration. Trademark infringement also exists if there is a likelihood of confusion in the mind of the public, through:

- use of identical trademarks for products or services similar to those listed in the registration; or
- use of an imitated trademark for products or services identical or similar to those listed in the registration (articles L-713-2 and L-713-3 of the French Intellectual property code).

According to French case law an infringement of trademark by using a third party's trademark would not be constituted if the three following requirements are fulfilled:

- the use of the trademark must be a necessary reference. Indispensable referencing is, for example, when a manufacturer of accessory products uses the trademark of the principal product for promotion purposes;
- the use must not create any likelihood of confusion on the part of consumers, regarding the origin of the products or services provided on the web site; and
- the use of the trademark must not be the cause of any injury to the owner of the trademark.

The unauthorised use of a third party's trademark may also give rise to an action for unfair competition and or parasitism (see above).

For more information please contact: slipovetsky@kahnlaw.com or fperbost@kahnlaw.com

10. MEDIA

BRAZIL
COMMUNICATION COUNCIL MEMBERS ARE APPROVED

As a consequence of the approval of the amendment to article 222 of the Brazilian Constitution, which permits foreign investment in journalistic and broadcasting companies, the National Communication Council (*Conselho Nacional de Comunicação*), created by the Brazilian Constitution in 1988 but never formally established due to lack of initiative of the Congress, was finally installed. The Council is an auxiliary body for the control of social communications.

On 5th June 2002, the Congress approved the members of the Council. The Council must be composed of 14 members representing broadcasting companies, television companies; written press companies; different areas of social communications such

journalists, broadcasters, artists, cinema and video, and also an engineer knowledgeable in the field of social communication and five members representing the society.

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

BRAZIL
FOREIGN INVESTMENT IN JOURNALISTIC AND BROADCASTING FIRMS

On 28th May 2002, the Senate approved the proposal for the amendment to article 222 of the Brazilian Constitution. The main changes approved by the Senate are:

- national or foreign corporate entities may acquire an equity interest in journalistic and broadcasting companies, making it possible for the companies to be listed on stock exchanges; and
- journalistic and broadcasting companies may receive foreign investment up to a limit of 30 % of their corporate capital.

However, investment by foreigners is still subject to the passing of a supplementary law by the Brazilian Congress. It is not possible to predict when this supplementary law will be enacted.

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

SPAIN
LIQUIDATION OF QUIERO TV

At the General Shareholders' Meeting held on 25th April 2002, the shareholders of Quiero TV (terrestrial digital pay TV) decided to:

- initiate legal liquidaion of the company;
- request the MST for the devolution of the licence obtained through the contest held on 14th October 1999 and the devolution of the guarantees issued for EUR 34 million; and
- cease broadcasting .

On 25th May 2002, the Council of Ministers resolved not to accept the requests of Quiero TV, warning the company that it could lose all or part of the EUR 34 million granted in favour of the MST for compliance with its obligations.

According to recent media information, the reason for that decision lies in the fact that the Council of Ministers considered that the Article 17 of the Private TV Act No. 10/1988 of 3rd May does not include "mutual consent" between the licence holder and licensor as a legal cause for rescinding the concession.

On 30th June 2002, Quiero TV ceased broadcasting due to its inability to meet its financial obligations in connection with the maintenance of its programming.

For more information please contact: aam@gomezacebo-pombo.com

11. TARIFFS

CANADA
CRTC RELEASES PRICE CAP DECISION

The Canadian Radio-Television and Telecommunications Commission ("**CRTC**"), the Canadian telecommunications and broadcasting regulator, recently released Telecom Decision CRTC 2002-34, *Regulatory framework for second price cap period* (the "**Price Cap**" decision). This decision reviews and revises the price cap regime in Canada which was initially adopted in 1997.

The CRTC adopted a number of changes to the framework for the charges levied by incumbent local exchange carriers ("**ILECs**") for services provided to residential and business customers, in addition to services provided to competitors. A key changes introduced by the CRTC is the creation of a number of new service baskets and sub-service baskets. For example, the CRTC sub-divided the Residential Services Basket into Residential Services in Non-High Cost Services Areas and Residential Services in High Cost Service Areas. Both of these sub-baskets are further divided up between Basic Residential services and Residential Optional services.

The CRTC also established two categories of services within the Competitor Services basket in order to better define the pricing treatment of these services. The first category of services is comprised of essential and near-essential services. These services, dubbed "Category I services", include interconnection and ancillary services required by Canadian carriers and resellers interconnecting to the ILECs' networks. Category I services will be priced on the basis of Phase II costs plus the mandated mark-up of 15 %, subject to certain exceptions.

Included within the Category I services are competitor-based Digital Network Access service ("**DNA service**"). The Commission determined that the ILECs should develop a competitor-DNA service and that this service would fall within Category I. However, in order to avoid distortions in the retail market for DNA service, competitors are prohibited from engaging in the simple resale of the competitor-DNA service.

The second category of services is comprised of services that are developed for use by telecommunications service providers ("**TSPs**"), other than essential and near-essential services. These services are dubbed "Category II Competitor Services". Their pricing will be determined on a case by case basis.

The new price cap regime will feature two different kinds of price constraints. First, there will be "basket constraints" which impose a constraint on the revenues derived from a basket or sub-basket of ILEC services. The basket constraints will apply on an annual basis and will operate through service basket limits on the increase of the price of services.

The individual basket constraints will be determined with reference to an inflation factor, a productivity factor and an exogenous factor, as appropriate. The CRTC adopted the chain weighted GDP-PI published by Statistics Canada as the inflation measure and the productivity offset has been set at 3,5 %. The Commission stated that a productivity offset will be applied to a basket of services if competition in the market for those services is insufficient to ensure that subscribers will benefit from productivity gains.

The second form of price constraint is rate element constraint. This form of constraint imposes a restriction on the price of a specific service within a service basket. ILEC services may be subject to both a basket constraint and a rate element constraint.

Finally, the CRTC decided to introduce rebate mechanisms designed to provide ILECs with a strong incentive to comply with quality of service indictors. ILECs that fail to meet the quality of service indicators mandated by the Commission will be required to provide the affected customers and competitors with rebates. The quality of service enforcement mechanism will be implemented on an interim basis and will be finalised in a follow-up proceeding. The Commission also indicated that it will initiate a proceeding in the near future to consider the establishment of a "consumer bill of rights".

While consumer groups were generally pleased with the Commission's decision, industry players – both incumbents and competitors – were disappointed and argued that the new price cap regime will stymie the development of facilities-based competition in the local market. The incumbents have generally argued that the new price cap formula for local residential services will suppress prices and thus stifle competition. Competitors and new entrants, equally disappointed with decision, had sought greater cuts to competitor access rates and have argued that the new price cap regime does not create the conditions necessary for fair and effective competition.

A copy of Telecom Decision 2002-34 can be found at:
http://www.crtc.gc.ca/archive/ENG/Decisions/2002/dt2002-34.htm
For more information please contact:
tmiedema@mccarthy.ca or lsalzman@mccarthy.ca

12. TELECOMMUNICATION

AUSTRIA
OPERATORS CONTEST COSTS FOR SURVEILLANCE ACTIVITIES

Since 1st June 2002, Austrian telecommunications operators providing direct connection to end users must facilitate the surveillance of telecommunications for criminal investigation purposes. Thereby, they must provide and install surveillance equipment as defined by the Telecom Surveillance Regulation of 30th November 2001 (the "**Regulation**"). According to section 89 Telecommunications Act, the (significant) costs for such equipment are not reimbursed by the State, which has led some mobile operators to challenge this provision before the Constitutional Court.

The operators *inter alia* are unhappy that the costs of installing the surveillance equipment are not reimbursed even though these costs are related to a function in the interests of the public, i.e. a function which generally has to be performed by the State.

In addition, the operators claim that section 89 Telecommunications Act is discriminatory: different elements of the surveillance equipment must be installed irrespective of the size of the operator's network. This leads to a high share of the overheads which have to be borne by every operator. Thus, very small operators with few customers to be monitored have to bear higher costs per end user than large operators.

The Constitutional Court's decision is expected to be issued during the year 2003.

The text of the Regulation can be viewed at: www.rtr.at

EU
ELECTRONIC COMMUNICATION REGULATORY FRAMEWORK

On 7th March 2002, the European parliament and the Council adopted Directive 2002/21/EC establishing a harmonised framework for the regulation of electronic communications services, electronic communications networks, equipment or services (the "**Framework Directive**"). This text sets out procedures to ensure the harmonised application of the regulatory framework through the EU and lays down the tasks of the national regulatory authorities.

This regulatory framework consists of this Directive and four other specific Directives:

Directive 2002/19/EC of the European Parliament and of the Council of 7th March 2002 on access to, and interconnection of, electronic communication networks and associated facilities (the "**Access Directive**"), whose purpose is to establish a regulatory framework, in accordance with internal market principles, for relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits;

Directive 2002/20/EC of the European Parliament and the Council of 7th March 2002 on the authorisation of electronic communications networks and services (the "**Authorisation Directive**"), which covers general authorisation of all electronic communication networks and services, under a framework ensuring the freedom to provide the same subject to the conditions set out in the Directive;

Directive 2002/22/EC of the European Parliament and of the Council of 7th March 2002 on universal service and user's rights relating to electronic communications networks and services (the "**Universal Service Directive**"), whose purpose is to ensure the availability throughout the Community of good quality publicly available services through effective competition and to establish the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services; and

Directive 97/66/EC of the European Parliament and of the Council of 15th December 1997 concerning the processing of personal data and the protection of privacy in the telecommunication sector.

The Directives can be found at:

2002/19:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002L0019&model=guichett

2002/20:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002L0020&model=guichett

2002/21:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002L0021&model=guichett

2002/22:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002L0022&model=guichett

For more information please contact: LE_GOUEFF@vocats.com

GERMANY
TOLL BY SATELLITE

Compared to the conventional vignette the satellite-supported toll system "Toll Collect" has one important advantage: with this small device the size of a car radio the toll for trucks can be exactly calculated for the actual distance covered. The system is a combination of two proven techniques: mobile radio and Global Positioning System ("**GPS**"). A small device equipped with a GPS-receiver and a mobile radio transmitter is installed in the driving cap of a truck. If the truck starts moving, the system automatically records where the truck is situated. The truck's position can be determined with a deviation of less than one metre. Whenever the truck moves on a toll road the toll is automatically calculated from the truck's data such as number of axes, weight and distance covered. The calculated toll is transmitted to a central office, which balances accounts directly with the forwarding agency.

The toll-collect-system can also be used without the device. Driver and forwarding agency have to determine the exact route taken before the driver sets out on the trip. Subsequently, the route is registered with the central office via the Internet. At the same time the forwarding agency pays the toll for the route registered.

For more information please see: www.heise.de and www.handelsblatt.com

INDIA
TRAI DRAFT SETS TIME LIMIT FOR INTERCONNECTION

The Telecom Regulatory Authority of India ("**TRAI**") on 4th June 2002 issued a revised draft of the Reference Interconnect Offer ("**RIO**") agreement and RIO Guidelines. The draft RIO Agreement provides standard terms and conditions on the basis of which interconnection can be established with the offerer and covers several issues including scope and definition of services, point of interconnection, interconnection provisioning procedures, network and transmission requirements, technical specification standard, maintenance, network integrity, safety and protection, charging mechanisms and commercial terms and conditions.

According to the draft RIO Agreement, the party seeking interconnection is required to make a formal request in writing to the interconnection provider, indicating the number of ports and other facilities required, and the time schedule. The Interconnection provider is required to intimate within a period of 30 days from the date of receipt of such formal demand, either the acceptance or an alternative proposal for meeting this demand fully or partially as well as the approximate dates for meeting the demand. The full demand is required to be met within 12 months and the relevant demand notes for the accepted part of the demand is required to be issued within 30 days of receipt of the formal demand. In case no response is made within 30 days, the request will be treated as accepted demand and interconnection seeker shall be free to deposit the prescribed amount for the required number of ports. The date of such deposit shall be treated as the date of "firm demand".

The draft RIO Agreement also provides that if any party fails to make available the interconnection capacity within 12 months of the placing of firm demand, it will be required to pay liquidated damages to the other party. The payment of the liquidated damages would not, however, release the defaulting party from the obligation to provide the ordered capacity. A co-ordination committee would co-ordinate all mutual activities relating to implementation of the interconnectivity, amendment of schedules, reconciliation of accounts etc, lay down the procedures required for smooth implementation of the agreements, and in case of any disputes, attempt a reconciliation within 30 days. The draft RIO agreement and the guidelines are expected to be formally adopted shortly.

For more information please contact: vaibhav@nishithdesai.com

MEXICO
SCT TO CANCEL DOMINANCE RULES ISSUED AGAINST TELMEX

On 12th July 2001, the Federal Official Gazette published the Administrative Resolution by virtue of which the Ministry of Communications and Transportation ("**SCT**"), through the Federal Telecommunications Commission ("**COFETEL**"), resolves to annul, among other administrative resolutions issued by such body against Teléfonos de México S.A. de C.V. ("**TELMEX**"), the Dominance Rules issued by the SCT declaring TELMEX as dominant carrier in five relevant markets. The Dominance Rules were published as recently as 12th September 2000 to impose a series of guidelines on the dominant carrier regarding tariffs, quality of services and information, pursuant to the powers invested in the SCT under article 63 of the Federal Telecommunications Law. The Circuit Court resolution is the result of a legal battle between TELMEX and the Mexican Antitrust Commission ("**COFECO**") which began in December 1997 when COFECO issued a resolution declaring TELMEX as an economic agent with substantial power in five relevant markets (i.e. basic local telephony, access, national and international long distance and interurban transportation). Amidst the legal battle, COFECO notified the December 1997 resolution to the SCT which, in turn, based on the resolution issued by COFECO, issued the Dominance Rules. Even though article 63 of the Federal Telecommunications Law vests the SCT with the power to regulate the dominant agents in the telecommunications sector, the power to declare a dominant agent lies solely with COFECO. (Whether or not the SCT/COFECO should have the power to declare who the dominant agents are in the telecomm market has been one of the most debated issues in the Telecommunications Parliamentary Conference which has been working for over a year on the drafting of a new Federal Telecommunications Law). TELMEX's main argument against COFECO was that the COFECO resolution was unconstitutional as it lacked proper legal basis and motivation. On 11th May 2001, the First Circuit Court ruled against COFECO and ordered it to resolve the matter in line with an administrative reconsideration filed by TELMEX against the December, 1997 resolution. Immediately thereafter, TELMEX requested the judge to declare that any and all

administrative acts of any governmental authority issued as a consequence of the December 1997 resolution be annulled, the request was then refused by the courts. In August 2001, COFECO refused the administrative reconsideration filed by TELMEX against the December 1997 resolution and the courts confirmed the resolution on November 2001. TELMEX then filed a claim against such resolution before the First Administrative Circuit Court which on 27th May 2002, resolved to modify the November 2001 resolution and order the annulment of all administrative acts that were issued as a result of the issuance of the December, 1997 resolution, even if the administrative body issuing such resolution was not COFECO. The court specifically ordered the annulment of the Dominance Rules and other COFETEL resolutions relating to tariffs on the grounds that since the December 1997 resolution provided the necessary basis for issuing the Dominance Rules, to the extent that the court was declaring the unconstitutionality of the COFECO resolution, any and all administrative acts arising therefrom ought to be also revoked. The court's resolution did not only annul the Dominance Rules but also ordered the annulment of several interconnection resolutions agreed between TELMEX and other Mexican carriers (among them Avantel, a WorldCom subsidiary) since 1999. As to the interconnection resolutions, COFETEL only revoked those sections of the interconnection resolutions that were based on the Dominance Rules, leaving the remainder of the resolutions in full force and effect.

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

MEXICO
MEXICAN LEGISLATOR SCRUTINISES COFETEL S AUTONOMY

After almost one year of working sessions by the Parliamentary Telecommunications Conference on passing a New Federal Telecommunications law, the Conference is still working on determining the role that the Federal Telecommunications Commission ("**COFETEL**") should have *vis-à-vis* the Undersecretariat of Communications of the Ministry of Communications and Transportation ("**SCT**"). To date, the COFETEL has acted as a public body with technical and operational autonomy whose role has been limited to acting as an aide and advisor to the SCT on telecom matters. There has been intense pressure from some within the industry and from COFETEL to broaden the scope of COFETEL's authority and vest it with the power to issue binding resolutions for the industry and issue concession titles and permits without having to be sanctioned by the SCT. Under the proposal, COFETEL would remain a public body (*órgano desconcentrado*), financially dependent on the SCT although with technical and operational autonomy; however, its resolutions would be binding. The SCT on the other hand, is reluctant to broaden COFETEL's authority as it would render the Undersecretariat's activities moot and would remove the SCT's power to direct telecommunications policies. The schism that this topic has brought about within the Conference has spilled over to the private sector. Only recently, 9 telecom companies (among them, Axtel, Motorola and Ericsson) left the Mexican Telecommunications Chamber (*Cámara Nacional de la Industria Electrónica, de Telecomunicaciones e Informatica*, "**ANIETI**") to form a new Telecommunications Association arguing that CANIETI's position on the new Federal Telecommunications Law and on the role of the regulator did not properly reflect the interests of many within the telecom industry. It is expected that TELMEX will join the new association shortly, after having left CANIETI several years ago.

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

PORTUGAL
ACCESS TO DIGITAL TECHNOLOGY FOR LOCAL RADIO STATIONS

After the Frequency Management Working Group of the European Conference of Postal and Telecommunications Administrations ("**CEPT**") was held in Maastricht, Holland, the ICP-ANACOM announced that local radio stations can have access to digital technology to support their radio broadcasting.

The meeting's main objective was to plan the coverage of Terrestrial Digital Audio Broadcasting ("**T-DAB**") in the L band (1452-1479,5 MHz) for each of the member countries.

The Portuguese administration – represented by ICP-ANACOM – stated, after the meeting, that the allocation of frequency blocks to all geographical regions that had previously been established has been achieved and covers the entire national territory.

This technology is a new digital radio system developed to replace the current analogue system, encompassing an enhanced capacity and an improved sound quality that can be compared to that of compact discs.

For more information please contact: mc@vieiradealmeida.pt

SOUTH AFRICA
THE INTRODUCTION OF NEEDLETIME

Recent amendments to the Copyright Act, 1978 (the "**Act**") and the Performers' Protection Act, 1967 (the "**Amendments**") have resulted in the introduction of "needletime". "Needletime" or "pay for play" refers to the payment of a royalty in respect of the broadcast, or performance, of a sound recording. The Act defines a sound recording as "*any fixation of sounds capable of being reproduced*", but excludes a sound-track associated with a cinematographic film.

The introduction of needletime was prefaced by much debate among the interested parties. On the one hand, it was argued that the incorporation of needletime would extend the scope of intellectual property rights of performers and give performers greater protection. Others argued that the imposition of needletime would simply place additional, onerous burdens on broadcasters.

The Amendments include an additional restricted act in respect of sound recordings. It is now prohibited to broadcast a sound recording; cause the sound recording to be transmitted in a diffusion service; or communicate the sound recording to the public; without payment of a royalty to the owner of the copyright in the sound recording.

The Amendments give effect to the provisions of the WIPO Performances and Phonograms Treaty ("**WPPT**"), to which South

Africa is a signatory, notwithstanding that the introduction of needletime was discretionary for signatories to WPPT. The amount of the royalty to be paid in respect of needletime is to be determined by agreement between the broadcaster, the performer and the copyright owner (usually a recording company). Furthermore, the copyright owner who receives a royalty for the broadcast of the sound recording, is obliged to share that royalty with the performer whose performance is included on the sound recording, if that performer would have previously received a royalty under the Performers' Protection Act. An agreement between the copyright owner and the performer will determine the performer's share of the royalty.

It is anticipated that regulations will be published regarding the establishment and accreditation of collecting societies, for purposes of representing performers and copyright owners.

For more information please contact: peterg@wwb.co.za

SPAIN
THE ADAPTATION OF THE TELEF NICA CABLE LEGAL TITLE

After a three-year delay in their proceeding, the MST has completed the adaptation of the Telefónica Cable legal title (18 individual type "B1" licences for each area into which Spain is divided, a general type "C" authorisation, a provisional authorisation for the provision of video on demand and the maintenance of the concession for TV services), and has also completed the process of adapting the legal titles of the Cable operators, granted under the provisions of the Cable Communications Act 42/1995 of 22nd December (Cable Communications Act) and its developing Regulation, to the GTA, the regulation currently in force.

One of the essential issues of this adaptation has been the fact that the MST has allowed Telefónica Cable to use "alternative technologies" for the provision of the services to their users (including ADSL), in substitution of the express obligation to build a cable network using fibre optic and coaxial cable as was specifically stated in the conditions for the contests and under previous cable regulation.

This decision has a dual effect: seen positively, Telefónica Cable will be able to have immediate access to its customers in order to provide them with broadband services, by only carrying out a few changes to the traditional telephone lines already present in most Spanish businesses and households; seen negatively, however, Telefónica Cable will not be obliged to assume the enormous investments undertaken by the other alternative cable operators in order to fulfil the requirements of the Law by building a real cable network (EUR 3,000 million), as required by the Cable Communications Act and the conditions of the contests carried out for the provision of cable services.

A very substantial issue in favour of alternative cable operators is the fact that a mandatory but not binding report from the State Council seemed to accept the maintenance of the obligation to build a real cable network (fibre optic or coaxial cable), since alternative technologies (such as ADSL) cannot be used across the whole networ, due to the fact that the Cable Communications Act and subsequent Regulation together with the specific provisions of the contests allowed the operators to use alternative technologies only regarding specific and justified cases.

The cable operators of the Auna Cable Group have sued the MST before the Spanish National Court over the adaptation of the Telefónica Cable legal title.

For more information please contact: aam@gomezacebo-pombo.com

UK
NEW POSSIBILITIES FOR WIRELESS

On 10th June 2002, the e-commerce Minister announced changes to the current restrictions on use of equipment within licence-exempt frequency bands for commercial purposes.

Under the Wireless Telegraphy Act 1949 ("**WTA**"), it is an offence to *"establish or use"* any wireless telegraphy station or *"install or use"* any wireless telegraphy apparatus without a licence granted by the Secretary of State or without the benefit of an exemption from this requirement. However, as a pre-condition to benefiting from the exemption, equipment cannot be used for commercial purposes. This has presented a barrier to market entry to operators seeking to exploit Bluetooth, 802.11 or other wireless local area network technologies commercially.

The opening up of the license-exempt frequency bands follows a Radio-communications Agency ("**RA**") consultation on use of apparatus within these bands. The Wireless Telegraphy (Exemption) (Amendment) Regulations SI No. 2002/1590 will, from 8th July 2002, exempt from the WTA licence requirement apparatus operating in the 2400.0 to 2483.5 Mhz frequency band. Apparatus will be exempted provided that it complies with the UK Radio Interference Requirement 2005 for wideband transmission systems operating in the 2.5 Ghz frequency band and uses spread spectrum modulation techniques.

This proposed opening up of the licence-exempt bands for commercial use does not, however, alter the potential application of the Telecommunications Act 1984 to any system that may be operated. In parallel with the RA consultation on the licence-exempt bands, the Department of Trade and Industry ("**DTI**") consulted on the bringing up to date of the Cordless Telephony Class Licence, which at the time only permitted the provision of services based on CT2 and DECT technology. The Cordless Telephony Licence has also been brought into line with the structure of rights and obligations contained in the Telecommunications Services Licence, which enables licensees to provide fixed services (to up to 20 premises).

The draft Communications Bill, which will provide, amongst other things, for the implementation of the new EU electronic communications rules assuming that it can be in place before July 2003, will change the approach to telecommunications licensing. OFCOM, the new converged sector regulator, which will take up its functions when the Communications Bill comes into force, will be able to make certain services subject to prior authorisation and to impose on network operation and service provision certain, justified, conditions but the current Telecommunications Act licensing regime will fall away.

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UK
OFTEL ANNOUNCES INCREASED RELIANCE ON COMPETITION ACT

Oftel issued a statement on 1st July 2002 setting out how the Director General of Telecommunications intends to make use of competition law, rather than using Oftel's sector-specific powers, when faced with possible anti-competitive behaviour. Although the Competition Act 1998 (which came into force in March 2000) strengthened Oftel's powers to investigate and pursue companies behaving anti-competitively, Oftel has in the past turned initially to its sectoral powers under the Telecommunications Act 1984 and its ability to enforce licence conditions. However, the Director General states that Oftel's objective going forward is to use the Competition Act wherever possible.

Oftel considers that using the Competition Act will encourage compliance because of the increased power that Oftel has under that Act to investigate companies (in particular by carrying out unannounced visits of "dawn raids") and, in the event of a breach, to impose significant financial penalties on the company. Other advantages of using competition law include an ability to punish past behaviour without having to show any continuing breach and the fact that interim measures imposed under the Competition Act would not lapse after 2 months (as is the case under the Telecommunications Act). It should also be easier to obtain fast and comprehensive responses to information requests at the outset of any investigation using the informal procedures under the Competition Act.

Allegations of *inter alia* predatory pricing, price squeezing, refusals to supply and bundling will now be dealt with under the Competition Act, although the Director General does consider that there may be certain circumstances where sectoral powers may be more appropriate. For example, Oftel considers that interconnection disputes will continue to be dealt with using sector-specific powers, as the Director General has a statutory duty to resolve these and in view of the need to ensure predictability about the way interconnection rules will be applied.

Oftel believes that this shift towards greater use of competition law is in line with the new regulatory framework for communications in Europe and the UK, particularly in light of the new EU legislative framework (which must be transposed into domestic law by July 2003) and the establishment of OFCOM. The new framework is addressed in the draft Communications Bill.

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UK
OFTEL S CONCLUSIONS ON BT'S RETAIL PRICES

On 20th June 2002, the Director General of the Office of Telecommunications ("**Oftel**") published a statement, "Protecting Consumers by Promoting Competition: Oftel's Conclusions".

British Telecommunications plc ("**BT**") is currently subject to retail price controls. These price controls are based on a RPI +/- X %. The current BT retail price controls impose a price cap of RPI - 4.5% on the lowest 80 % by spend of residential calls. These price controls have been in place for nearly five years due to a "roll-over" of the original four year price control period to July 2002.

Oftel has been reviewing the fixed market generally to assess the level of competition to BT for the provision of fixed telephony services. An indication that competition was effective would have enabled Oftel to remove or significantly reduce the current price controls. However, whilst Oftel's market review has shown that there is competition to BT, from cable operators, indirect access operators and service providers, the market is still not effectively competitive. This conclusion is based on BT's fixed access market share, which is only slowly being reduced, and the very gradual decline in BT's profits from this important market sector.

Oftel has concluded, based on its market review findings, that the withdrawal of sector-specific regulation in the fixed market would run the risk of adversely affecting consumers. As a result, Oftel concluded that an amended price control, coupled with new measures to provide an additional form of competition to BT, is likely to lead to a faster reduction in BT's market share, increased competition and increased consumer choice. Assuming that this additional pro-competitive measure works as intended, and the competitive pressures on BT lead to lower consumer prices, Oftel considers that the price control regime should be relaxed. The principal additional measure being proposed by Oftel is a new "wholesale line rental" product.

The proposed wholesale line rental product will allow competitors to offer both line rental and calls at cost-orientated rates and offer, like BT, a single bill. Currently, service-based competition using indirect access or Carrier Pre-Selection does not remove BT entirely from the customer's universe. BT still maintains its customer contact by providing, and billing for, the line rental, while the service provider focuses on calls. The proposed new wholesale product would enable BT's competitors to replace BT altogether, albeit based on an underlying wholesale product which BT is required to provide to those competitors. In a significant change from its normal approach, Oftel has published in its statement the wholesale prices it expects to see for the underlying rental, transfer of service and the connection of a new line. The service is expected to be made available, at least in a basic form, within four months. Work is to start in July, when Oftel intends to set up industry groups to discuss the underlying product and operational issues. Oftel intends to publish a product specification in autumn 2002. This is an extremely challenging timetable to be met.

The Oftel proposals do not stop there. A new price control will be set from July 2002 based on an RIP -RIP formula. The lowest 80 % of residential users by spend, therefore there should be no increase in their bills. To incentivise BT to move quickly to introduce the wholesale line rental product, Oftel will impose, once the product specification is ready, an RPI +0 % price control. However, Oftel makes clear that the product must be "commercially viable" in order for this loosening of the price cap to occur. This new price control will apply for four years. Oftel will undertake a review of the retail market in 2004.

BT's licence will be modified to implement Oftel's proposals. The proposed modifications are subject to public consultation to 19th July 2002. If BT does not reject the modifications, they will take effect from 1 August 2002. If, however, BT does reject the proposed modifications, Oftel has stated that it will refer the issue to the Competition Commission. If a reference is required to be made, Oftel has stated that it is minded to roll-over BT's existing price controls whilst the Competition Commission considers the case.

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13. UNIVERSAL SERVICE

SPAIN
UNIVERSAL SERVICE COMPRISES INTERNET ACCESS

Under the new Spanish Information Society Services Act (which was recently approved by the Parliament on 28th June this year but which has not yet been published in the Spanish State Official Bulletin), the Ministry of Science and Technology ("**MST**") has amended the General Telecommunications Act No. 11/1998, dated 24th April ("**GTA**") to include Internet access for all Spanish citizens as part of the universal service, "with sufficient quality", according to the provisions of the recently approved Directive 2002/21/EC of Parliament and Council, dated 7th March, on Universal Service ("**Universal Service Directive**").

An important barrier to offering Internet access to all citizens in each area within the Spanish territoryarises from the fact that the majority of rural areas in Spain are covered only by the Spanish incumbent Telefónica de España, S.A.U. ("**TESAU**") and by using the so-called wireless system "Telefonía Rural de Acceso Celular" ("**TRAC**"), which has around 255,000 users and a 2,400 switching availability, which is not enough to support an Internet connection "with sufficient quality", as provided under the Universal Service Directive.

Accordingly, neither TESAU nor any other operator in Spain would be interested in providing an Internet access service available in any area of the national territory, due to the tremendous level of investment in infrastructures that would have to be carried out before launching the service, bearing in mind the low profits that running this activity is likely to generate.

In order to resolve the problems of offering Internet access to all citizens and the lack of capacity of the TRAC system, the Spanish Government has promoted the inclusion of a specific provision within the European funding programme FEDER, reserved for financing the necessary investments in specific areas of the EU.

The current FEDER programme for 2002 includes a so-called "Operative Programme Information Company for areas Objective 1 (Andalucía, Asturias, Canarias, Cantabria, Castilla León, Castilla La Mancha, Extremadura, Galicia, Murcia and the Valencian Community)", under which 50% of the costs for 2002 of EUR 146,895.027 being attributable to the European fund and the other 50 % to the Spanish State.

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TABLE OF CONTENTS BY COUNTRY

NEWS ITEMS

Country	Title	Category
ARGENTINA		
AUSTRIA		
BELGIUM		
BRAZIL		
CANADA		
EU		
FRANCE		
GERMANY		
HONG KONG		
INDIA		
LUXEMBOURG		
MEXICO		
NORWAY		
PORTUGAL		
SPAIN		

Country	Title	Category
SOUTH AFRICA		
THE NEDERLANDS		
UK		

COMMENTARIES

Country	Title

EVENT

Country	Title

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