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This 2nd edition of IT and Telecom Baltic Legal Update marks the 10th anniversary of Sorainen's Baltic Legal Update in which annual bulletins, reflecting key changes in local legal environments, were published. Since the beginning of 1999, when our Vilnius office was launched to complete our pan-Baltic approach, Sorainen has published Baltic Legal Update (BLU) as it is today, the newsletter outlining the most important legislative changes in the Baltics.

Enjoy the reading!

Renata Berzanskiene

EU NEWS

INFORMATION SOCIETY SERVICES

CFI essentially upheld Commission finding that Microsoft abused its dominant position

On 17.09.2007, the Court of First Instance ("CFI") essentially upheld the Commission's finding that Microsoft abused its dominant position as regards, firstly, Microsoft's refusal to supply competitors with "interoperability information" and to authorise them to use that information to develop and distribute products competing with its own products on the work group server operating system market and, secondly, Microsoft's tying Windows Media Player with the Windows PC operating system.

Refusal to supply interoperability information

As regards the first alleged violation, the CFI stated that a refusal to supply on the part of a dominant undertaking may constitute abuse of a dominant position if the following conditions are met:

- a) the refusal relates to a product or service indispensable to the exercise of an activity on a neighbouring market;
- b) the refusal is of such a kind as to exclude any effective competition on that market; and
- c) the refusal prevents the appearance of a new product for which there is potential consumer demand.

The CFI then went on to conclude that the Commission did not err in considering that those conditions were satisfied, and upheld the part of the Commission's decision concerning interoperability.

Bundling of the Windows client PC operating system and Windows Media Player

The CFI agreed that the factors underlying the Commission's conclusions establishing abusive tying were correct and consistent with Community law and the Commission was correct in foreseeing a significant risk that tying would lead to weakening of competition in such a way that maintaining an effective competitive structure would not be ensured in the near future. The CFI upheld the part of the decision concerning bundling the Windows Media Player.

The CFI also made clear that Microsoft retains the right to continue to offer the version of Windows bundled with Windows Media Player and that it is required only to enable consumers to obtain the operating system without that media player. The CFI noted that this measure does not mean any change in Microsoft's current technical practice other than development of that version of Windows.

Monitoring trustee

As regards the appointment of a monitoring trustee, the CFI observed that by establishing the mechanism of a monitoring trustee, with own powers of investigation and capable of being called upon to act by third parties, the Commission went far beyond the situation in which it appoints its own expert to advise it during an investigation. The CFI then found that the Commission had no authority to compel Microsoft to grant a monitoring trustee powers which the Commission itself is not authorised to confer on a third party, and annulled the decision in so far as it ordered Microsoft to submit a proposal for the appointment of a monitoring trustee.

The fine

The CFI found that the Commission did not err in setting the amount of the fine and upheld the fine at EUR 497 million.

It must be noted that the decision of the CFI may be appealed, on points of law only, before the Court of Justice of the European Communities (ECJ).

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TELECOMS

European Commission proposes repeal of GSM Directive

On 25.07.2007 the European Commission issued a proposal to repeal Council Directive 87/372/EEC of 25.06.1987 ("the GSM Directive"), under which Member States were required to reserve use of the whole 890-915 MHz and 935-960 MHz bands for GSM. Currently, the GSM Directive prevents use of 900 MHz band systems by other technologies, such

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as UMTS, and therefore is regarded as a hurdle for developing the information society in the EU.

The main objective of the Commission proposal is to allow a larger choice of services and technologies, thereby maximizing competition in use of the bands so far covered by the GSM Directive. Therefore, use of this spectrum would be allowed for pan-European electronic communication services in addition to GSM. As a first step, this would include UMTS. Considering the evolution of technology and consumer needs, these bands would be kept under review so that additional pan-European systems could also be introduced and coexist with GSM and UMTS. The Commission also stresses the importance of ensuring that GSM services and operations remain coordinated and protected.

In order to allow use of the 900 MHz and 1800 MHz band in line with EC policy objectives and with market demand for mobile communications, it is proposed - by repealing the GSM Directive - to adopt a Commission Decision pursuant to the Radio Spectrum Decision which would harmonise new use conditions for the bands in question, allowing additional more advanced pan-European mobile communications services.

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European Commission plans to upgrade EU framework for electronic communications

In November 2007 the European Commission plans to present a proposed package of changes to the EU legal framework for electronic communications networks and services. Though these are still undergoing internal consultation in the Commission, the cornerstones of the planned reform are currently circulating in the media.

The proposals are likely to include a regulation establishing a European Electronic Communications Market Authority ("the new Authority"). From what is publicly known, the new Authority will not be responsible for formal decision-making, but will advise the Commission. The executive body of the new Authority should comprise the heads of national regulatory agencies ("NRA"). Plans are also in hand to introduce a significant novelty in the regulation of the telecommunication sector regarding the conduct of market analysis. So, if NRA do not complete a market analysis within the mandatory timeframe (one year for new markets, and every two years for existing markets), the Commission may request the new Authority to do so instead of NRA and to give an estimate and opinion to the Commission. The Commission may later issue a mandatory decision directing NRA what to do.

The new legal framework will likely also enable NRA to impose an obligation for functional separation on vertically-integrated undertakings, requiring them to place activities related to the wholesale provision of access products in an independently operating business unit in order to ensure fair competition. However, to impose a functional separation obligation, NRA will need express Commission approval.

The Commission also plans to reduce the number of regulated telecommunication markets from 18 to 8, so far it is not clear which market will no longer be regulated. If the commissioners endorse the new Commission proposal, it will be forwarded to the 27 European telecommunications ministers and the European Parliament for approval.

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PERSONAL DATA PROTECTION

New EU-US agreement on transfer of passenger name record (PNR) data

In July 2007 the EU signed a new agreement with the US on the processing and transfer of passenger name record (PNR) data by air carriers to the US Department of Homeland Security, which replaces the previous PNR interim agreement of 19.10.2006.

The new PNR agreement refers to 19 categories of data collected by the US authorities, such as contact data, payment details and itinerary. Concerns remain that privacy and data protection rights might be at risk. The European Data Protection Supervisor (EDPS) has outlined four areas of concern: a 15-year retention period for data, unlimited number of US agencies having access to data, lack of a "robust" system of redress, and unilateral obligations of the US as regards the scope of the agreement. The European Parliament (EP) is also concerned about an adequate level of data protection and has issued resolutions to that effect. The Article 29 Working Party, an independent European advisory body on data protection and privacy established pursuant to Article 29 of Directive 95/46/EC, has concluded that the level of data protection under the new agreement is considerably weakened, leaving open serious questions and containing too many emergency exceptions.

Another, albeit more positive, issue for data transfer to the US concerns accession of the Society for Worldwide Interbank Financial Telecommunication (SWIFT) to the US Safe Harbour programme on 20.07.2007. This is a result of criticism by the EP, EDPS and others that SWIFT had been providing personal data to the US without ensuring adequate levels of protection. The Safe Harbour programme is a framework of seven data protection principles negotiated between the EU and the US to enable data transfer from the EU to the US. In addition, the US has committed to use any data received from SWIFT exclusively for counter-terrorism purposes, the data retention period being 5 years.

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THE BALTIC STATES

ESTONIA

TELECOMS

Analysis of competition in telecoms markets

The Estonian National Communication Board (ENCB) has completed the first stage in market analysis of competition in the 18 fields of communication. A staggering number of 10 markets were found to have insufficiencies, mainly in their wholesale market capacity. On those markets, the ENCB has determined and designated undertakings with significant market power (SMP) and their obligations to support competition. Further corrections towards perfect competition are under way by targeting regulations at companies with SMP. The ENCB has grounds to believe that these steps will result in termination of the infringement procedure started by the European Commission against Estonia in 2005.

In the same field, the ENCB recently suffered a setback when the Supreme Court of Estonia repealed the ENCB's prohibition of changes to certain

communication products of Elion Ettevõtte. The ENCB was sued for impeding a former telecom monopoly in introducing products which, according to the ENCB, could hog the entire market, leaving others no room to compete. The ENCB claimed that SMP would be selling a product which, in case of extensive use by its clients, might reduce the fee for the service to a level lower than that provided wholesale for other communication companies using the same network. Such a price difference would constitute a violation of competition.

The Supreme Court accepted the ENCB reasoning that a possible infringement might indeed take place in the course of awarding bonuses and sales offers to subscribers of the service; however, the ENCB claims have not been backed by evidence. For that reason, the Supreme Court ruled that the ENCB regulation was based on a hypothesis. Although a future infringement does not have to be proved before actual violation takes place, the presumption on which the restrictive regulation was based has to be well-founded. The Supreme Court concluded that an analysis of the market and its future developments in conjunction with the product has to be carried out before any restriction can be prescribed. The decision highlights the importance of consistency of this measure with the rights of the competitors and end-users.

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PERSONAL DATA PROTECTION

Phone call recording guidelines

The Estonian Data Protection Inspectorate (EDPI) has recently published recommendatory guidelines for recording phone calls. The document highlights and suggests solutions for legal problems of recording corporate phone calls, especially calls to helpdesks or call-centres.

In general, recording telephone conversations is considered an infringement of personal privacy under the Estonian Constitution and the Data Protection Act. It is important to note that companies who record phone calls consider the rights of individuals making calls as well as company employees. The EDPI emphasizes that recording a phone conversation requires consent from both parties to the call, whereas the caller must be notified at the beginning of the call and employees agree, preferably in writing, before starting employment. This regulation is harmonized with and derived from EU directives 2002/58/EC and 1995/46/EC.

Some exemptions exist to the rule on recording and processing personal data. The general rule states that it is not prohibited to process a phone call when a person's life or health is in imminent danger. This, however, usually applies to emergency services. Nevertheless, specific data may be saved in reference to caller identification when it is required to send an invoice to that person. It is also allowed to record data for calculating the amount of the fee, where a service charge is based on the time or capacity of usage. However, the company recording the data must guarantee the confidentiality and classification of information retained.

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LATVIA

INFORMATION SOCIETY SERVICES

Creation of national database of stolen communication devices

On 11.09.2007, the Latvian Cabinet of Ministers adopted Regulations No. 619 (2007) which aim at creating legal rules to facilitate prevention of theft of electronic communications network terminal equipment (e.g. mobile phones), and distribution and use of such stolen or lost equipment.

The Regulations establish the procedure for notifying loss or theft of mobile phones, and the procedure for including such notified information on lost or stolen devices in a centralized database, which will include information about lost and stolen equipment as notified by their owners to electronic communications merchants or the State Police. The Regulations likewise charge providers of electronic communication services with ensuring that lost or stolen devices may not be used in the networks of providers of electronic communication services.

Providers of electronic communication services are responsible for establishing the database by 01.01.2008. In addition, providers are charged with ensuring free online access to the database for investigation institutions and the Information Centre of the Ministry of the Interior.

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TELECOMS

Latvia accedes to Additional Protocol to Council of Europe Convention for Protection of Individuals with regard to Automatic Processing of Personal Data

On 03.05.2007, the Latvian Parliament adopted amendments to the Law on Electronic Communications. The new wording *inter alia* provides for revision of terminology, establishes a new regulatory framework for construction of electronic communication networks, and defines the functions of the Electronic Communications Directorate. The amendments charge providers of electronic communication services with ensuring that specified data are to be retained for 18 months and upon request are transferred to law enforcement authorities. There are divergent opinions among law enforcement authorities, providers of electronic communication services, and ombudsman whether the amendments allow providers of electronic communication services to disclose retained data to law enforcement authorities if their requests have not been sanctioned by the court. The amendments are effective as of 07.06.2007 (some provisions will come into force on 01.01.2008). On 12.06.2007, the Latvian Parliament adopted amendments to the Law on Electronic Documents. The amendments establish that only a natural person may possess an electronic signature. Therefore, natural persons may electronically sign on their own behalf as well as on behalf of other natural or legal persons. The amendments are effective as of 26.06.2007.

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PERSONAL DATA PROTECTION

Latvia accedes to Additional Protocol to Council of Europe Convention for Protection of Individuals with regard to Automatic Processing of Personal Data

On 11.10.2007, the Parliament passed a law adopting the Additional Protocol to the Convention for Protection of Individuals with Regard to Automatic Processing of Personal Data regarding supervisory authorities and trans-border data flows.

The Protocol specifies the powers of supervisory authorities - in Latvia, the State Data Inspection. The Protocol provides that supervisory authorities must exercise their functions in complete independence. In addition, the Protocol regulates trans-border flows of personal data to countries not yet parties to the Convention.

The Ministry of Foreign Affairs has yet to deposit the instrument of accession with the Secretary General of the Council of Europe. Accession will take effect on the first day of the month following expiry of a period of three months after the date when the instrument of the accession is deposited.

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LITHUANIA

TELECOMS

Results of Lithuanian tender for WiMAX licences contested by unsuccessful bidders

On 17.09.2007 the Communications Regulatory Authority of the Republic of Lithuania ("RRT") announced the preliminary results of a public tender for the right to operate public communications access networks in the 3.4GHz to 3.6GHz radio frequency band using WiMAX technology.

The preliminary winners of the tender are the public company "Lietuvos radijo ir televizijos centras" and two public limited companies – "Balticum TV" and "Nelte". Ten companies participated in the tender. Three unsuccessful bidders did not agree with the preliminary results of the tender and contested the preliminary results. The final decision of RRT is still pending.

For the purposes of the tender, RRT set up a special commission, which had the task of evaluating all documents submitted by participants in order to choose the most credible and skilled candidates capable of implementing WiMAX technology in Lithuania.

In all three Baltic States, WiMAX licences were distributed through public tenders. Notably, in other European Union Member States WiMAX licences were distributed mostly through public auctions organized by respective governments. Therefore, the opinion has been voiced in mass media that public tenders are not sufficiently transparent and impartial for the purposes of distributing limited resources such as frequencies.

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PERSONAL DATA PROTECTION

Comprehensive amendments to the Law on Legal Protection of Personal Data

On 11.09.2007, a draft Law Amending the Law on Legal Protection of Personal Data was submitted to the Lithuanian Parliament. The draft law was prepared by the Ministry of Justice with a view to correcting and fine-tuning the presently valid Law on Legal Protection of Personal Data which is in force since 13.04.2007, so that the latter fully implements the requirements of Directive 95/46/EC on protection of personal data.

Among the changes proposed by the draft law, the following proposals are particularly important and, once adopted, will have immediate and stark effect on the national personal data protection legal framework.

(i) The proposed amendments broaden the scope of application of the Law on Legal Protection of Personal Data. Presently, Lithuanian branches and representative offices of EU-based companies fall outside the scope of the Law on Legal Protection of Personal Data. The draft law patches this loophole, providing that the subjects concerned will be treated as personal data controllers and will be fully subjected to the requirements of the Law on Legal Protection of Personal Data.

(ii) Taking into account the public opinion that at present the personal identification code is used too liberally, often for purposes that do not justify use of this personal identification tool, the draft law restricts use of personal identification codes. The draft law explicitly prohibits making personal identification codes publicly available. Further, the draft law prohibits the use of personal identification numbers for the purposes of direct marketing.

(iii) The draft law defines the concept of video surveillance and establishes rules for processing personal data by means of video surveillance. Video surveillance at the workplace is specifically singled out as an area of concern.

(iv) Taking into account the need for financial institutions to evaluate the risks inherent to the financial services they provide, the draft law establishes a special legal regime for processing personal data for the purposes of evaluating creditworthiness. Once adopted, the amendments will allow exchange of information on the financial obligations of clients under scrutiny between undertakings who, due to the nature of their services, face financial risk and thus have a legitimate interest in evaluating the creditworthiness of their clients.

(v) Among other important amendments, the following could be mentioned: provisions strengthening the independence of the State Data Protection Inspectorate; introduction of a simplified notification procedure provided that the company in question has the specialized data protection unit (a responsible person or department); detailed procedure for accepting and examining the complaints by the State Data Protection Inspectorate.

It is expected that the amendments will be adopted during the Parliament's autumn plenary session of 2007.

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NEWS IN SORAINEN

Recent deals

Risk analysis on digitally signing banking agreements for Parex Bank
Parex Banka Estonian Branch intends to start signing account agreements and other banking agreements by using digital signatures. The issues were novel as digital signatures have not previously been used for concluding banking agreements in Estonia. We provided the client with an extensive analysis regarding different risks and aspects of digital signatures. The assignment was handled by partner Kaido Loor and associate Viljar Kahari.

Representing Bravocom in a dispute
Representing Estonian mobile phone network operator Bravocom Mobiil AS in a dispute with a virtual operator. This virtual operator received an unfair benefit from interconnection fees. The case was advised by partner Kaido Loor.

Advice on development agreements for the world's leading IT company
Tallinn office advised the world's leading IT company in relation to contract negotiations with the Estonian Ministry of Social Affairs and E-Tervise SA on creation of the first fully electronic digital health record in Estonia. The case was handled by associate Ivar Kurvits and partner Kaido Loor.

Advising the world's leading IT company
In 2007 Riga office has been advising the client in a number of IT projects involving software development and support. These include assistance in several public procurement tenders for provision of IT consulting services. For example, one concerns implementing an export control system for Latvian customs, while another concerns implementing a digital archiving system for the Latvian centralised data base of x-ray and other digital images.

Advising a Belgian law firm specializing in e-commerce and e-matters
Riga office has been working with a Belgian law firm in a number of cases related to preparing country reports on various e-commerce, e-governance, data protection, and telecommunications matters. These include the first study on use of electronic signatures in e-government applications in Latvia. On the basis of this survey, the European Commission will be working on some new legislative initiatives at EU level. We also prepared a country profile report on e-procurement, which will be used by the European Commission. The cases were led by partner Agris Repss.

Assistance to a video content provider to hotels in entering Latvian market
Riga office assisted the client in entering the local market and in preparing a standard contract package including service contract and equipment lease contract. We also advised the client on provision of satellite content to hotels, including regulation on adult content as well as licensing issues. The client was assisted by partner Agris Repss.

Advising in case which might establish important principles on transfer of debtors' data to collection agencies in Latvia
Riga office represented a client in an administrative investigation case started by an individual who claimed that his personal data had been illegally transmitted to a third person. This case is noteworthy because it might establish important principles on transfer of debtors' data to collection agencies. The client was advised by partner Agris Repss and associate Andis Burkevics.

Acting for a leading local IT company in consumer claim
Riga office acted for the client in a consumer claim regarding defective hardware. We represented the client against an aggressive customer, successfully rebutting all allegations. As a result, no administrative process was started against the client. The client was assisted by partner Agris Repss.

Asseco acquires Sintagma in Lithuania
Vilnius office team led by partner Laimonas Skibarka and senior associate Raminta Karlonaite advised Asseco Poland S.A. in its acquisition of a majority stake in UAB Sintagma, a major Lithuanian IT company. Asseco Poland S.A. is the largest IT company in Poland. Asseco Group also operates in Slovakia, the Czech Republic, Romania, and Serbia and plans to enter Germany and Austria.

Advising Bite on legal requirements for WAP services and Internet forums
Vilnius office advises a leading Lithuanian mobile operator Bite on a regular basis on various issues of ICT and Telecoms laws. Recently we have advised the client on legal aspects of providing certain WAP services as well as on legal requirements for Internet forums. We have also advised the client on various aspects of service agreements with leading international and Lithuanian IT companies. The client is advised by partner Renata Berzanskiene and associate Sergejs Trofimovs.

Legal advice on E-commerce to a distributor of communications support materials
Vilnius office advised Antalis Lietuva UAB,

the Lithuanian subsidiary of the largest European group in distribution of communications support materials, on certain E-commerce legal issues. The case was handled by partner Renata Berzanskiene and associate Sergejs Trofimovs.

Advice to a leading VoIP carrier - Voxbone SA
Vilnius office team advised the leading VoIP carrier Voxbone, which provides centralized access to local phone numbers and toll-free numbers around the world, on a Lithuanian national legal framework in the field of electronic communication services. Associate Sergejs Trofimovs advised the client.

Continuous advice to a leading Baltic IT company Tilde
Vilnius office is providing regular advice to the Lithuanian subsidiary of leading Baltic IT company Tilde on IT and corporate matters. Recent advice involved assistance on matters related to the domain name BOMS.LT. Partner Renata Berzanskiene was involved in the case.

Other news

Sorainen advises majority of TOP 15 Baltic IT service companies
At the end of May 2007, Prime Investment published the Baltic ICT Market news, where it announced the TOP Baltic IT service companies in 2006 based on the data provided by management (http://www.primeinvestment.lt/files/ICT_news_07may.pdf). Sorainen has provided or is regularly providing legal assistance in IT and corporate matters to more than half of the TOP 15 Baltic IT service providers. Sorainen was also involved in acquisition of one of the largest IT service companies in the Baltics – Sintagma.

Employees

Lasma Liede joined Sorainen Riga office as an associate in August 2007. Her key areas of expertise are IT Law, and Litigation & Arbitration. Before Sorainen, Lasma worked at Nordea Bank Finland Plc Latvia branch (2001-2006) where she started as corporate assistant, later becoming legal counsel. She has also gained experience at the Constitutional Court and the Ministry of Justice. Lasma graduated with distinction from the University of Oxford (M.Jur) and the University of Latvia (Dipl.Jur).