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TELECOMMUNICATIONS

EU

EU adopts Recommendation to Promote Public Wireless Broadband Services in Europe

On the 20 March 2003 the European Commission adopted a Recommendation (the "**Recommendation**") calling upon Member States to facilitate the use of Radio Local Area Networks ("**R-LAN**") for accessing public services. The purpose of the Recommendation is to encourage Member States to enable the use of public R-LAN access networks by way of a general authorisation and without sector specific conditions. It is hoped that R-LAN will compliment other broadband access infrastructures as a means of implementing broadband wireless access to the Internet. Until this point, broadband access has primarily been provided over the corporate telephone network (e.g. using ADSL technology) or by way of cable television networks (with cable modems). This Recommendation represents the first of two phases of action regarding R-LAN. Once implemented, the second phase will try to identify radio spectrum issues and harmonise the necessary frequency usage parameters and requirements and is due to start in June 2003.

Contents

SINGAPORE

Ultra wide band programme

The Infocomm Development Authority of Singapore (the "IDA") has launched an Ultra-Wideband ("**UWB**") programme which involves a two year effort to introduce UWB technology to Singapore. The IDA hopes to encourage technical UWB experimentation through trial regulations, gather experimental data to determine regulations for future commercial deployment of UWB and create a pool of UWB players and users.

UWB is a wireless technology that utilises very low power radio signals consisting of very short pulses. By generating millions of pulses each second, a UWB device is able to transmit large amounts of data. Potential UWB applications are diverse and include wireless LAN, home multimedia networking, peer-to-peer mobile communication, through-wall or ground penetration radar imaging, asset tagging and tracking and vehicle collision avoidance.

SPAIN

New General Telecommunications Bill

On 7 March 2003, the Council of Ministers approved the General Telecommunications Bill (the "**Bill**"), which has been sent to the Spanish Parliament and should be approved in the autumn of 2003. This Bill implements the European Union Telecoms regulatory package in Spain.

Under the Bill a simplified licensing regime is introduced, suppressing the permits and licences that currently exist in Spain and introducing a mere notification obligation for the telecom operators. It also enhances the supervisory powers of the Telecommunications Market Commission (the "**CMT**") and the sanctioning regime.

The concept of "operator with significant market power" has been introduced. The CMT may impose obligations on operators with significant market power, including interconnection and access obligations, in order to ensure competition in the relevant market.

The Bill maintains the obligations regarding the provision of services under the universal service requirements.

Furthermore, the Bill also anticipates that, in certain circumstances, spectrum trading may become possible in the future. It also foresees the sharing of communications infrastructure by operators.

UK

Oftel Narrowband Market Review

The new regulatory framework for electronic communications networks and services will enter into force in the UK on 25 July 2003. The basis for the new regulatory framework is five new EU Communications Directives[1] (the "**Directives**") that are designed to create harmonised regulation across the EU and aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.

The new Directives require National Regulatory Authorities ("**NRAs**"), including the Director General of Telecommunications and the Office of Telecommunications ("**Oftel**") to carry out reviews of competition in communications markets, to ensure that regulation remains proportionate in the light of changing market conditions.

Oftel has identified communications markets for a number of products for which it is carrying out such reviews (the "**Market Reviews**"), the scope of these products is as follows:

– Wholesale access, call origination and transit;

– Wholesale international services;

– Internet call termination;

– Fixed geographic call termination;

– Retail markets;

– Broadband (with separate reviews for digital subscriber lines, leased lines and local loop unbundling);

– Broadcast transmission;

– Mobile (with separate reviews for mobile access and call origination, mobile call termination and wholesale international roaming); and

– Directory enquiry services.

Each Market Review will set out: the background to the product market or markets considered; the legal basis for the market review; analysis and definition of the applicable markets identified in the review; an initial assessment of market power in the markets identified; proposals for remedies to address market power in markets identified (if applicable); a Notification under the Electronic Communications (Market Analysis) Regulations 2003; and draft conditions to implement the proposed remedies (if applicable).

[1] *the Framework Directive* - Directive 2002/21/EC; *the Access Directive* - Directive 2002/19/EC; *the Authorisation Directive* - Directive 2002/20/EC; *the Universal Service Directive* - Directive 2002/22/EC, and; *the Privacy Directive* - Directive 2002/58/EC.

On 17th March 2003 Oftel published the first of five Markets Reviews that addresses fixed narrowband product markets (together the "**Narrowband Market Reviews**").

Wholesale access, origination and transit

The markets and technical area considered in this review relate to wholesale services provided over fixed public narrowband networks. Wholesale services are services sold and purchased by communications providers rather than end-users.

The product markets include:

– analogue and digital (≤256kbits/sec and >256kbits/sec) exchange lines;

– call origination on fixed public narrowband networks;

– local-tandem conveyance and transit on fixed public narrowband networks;

– inter-tandem conveyance and transit on fixed public narrowband networks; and

– single transit on fixed public narrowband networks.

In this Market Review, Oftel considers that there are separate geographical markets for Kingston-upon-Hull ("**Hull**") and the United Kingdom excluding Hull. This is because Hull is anomalous as, historically, Kingston Communications (Hull) plc ("**Kingston**") is the incumbent telecommunications provider in Hull and BT plc ("**BT**") is the incumbent telecommunications provider for the United Kingdom excluding Hull.

Oftel's initial conclusions are that BT has market power in the markets for call origination, residential and business analogue exchange lines, residential (>256kbits/sec) digital exchange lines, and business (both ≤256kbits/sec and >256kbits/sec) digital exchange lines. Oftel's initial conclusions are that Kingston has market power in the same markets and, in addition, additionally in the residential (≤256kbits/sec) digital exchange line market.

Oftel has proposed a range of potential remedies including conditions for the provision of network access, prohibition of undue discrimination, publication of charges, account separation and the publication of a reference offer. In relation to the call origination market Oftel proposes that BT and Kingston should continue to be subject to a condition to provide carrier pre-selection and indirect network access and that BT should continue to provide its flat rate Internet access call origination product (known as "FRIACO").

Wholesale international services

Wholesale international services concern the wholesale provision of conveyance of traffic to network termination points outside the UK.

Oftel has determined that UK markets for wholesale international services should be reviewed on a route-by-route basis and has identified 238 "country-pair" route markets (e.g. UK -> France, UK-> China, UK -> Hong Kong) and 4 satellite routes (e.g. UK -> Inmarsat).

Oftel's initial conclusions are that BT has market power in 121 wholesale international services markets and that Cable & Wireless plc has market power in 4 markets.

Oftel has proposed a range of potential remedies including conditions for the provision of network access, prohibition of undue discrimination, publication of charges, account separation and the publication of a reference offer.

Internet call termination

This review considers the market for wholesale unmetered narrowband Internet termination. This is the key wholesale service needed by ISPs wishing to offer unmetered, flat rate, narrowband Internet access services to consumers.

The review considers separate geographic markets for Hull and the UK excluding the Hull market.

Oftel's initial conclusions are there is no single dominant provider of wholesale Internet termination services within the UK, excluding Hull, and therefore that no provider has market power. However, Oftel considers that, in Hull, Kingston has market power as it is virtually the sole supplier of unmetered wholesale services for Internet traffic originating within the Hull market. Therefore, in Hull, Oftel proposes conditions that Kingston should be subject to for the provision of network access, prohibition of undue discrimination, publication of charges, account separation and the publication of a reference offer.

Fixed geographic call termination

This review considers markets for fixed geographic call termination, i.e. the termination of a call on a particular fixed network.

Oftel's initial conclusions are that, as it is not possible for any other fixed network operator to provide call termination services on another operator's fixed network, it follows that each fixed network should be considered to be a separate market. As each operator has 100% market share for the provision of call termination services on its own network, each operator has market power in relation to the call termination market for its network.

Oftel proposes that each operator should be subject to conditions for network access, prohibition of undue discrimination, publication of charges, account separation and the publication of a reference offer and that there should be reciprocal charging between each operator set in accordance with BT's regulated call termination charge. Oftel proposes that Kingston should

fall outside the reciprocal charging regime as Kingston has argued that its efficient costs are greater than those of BT and other fixed operators, and therefore Oftel proposes that Kingston should set its charges in accordance with its long run incremental costs incurred in providing the service.

Retail markets

This Market Review considers the following retail fixed narrowband markets:

– Residential and business analogue exchange line services;
– Residential 128kbit/s-capable exchange line services;
– Business ISDN2 and ISDN30 exchange line services;
– Local calls;
– National calls;
– Retail International Direct Dialling (IDD) routes which are competitive at the wholesale level treated as a single retail market;
– Retail IDD routes which are not competitive at the wholesale level treated as separate retail markets;
– Calls to mobiles; and
– Operator assisted calls.

Oftel's initial conclusion is that BT and Kingston have market power in the following markets:

– Residential and business analogue exchange line services;
– Business ISDN2 and ISDN30 exchange line services;
– Local calls (in business and residential markets);
– National calls (in business and residential markets);
– Retail IDD routes which are competitive at the wholesale level (in the residential market);
– Retail IDD routes which are not competitive at the wholesale level (in the residential market);
– Calls to mobiles (in business and residential markets); and
– Operator assisted calls (in business and residential markets).

and that Kingston additionally has market power in the following markets:

– Residential 128kbit/s-capable exchange line services;
– Retail IDD routes which are competitive at the wholesale level (in business markets); and
– Retail IDD routes that are not competitive at the wholesale level (in business markets).

Oftel proposes that BT should be subject to an RPI-0% price control in relation to its retail customers. Further it proposes that BT and Kingston should be subject to conditions prohibiting undue discrimination, and requiring account separation and price publications.

Copies of the Narrowband Market Reviews are available at: http://www.oftel.gov.uk/publications/eu_directives/index.htm and Oftel is seeking responses to the Narrowband Market Reviews by 30 May 2003.

Next stage of spectrum pricing

The Radiocommunications Agency (the "**RA**") has published a consultation paper on the next stage of administrative spectrum pricing through regulations made under the powers of the Wireless Telegraphy Act 1998 (the "**Consultation**"). It is hoped that the proposals will take effect from August/September 2003.

These proposals are part of an ongoing programme to introduce spectrum pricing principles to all sectors of radio use. This was considered in detail in the "Review of Radio Spectrum Management 2002" by Professor Martin Cave published in March 2002 (the "**Cave Report**"). In its response to the Cave Report the Government announced its intention to review the effects of incentive pricing and the model and methodology for valuing spectrum and setting fees.

The RA is in the process of commissioning an independent study to support this exercise (the "**Study**"). The aim of the Study is to review the current pricing regime and formulate a set of guiding principles for setting administrative prices for radio spectrum in the future. It is hoped that the Study will be completed by early 2004.

The Consultation sets out RA's proposals for changes in August/September 2003, without prejudice to any longer term changes that may follow the outcome of the Study. It is intended that, when the proposals have been finalised following the Consultation, they will be incorporated in new regulations under the Wireless Telegraphy Act 1998.

Proposals to Replace the Telecommunications Code

Earlier this month Oftel proposed a revision of the existing Telecommunications Code as a result of the implementation of the new EU Communications Directives which are due to come into force on 25 July 2003. The Telecommunications Code currently applies to telecoms licence holders and provides for them to have access to public and private land in respect of developing communications networks. In line with the changes that have been made under the EU Communications Directives, the Telecommunications Code is being adapted so that it extends to all communication providers. This new code will mean that non-network providers are able to apply for the code where they may be installing infrastructure that will be used by a communications provider.

BROADCASTING

EU

Television without Frontiers (First Public Hearing)

Earlier this year the European Commission adopted a work programme in respect of a possible review of the Television without Frontiers Directive (89/552/EEC) (the "**Directive**"). A public consultation is due to begin, which will include public hearings in April and June, to consider the questions raised in this work programme. The Directive serves the interests of the European audio-visual sector and culture diversity. Some of the main themes which the consultation hopes to address are: access to events of major importance to society; promotion of cultural diversity and of competitiveness of the European programme industry; protection of general interests in television advertising, sponsorship, tele-shopping, self promotion and the protection of minors. Written contributions to the questions raised in the consultation are due to be submitted by 15 July 2003.

SINGAPORE

Formation of media authority

The Singapore Broadcasting Authority, the Films and Publications Department and the Singapore Film Commission merged on 1 January 2003 to form the Media Development Authority ("MDA") of Singapore. The creation of MDA is in response to the convergence of communication technologies (television, film, video, radio, printed publications and new media) which requires a consistent approach in developing and managing the different forms of media, in order to promote the growth of the media industry and manage content to protect core values and safeguard consumers' interests.

There are eight free-to-air broadcasters in Singapore and one cable television operator. In addition, there are about fifteen satellite broadcasters licensed to uplink their services from Singapore, using the four available uplink facilities provided by ST Teleport, SingTel Telecast, MediaCorp T&T and Ascent Media.

Last December MDA embarked on a public consultation for a draft Code of Practice dealing with market conduct in the provision of mass media services (the "**Code**"). The aim of the Code is to ensure that media operators serve the public interest, protect consumers from improper business practices,

prevent unfair competition and abuses by dominant operators, promote competition by ensuring fair and appropriate market conduct and encourage industry self-regulation. The deadline for public consultation and feedback has ended but no announcement has been made on when the Code will take effect.

UK

The Communications Bill Update

The Communications Bill is in the House of Lords

The Communications Bill was introduced into the House of Commons on Tuesday 19 November 2002. The Bill completed its passage through the Commons on Tuesday 4 March 2003 and was introduced into the House of Lords on the following day. The Second Reading in the House of Lords has just been completed.

Ofcom launch in December 2003

The new CEO of Ofcom, Stephen Carter, has announced that he intends all Ofcom staff to be accommodated in Riverside House, Ofcom's Headquarters, by Monday 15 December. The timetable for the transfer of powers to Ofcom is currently being discussed, however, it is expected that full powers will vest with Ofcom by the end of the year.

DATA PROTECTION

EU

Airline Data Transfers to the US

The EU Commission and EU Parliament are at odds over an agreement with the United States customs authorities dealing with the transmission of airline passenger data from the EU to the United States.

The implementation of the US Aviation and Transportation Security Act 2001 (the "**Act**") in the aftermath of September 11 requires airlines to transfer passenger name records (i.e. passenger personal data) to the United States immigration service. Adhering to this requirement raised concerns that the obligations under Directive 95/46/EC (the "**Data Protection Directive**"), that personal data shall not be transferred to countries without adequate levels of protection, would be breached. The Data Protection Directive does allow the EU Commission to adopt a decision confirming the adequacy of the data protection provisions of a particular country. Discussions have been

undertaken between the EU Commission and United States officials to assess how to meet the requirements under the Act and prepare a decision on adequacy.

In February 2003, the EU Commission and United States Administration issued a joint statement that, pending a EU Commission decision of adequacy under the Data Protection Directive, EU data protection authorities should not find it necessary to take enforcement action against airlines complying with the US requirements. As a result, the US immigration service undertook to protect the personal data transferred.

However, this approach was recently discredited by the EU Parliament which adopted by overwhelming majority a resolution rejecting the joint statement, followed by a requirement that the EU Commission suspend this "agreement", which it considered to lack any legal basis. In the meantime the EU Parliament will determine if an action may be brought before the European Court of Justice.

It appears that the EU Parliament was not informed in due time of these talks between the EU Commission and United States Administration. MEPs also objected to the fact that passengers were not informed of the fact that their personal data was being transferred and do not have the possibility to give their consent, as is provided for by the Data Protection Directive. The EU Commission acknowledged Parliament should have been informed earlier, but stressed that discussions with the United States authorities were still under way.

The way has been left open for the possibility of the EU Commission to proceed according to Article 25 of the Data Protection Directive, which, as discussed above, mandates them to determine if data to be transferred to third parties will be protected in an "adequate" fashion. The EU Parliament's Committee on Citizens' Rights are due to hold a hearing on this matter shortly.

LUXEMBOURG

Implementation of the Telecoms Data Protection Directive

The European Court of Justice and the National Commission for the Data Protection have respectively contributed towards the data protection legislation in Luxembourg.

Implementation of Directive 2002/58/EC

In its judgment of 6 March 2003, the European Court of Justice declared that the Grand-Duchy of Luxembourg had failed within the prescribed period to adopt the laws, regulations and administrative provisions necessary to comply with Directive 97/66/EC of the European Parliament and of the

Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (the "**Telecoms Data Protection Directive**"). This Directive should have been implemented by 24 October 1998. A draft bill was filed on 30 March 1999 but was subsequently withdrawn on 21 March 2000.

Nevertheless, the new Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ("**Directive on privacy and electronic communications**") which is due to be implemented by Member States before 31 October 2003, replaces the Telecoms Data Protection Directive and is currently being implemented in Luxembourg. It is anticipated that a draft of bill may be presented to the Government for signature during the course of April.

The Directive on privacy and electronic communications is the result of the developments in the markets and technologies for electronic communication services and aims to provide an equal level of protection of personal data and privacy for users of publicly available electronic communication services, regardless the technologies used.

The National Commission for the Data Protection has made available its notification / authorisation scheme

The National Commission for Data Protection was created in Luxembourg by the Law of 2 August 2002 which deals with the protection of processing personal data (the "**Law**"), and entered into force on 1 December 2002. The Law implements Directive 95/46/EC and replaces the law of 31 March 1979, which regulated the use of personal data in automated processes and laid down the conditions for making data processing legitimate.

According to Article 12 of the Law, a dual procedure has been introduced that means that data processing shall either be notified or authorised. As a general rule, the processing of personal data should simply be notified to the National Commission for Data Protection. The Law however provides that certain types of processing will require a prior authorisation of the National Commission for Data Protection and thus a decision of the National Commission for Data Protection in respect of the legitimacy of the processing. This applies to, amongst others, processing of sensitive data in certain circumstances.

The application form for the new "simplified notification" is not yet available. Furthermore, no application form for an authorisation of a data processing is currently planned to be available. Therefore, the requests for a prior authorisation of a data processing have to be sent to the National Commission on a sheet of paper which sets out the following information: (a) name and address of the controller or his representative, (b) conditions of legitimacy, (c) purposes of the data processing, (d) origin of the data, (e) description of the data and the processing, (f) description of the category or group of the categories of the data subject, (g) categories of recipients to

whom the data might be communicated, (h) third countries to which data are intended to be transferred, and (i) detailed description of the security measures in place.

SWEDEN

A Swedish Act on biobanking

On 1 January 2003 the Swedish Parliament adopted legislation dealing with biobanks (the "**Act**"). The term biobank relates to tissue specimens which are collected and preserved for the purposes of care and quality assurance, training, research, clinical tests, development and other similar purposes. In cases where the purpose is for the research or clinical testing, establishing a biobank requires the approval of a Research Ethics Committee.

The purpose of the Act is the protection of personal integrity when treating human biological material. The Act establishes that tissue specimens taken within health and welfare care requires consent before storing in biobanks.

The consent shall be informed and must be given by the donor of the specimen. In cases where the specimen is taken from a minor or from a foetus the consent shall be provided by the person having the custody or the mother respectively. The Act further provides that the consent can be revoked at any time and that any tissue specimen thereafter shall be destroyed.

The Act applies to biobanks established by care providers, both public and private, subject to the Health and Medical Services Act and Dental Services Act.

In principle, the Act prohibits tissue specimens from biobanks to be made available outside Sweden. It also prohibits tissue specimens or parts thereof contained in a bio bank to be assigned or distributed for purposes of profit.

Non compliance with the provisions of the Act may result in criminal liability and damages may also be claimed for infringement of personal integrity.

When a biobank is going to be established it must be reported to the Swedish National Board of Health and Welfare (which is also the supervising authority overseeing compliance with the Act).

Personal data concerning the donors, other than the actual tissue specimen, collected in conjunction with a biobank, will not constitute a part of the biobank. In such instances the provisions of the Swedish data protection legislation will apply.

UK

A change to the British Code of Advertising, Sales Promotion and Direct Marketing

The eleventh edition of the British Code of Advertising, Sales Promotion and Direct Marketing (the "**Code**") came into effect on 4 March 2003. Primarily the Code deals with the content of marketing communications, however, there are certain rules within the Code that go beyond content, for example those that cover the administration of sales promotions and the use of personal information in direct marketing. The Code has been redrafted to clarify uncertainties that previously existed in relation to emerging new media.

In particular, the Code reflects the requirement set out in the Electronic Communications Data Protection Directive 2002/58/EC that explicit consent of consumers is required where marketing is to take place via email or SMS transmission, save that marketers may market their similar products to their existing customers without the explicit consent so long as an opportunity to object to further such marketing is given on each occasion.

The Code also deals with the requirements set out in the E-Commerce Regulations 2002 that any marketing communications be clearly presented as such and, unsolicited marketing communications should be clearly identified as such without the need to open them.

The Code supplements the law and fills the gaps that the law may not reach and, although the Code is not legally binding, failure to comply with the Code is likely to bring with it significant adverse publicity.

Consultations on data retention and access to communications data

The Government has launched two consultations papers: the first focuses on a Code of Practice for voluntary retention of communications data in accordance with the requirements under the Anti-Terrorism, Crime and Security Act 2001 ("**ATCS**"), and the second is another attempt under the Regulation of Investigatory Powers Act 2000 ("**RIPA**") to regulate who is able to access communications data.[2]

[2] The first attempt at this was last Summer and resulted in widespread public concern when it was revealed how may agencies would have access to, and how easy it would be to gain access to, communications data.

The Code of Practice For Voluntary Retention of Communications Data

In response to the terrorist attacks in New York on 11 September 2001 the UK implemented ATCS which contains measures addressing the requirement that communication service providers ("**CSPs**") retain certain communications data.[3] ATCS does not currently place an obligation on CSPs to retain communications data. The Government's preferred position is that CSPs will regulate themselves through the observance of a voluntary code which is dealt with in this consultation (the "**Voluntary Code**"). The aim of the Voluntary Code is that it contains measures, as deemed necessary by the Secretary of State, to safeguard national security, prevent or detect crimes and enable the prosecution of offenders relating to national security. The consultation paper provides that CSP's will have to retain subscriber information and telephony data for a maximum of twelve months (compared with seven years which was initially proposed). However, it is proposed that web activity logs, which include IP addresses used and URLs visited with details of dates and times, need only be held for four days.

The Voluntary Code has been drafted in consultation with the Information Commissioner, as there were concerns that it would create a conflict with the Data Protection Act 1998 ("**DPA**") which requires data to be processed fairly and lawfully and kept for no longer than necessary. The Home Office and the Information Commissioner have come to an agreement the relevant processing conditions justifying the retention of data under the DPA[4] can be that it is necessary for the (a) the administration of justice; (b) the exercise of any functions conferred on any person by or under any enactment; (c) the exercise of any functions of the Crown, a Minister or the Crown or a government department; or (d) the exercise of any other functions of a public nature exercised in the public interest by any person.[5] Where data to be retained is sensitive the relevant condition for processing will be that it is necessary for the exercise of any functions of the Crown, a Minister or the Crown or a government department[6].

There are further concerns that retention of data under the Voluntary Code will be in breach of the fifth data protection principle which provides that 'personal data processed for any purpose or purposes shall not be kept for longer than is *necessary* for that purpose or purposes'. However, in determining whether data is retained for longer than necessary the consultation document states that CPS's will be able to heavily rely on the fact that the Secretary of State and Parliament will have concluded that the retention of communications data for periods specified in the Voluntary Code

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[3] Communications data includes telephone numbers which relate to particular individuals, the billing addresses of the customer and the telephone numbers called using that telephone. Such data also includes the time a call was made, the length of the call and the location of the sender and the recipient phone.

[4] Retention of data is deemed processing personal data for the purposes of the DPA

[5] Schedule 2, paragraph 5 of the DPA.

[6] Schedule 3, paragraph 7 (c) of the DPA.

is necessary in order to safeguard national security. The Information Commissioner supports this statement and, indeed, were it to be suggested that retention under the Voluntary Code did not satisfy the fifth data protection principle, the national security exemption found in section 28 of the DPA could be relied on to exempt such data from compliance with this principle.

There remains much uncertainty as to how many CSP's will sign up to the Voluntary Code. It is clear that, were a Voluntary Code to fail, the Government would put in place a mandatory code by order made by statutory instrument in accordance with section 104 of ATCS. However, as discussed in the last edition of ITC News, the All Party Internet Group have strongly recommended that the Government does not invoke its powers under section 104 stating that "*we do not believe that is practical to retain all communications data on the off chance that it will be useful one day. We further believe that existing retention policies, driven by and funded by business needs, are currently proving to be adequate resources for the majority of investigations*."

Consultation on Access to Communications Data

The Government is also seeking views in a separate consultation that considers access to communications data. Currently, RIPA provides for access by the Police, Customs and Excise, the Security Services and the Inland Revenue by way of warrant. The legislation also provides a means for adding other public authorities to this list. In June 2002, the Home Secretary was faced with considerable opposition when a draft statutory instrument was published which added additional public authorities to the current list under RIPA and this was subsequently withdrawn. The Home Office now admits that this statutory instrument was not proportionate and this consultation sets out mechanisms for limiting the type of data that might be accessed and the controls that might be applied.

Some of the proposals set out in the consultation document include:

– a 'double lock' safeguard where access to certain types of information is granted only after prior approval by an independent third party, such as the Information Commissioner;
– restrictions on the type of information public authorities are granted access to;
– restrictions on the reasons why public bodies can be granted access to this limited information;
– only allowing senior designated people within public bodies to authorise access;
– providing specialist training to public authorities on how to access communications data to ensure privacy is respected and those with legitimate and necessary access to such information know the law; and

– regular checks on public bodies by the Interception of Communications Commissioner to ensure access is not abused.

The deadline for responses for both consultations is 3 June 2003

INTERNET/E-COMMERCE

EU

European Electronic Signatures Standardisation

The European Electronic Signatures Standardisation Initiative ("**EESSI**") will hold an open meeting entitled "European Signatures versus Global Signatures" in April 2003 at the Italian Confederation Chamber of Commerce.

Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures (the "**Directive**") provides a Community framework for electronic signatures. The Directive identifies minimal requirements for certificates, certification service providers and signature creation and verification devices. The Directive allows the Commission to establish and publish references of generally recognised standards for electronic signature products. As a consequence, implementing laws in Member States shall presume compliance with the requirements laid down in the Directive when a product meets those standards.

A consistent and coherent approach is necessary, so that the legal framework for electronic signatures can build, as far as possible, upon standards and other forms of voluntary agreements which can be used to provide legally recognised signatures not only across Europe, but at an international level.

The European ICT Standards Board, with the support of the European Commission, launched an initiative bringing together industry and public authorities, experts and other market players which resulted in the creation of EESSI. EESSI seeks to identify under a common approach the need for standardisation activities in support of the Directive's requirements.

The open meeting to be held in April is intended to demonstrate the importance of this standardisation work in the context of the EU single market, and its implications at a national level. It further aims to demonstrate the technical status of the EESSI standards and their use in practice.

BELGIUM

Implementation of E-Commerce Directive

EU Member States had until 17 January 2002 to implement Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "**E-Commerce Directive**"). Failure to implement the E-Commerce Directive on time led to, in January 2003, the European Commission sending a reasoned opinion to Belgium.

The Belgian implementing legislation has finally been adopted and entered into force on 27 March 2003 (the "**Law**").

The Law contains eight chapters: preliminary provisions, fundamental principles, information and transparency, advertising, contracts concluded by electronic means, liability of intermediary service providers, supervision and sanctions as well as final provisions.

Scope of application

In accordance with the E-Commerce Directive, the Law applies to the information society services defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

The Law does not apply to taxation, data protection, agreements regulated by cartel law, certain regulated activities such as notarial activities, gambling and representation of a client and protection of his interest in legal proceedings.

Fundamental principles

No prior authorisation

No prior authorisation or similar restriction may be imposed upon information society service providers for the provision of their services.

Country of origin principle

In accordance with the E-Commerce Directive, the Law adopts the country of origin principle according to which the information society service provider is regulated by the law of the country of its establishment. This rule implies that any information society service provider established in another Member State may provide services in Belgium, indeed, the freedom to provide information society services is recognised as one of the main principles of the European internal market.

This rule is subject to a number of derogations and exceptions. It does not apply to, amongst other things contracts containing a "choice of law clause",

contracts entered into with consumers, some intellectual property rights, mandatory formal requirements for real estate contracts as well as the authorisation of advertising by unsolicited e-mails (spam).

Information and transparency

The information society service provider must provide sufficient information to the recipient of the services, including (where applicable) its identity, its contact details (geographical and electronic addresses), its trade registration number, its VAT number and any relevant code of conduct to which it subscribes. In addition, prices must be clearly indicated, mentioning whether or not taxes and delivery costs are included therein.

Where applicable, the service provider must also provide information about its regulated profession.

The contract terms and general conditions must be made available in a way which allows the recipient to store and reproduce them.

Before placing an on-line order, the recipient of the services must be informed of the languages offered for the conclusion of the contract, the various technical steps to follow to conclude the contract, the technical means for identifying and correcting input errors, and whether or not the contract will be filed and made accessible.

When the recipient of the services places his order through electronic means, the service provider must acknowledge the receipt of the recipient's order without undue delay and by electronic means. The acknowledgment of receipt must contain a summary of the order. The order and the acknowledgment of receipt are deemed to be received when the parties to whom they are addressed are able to access them. When the parties are not consumers, they may agree to derogate from these obligations by contract.

Some of these requirements do not apply to contracts concluded exclusively by exchange of electronic mails.

In respect of its relationships with consumers, the service provider has the burden of proof of the fulfilment of the above conditions.

Advertising

All types of advertisement must be clearly identifiable as such. They must include a clear and legible reference that they are "advertisements". The person on whose behalf the advertisement is made must also be clearly identifiable as well as promotional offers, competitions or games, the conditions of which must be easily accessible.

The Belgian legislator prohibits the use of electronic mails for advertising purposes without prior, free, specific and informed consent of the addressees resulting in the imposition of an opt-in system going one step further than the opt-out system proposed in the E-Commerce Directive. A

Royal Decree may be adopted in the future to provide exceptions to this opt-in system.

When sending advertising by electronic mail, the service provider must inform the addressees of their right to oppose such advertising in the future and appropriate means must be provided to that end.

The identification of the origin of a message or its transmission may not be hidden or falsified. Consequently, the use of so-called 'e-mail anonymisers' (which render impossible to trace the origin of a message) for sending electronic advertisements is prohibited.

The burden of proof that the advertisement was requested rests upon the service provider.

Contracts concluded by electronic means

Under Belgian contract law, a written and signed document is the preferred route to evidence a contract. However, the E-Commerce Directive requires the Member States to ensure that their legal system allows contracts to be concluded by electronic means.

As a result, the Law recognises that when a formal legal or regulatory requirement is imposed on the contractual process, such requirement is fulfilled by a contract concluded by electronic means provided the functional aspects of the requirement are satisfied.

The Law refers to the legislation on electronic signatures to define what can be considered as a signature and admits a set of standards comprehensible and accessible for future consultation as equivalent to a written document regardless of the medium and the transmission modalities.

There are certain exceptions to this rule and the legal and regulatory requirements of certain contracts cannot be fulfilled electronically, i.e. those creating or transferring real estate (except rental rights), those that require, by law, the involvement of courts or other public authorities, contracts of surety ship and collateral securities from persons acting outside their professional activities and contracts relating to family law or succession.

Liability of intermediary service providers

In accordance with the E-Commerce Directive, the Law makes a distinction between three types of intermediary service providers depending on the degree of their involvement in the provision of information society services: mere conduit, caching or hosting. As regard these intermediary service providers, the Law provides for immunity on detailed conditions, mainly when they only play a passive role and act expeditiously upon obtaining actual knowledge of an illegal activity to remove or disable access to the relevant information. The purpose of these provisions is to protect the service providers whose role is to merely act as intermediaries.

No obligation is imposed on the intermediary service providers to monitor the information that they transmit and store, or to seek actively for facts indicating illegal activity, however there is the possibility for a service provider to be temporarily ordered to do so by the competent judicial authorities in a specific case, as may be provided for by law.

Even though the Member States had the choice under the E-Commerce Directive not to impose such an obligation, the Belgian legislator made it compulsory for the service providers to inform promptly the judicial or administrative authorities of alleged illegal activities undertaken by recipients of their services or to communicate information enabling the identification of recipients of their services with whom they have storage agreements.

Supervision and sanctions

The Law provides for a warning procedure in case of breach of any of its provisions. The Minister of Economic Affairs may issue a warning to the service provider requesting it to cease and desist the violation. If the service provider does not comply with this warning, the Minister of Economic Affairs may inform the public prosecutor or propose a settlement.

In order to search for breaches of the Law, the Minister of Economic Affairs is also entitled to designate special agents, in addition to the police officers.

The Law imposes criminal penalties and fines of up to € 250,000 for non-compliance with the above provisions.

GERMANY

Federal Supreme Court decision on revocation right of distance selling agreements

The German Federal Supreme Court ("**FSC**", Bundesgerichtshof), the highest German court for civil cases, made a decision on 2 April 2003 on the interpretation of the exceptions to the revocation right of consumers in distance selling agreements. According to Section 312 d para. 4 no. 1 of the German Civil Code ("**Bürgerliches Gesetzbuch**"), a consumer has no revocation right if he acquires goods that have been produced according to the consumer's explicit specifications.

So far, there have been disputes about the interpretation of the term "goods produced according to the explicit specification of a consumer". Most voices in legal literature have argued that the relevant requirement should be whether the goods qualify as mass products, i.e. whether the seller is, with reasonable efforts, able to find another buyer for the returned good. If the returned good was too specific and no other buyer could be found, the consumer has no right to revoke the distance selling contract and to return the good.

In this case the FSC had to decide a case where a consumer ordered a computer notebook produced by the seller according to the explicit specification given by the consumer. The FSC did not raise the question whether the seller was able to find another buyer for the specified product. The FSC held that the consumer shall have the right to return goods and reclaim the purchase price if the seller was able to re-use the parts integrated in the notebook, provided that such re-use of parts only causes economically reasonable costs and that the functionality of such parts is not limited substantially. The FSC accordingly decided that in the case of a notebook this was possible with reasonable costs and without any limitations to the functionality or substance of the parts and, thus, the consumer had a right to return the notebook and claim back the purchase price and shipping costs.

In practice, if the case law follows this decision in subsequent cases, this will mean that producers or sellers of similar goods must take into consideration the possibility of a return and the costs for a re-use of the respective parts of the product. This may result in a rise of prices for goods delivered via distance selling means and further disadvantages for such goods compared to goods sold “off-line” as in such cases the consumer by statute has no right to return such goods produced according to his explicit specifications.

Is “deep linking” in line with the German Copyright Act?

In its judgment dated 18 September 2001, Munich District Court I addressed the subject of “deep linking” (file no. 7 O 6910/01). The appeal to Munich Higher District Court lodged against this judgment was withdrawn by the Defendant on 20 March 2003, with the effect that the judgment by Munich District Court I has now become final.

The proceedings were concerned with the admissibility, pursuant to sec. 87b of the German Copyright Law (UrhG), of inserting deep links with respect to the rights of the manufacturer of a database. Deep links (in contrast to hyperlinks) are links which point straight to a page on a third party website that is not the homepage.

The Defendant operates a news search engine at the address <newsclub.de>. The index pages of various print media websites are selected using a piece of software developed specifically for this purpose and the results - normally the headlines of articles taken from these print media - are presented to the user as deep links organised into categories. This enables the user to access the articles directly without having to visit the homepage of the linked website.

The newspaper group, Mainpost, which belongs to the Holtzbrinck group of companies, took legal action against this practice which, it believed, represented an infringement of its rights as the database manufacturer. In addition, the Plaintiff said, insertion of the deep links meant that its other pages were being bypassed, thereby reducing its advertising revenue which depends on how often the homepage is visited and how long each visit lasts.

In its judgment, the court firstly stated that the regional news provided by the Plaintiff represents a database pursuant to sec. 87a UrhG (secs. 87a to e UrhG entered into force in 1998 as part of the implementation of the EU database directive; they protect investment in the collection of data on which a database is based). In the court's view, the protection afforded by sec. 87a et seq. UrhG covers both the contents of the database and the elements required for its operation and consultation, such as the index and enquiry system. The procurement, verification and organisation of data in the Plaintiff's Internet news services required a considerable investment in terms of type and scope, such as the investment in the formulation of keywords allocated to the individual articles and short reports for publication on-line.

The court refused to accept that the Defendant's use of the contents of the databases was not concerned with the reproduction, dissemination or communication to the public of an essential part of the databases in terms of type and scope pursuant to sec. 87b, para. 1, p. 1 UrhG. The Defendant argued that most of the investment in the creation of the database was primarily expended in data procurement in the area of research activities and formulation, i.e. the preparation of unabridged texts which the Defendant made a point of not taking. However, the court held that an infringement of non-essential parts of the database in terms of type and scope, pursuant to sec. 87b, para. 1, p. 2 UrhG, amounts to an infringement of essential parts insofar as the activities run counter to normal utilisation of the database. The court held that the pursuit of individual economic interests by the systematic use of a third party's data (by automatically extracting and adopting the data along with its organisational structure) was inconsistent with the customary use of the Plaintiff's information service. Moreover, it said, the circumvention of advertising placed on the Plaintiff's pages encroached upon the Plaintiff's interests in an unacceptable manner, especially since the Defendant was competing with the Plaintiff by also offering Internet advertising space for sale.

In accordance with this judgment by Munich District Court I, any systematic and repeated adoption of - even non-essential - parts of a database for commercial purposes represents an infringement of sec. 87b UrhG. Cologne District Court decided differently in a similar case in which the Handelsblatt publishing group (which also belongs to the Holtzbrinck group) took legal action against the operator of a similar newspaper article search engine at the address <paperboy.de>. This decision has not become final, however. If the Federal Supreme Court should, in contrast to the previous instance, affirm an infringement of sec. 87b UrhG, this would have far-reaching implications for virtually every search engine that regularly and systematically selects the contents of off-site web pages and directs the user to its search results by way of deep links, as is the case, for example, with <google.de> and <yahoo.de>.

SINGAPORE

Googles.com.sg

An appointed Panelist of the Singapore Domain Name Resolution Service has ordered that the domain names google.com.sg and googles.com.sg be transferred to Google, Inc., the well-known operator of the GOOGLE search engine. The registrant of the domain names is a firm in the business of convention, conference and event organisation and registered the domains shortly after its incorporation in July 2002.

In accordance with the requirements under the Singapore Domain Name Dispute Resolution Policy (which mirrors ICANN's Uniform Dispute Resolution Policy) , Google, Inc., alleged that the domain names are identical or confusingly similar to its GOOGLE name and trade mark, that the registrant has no rights or legitimate interests in respect of the names and the domain names have been registered or are being used in bad faith by the registrant.

The Panelist found that use of the domain names meant there was a likelihood of confusion between the business of Google, Inc., and those of the registrant, despite the dissimilarity of the respective businesses. Significantly, the Panelist found that Internet users would be diverted to the registrant's website and once there, the presence of disclaimers does not cure the initial or illegitimate diversion, following the Estee Lauder case (WIPO case No D2000-0869). Such erroneous belief could also cause damage to Google, Inc.. The Panelist also found that although there was no evidence that the registrations were made to disrupt the business of Google, Inc., nor with a view of selling them for a profit, the non-use of the names could be regarded as bad faith under the Singapore Domain Name Dispute Resolution Policy and that the registrant had no rights or legitimate interests in the domain names.

SPAIN

New regulation on the registration of domain names ".es"

The regulations for the registration of domain names under the country code for Spain (.es) have been amended. On March 18, Ministerial Order 662/2003, approving the National Plan of Domain Names under the country code ".es" was enacted.

This new regulation has created the following third level domain names: .com.es; .nom.es; .org.es; .gob.es; .edu.es.

The registration of third level domain names will be much less restrictive than the registration of second level domain names, which remains subject to strict control.

One of the main changes of this regulation is that it will be possible to organise a bid to allot a generic domain name with relevant market value.

UK

Consultation on the Implementation of the Directive on Privacy and Electronic Communications

The Directive on privacy and electronic communications (Directive 2002/58/EC) (the "**Privacy Directive**") is part of the new EU regulatory framework for electronic communications networks and services. The Privacy Directive updates the current Telecoms Data Protection Directive (Directive 97/66/EC) in view of new technologies and provides that the privacy rules which currently apply to phone and fax services also apply to email SMS and the use of the Internet. The Privacy Directive also aims to protect the confidentiality of communications, it sets conditions on these for traffic, location, subscriber data, subscriber directories and regulates the use of communications networks for unsolicited direct marketing by phone, fax, email and SMS.

The Government has begun a consultation process concerning the implementation of the Privacy Directive in the UK and responses are required by 19 June. The Privacy Directive is due to be brought into force on 31 October 2003.

Information Technology

UK

Consultation on the Waste Electrical Electronic Equipment Directive and the Restricting Certain Hazardous Substances Directive

Following on from the article in the ITC Newsletter, December 2002, the Waste Electrical Electronic Equipment Directive ("**WEEE**") and the Restricting Certain Hazardous Substances Directive were adopted earlier this year and the Government has recently begun an 18 month consultation process on their implementation. The products covered by the directives include IT, telecoms, televisions, videos and electrical and electronic tools. Member States of the EU are required to implement the directives by August 2004. WEEE will introduce mandatory recycling of IT and telecoms equipment as well as household appliances, medical, lighting and monitoring equipment, and electrical and electronic tools and toys. The aim of the directive is to prevent waste electrical and electronic equipment, encourage re-use, recycling and other methods of recovering waste electrical and electronic equipment, and improve the environmental performance of all operators involved in the lifecycle of electronic and electrical equipment (e.g. producers, distributors, consumers and those operators directly involved in the treatment of electrical and electronic equipment).

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