

**LEGAL REGIME
OF INTERNET TELEPHONY**

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A new Internet service was offered recently at the Bulgarian market. It allows two or more persons to perform a voice communication in real time, regardless of the part of the world they are in. The peculiar thing in this case is that the international transmission of voice signals is done through the Internet. On January 10, 1998, the Commission published a Notice establishing three categories of Internet Telephony:

1. PC-to-PC (voice communications transmitted via the Internet between the PCs of two users using modems, software, loudspeakers and microphones);
2. Phone-to-PC (voice communications transmitted via the Internet between the PC of one user using a modem, software, a loudspeaker and a microphone, and another user using a traditional telephone connected to the public switched telephone network ("PSTN"));
3. Phone-to-Phone (voice communications transmitted via the Internet between two users using traditional telephones connected to the PSTN).¹

The first type allows virtually every Internet user to communicate with another user, provided that he has the required software, a sound card, headphones and a microphone. With the other two types the conversation is mediated by the provider of the service. The

latter have the following working principle: whenever a user wishes to make an international phone call he dials from a traditional or public phone the local number of his provider, dials his password and finally dials the number of the person he wishes to speak to. The voice transmission from the phone to the local provider of the service is carried out via the PSTN, and from the local provider of the service to the provider of the user on the other side – via the Internet.

In Bulgaria the Internet Telephony is offered by several operators. A matter of present interest is its current legal status and how it will change with the expected adoption of the Draft for Amendment and Supplementation of the Telecommunications Act (DASTA), published in the website of the Government (<http://www.government.bg/bg/index.html>).

DASTA provides a number of amendments of the current regime, including ones in relation to voice telephony in general, and Internet Telephony in particular. It should be mentioned that the term Internet Telephony, which is being used in the present commentary, has not been legally defined in the legislation. For the purposes of this commentary Internet Telephony is viewed as a service for a transmission of voice via the Internet.

1. Present legal regime

On the one hand we need to answer the question of whether Internet Telephony falls within the regulatory framework of the TA. As far as the voice signals are transformed and transmitted through the Internet in IP packets, the answer to this question should be sought in the provisions of Article 3, paragraph 1 of the TA. Its text gives a legal definition of the term *telecommunications* – *the transference, transmission or reception of signs, signals, written text, images, sound, or any type of information through a conductor, radio waves, optic or other electromagnetic medium*. On the other hand, the provisions of Article 2 define as a telecommunications activity the carrying out of telecommunications by means of the construction, maintenance and usage of telecommunications networks and/or provision of telecommunications services, i. e. performing telecommunications in a commercial way (Paragraph 1, section 7 of DASTA. This means that regardless of the way Internet Telephony is treated, being a service for a transmission of sign or sound information, it comes under the regulations of Article 3, paragraph 1 and the provision of this service would be treated like a telecommunications service, regardless of the fact that this specific terminology is not used in the law.

Since the regime for the activities of the Internet Access Providers (IAP) is regulated, according to the respective bodies, given that the regime of their activity is free there should be no restrictions regarding the provision of Internet services either. In other words, due to the insufficient knowledge and understanding of this problem the provision of access to the Internet is associated with the the provision of Internet services without taking in account the fact that such services are offered not only by Internet Access Providers.

In view of the TA currently in force and the issued according to it secondary legislation there are no serious legal restrictions for the provision of Internet Telephony as a telecommunications service, excluding the monopoly of the Bulgarian Telecommunications Company (BTC) over the transmission medium and the traditional telephone service (Paragraphs 10 and 11 of the Transitional and Final Provisions of the TA).

The arguments for this are the following:

First, we can assume that Internet Telephony provision is subjected to a free regime since it does not come directly or indirectly in the list of exclusively specified activities subjected to an individual or a general licensing, according to Order No. RD – 09.235 as of December 18, 1998 of the Postal Services and Telecommunications Committee for defining the telecommunications activities subjected to an individual or

Second, as stated above, Paragraphs 10 and 11 of the Transitional and Final Provisions, of the TA constitute a state monopoly to the benefit of BTC over the traditional telephone service between end points of the fixed telephone net. A conclusion cannot be drawn upon the legal interpretation of the terminology used that Internet Telephony corresponds to the notion of *traditional telephone service* and, consequently, it cannot be subjected to the monopoly of BTC.

2. Regime of Internet Telephony, according to the Draft for Amendment and Supplementation of the Telecommunications Act (DASTA)

In this draft considerable amendments are provided and if they become a legislative act this will lead to serious changes in the regime of Internet Telephony.

First, this draft provides an amendment to paragraph 1 of the Additional provisions of the Telecommunications Act (TA), which gives a legal definition of the term "voice service". According to this text "*a voice service is a telecommunications service for transmission of speech in real time via any type of a telecommunications network, regardless of the technology used for the transmission, which allows a user to speak to another user*". From the interpretation of paragraph 1 in relation to article 3, paragraphs 1 and 3 of the TA, it becomes clear that Internet Telephony, as a telecommunications service for transmission of voice in real time via the Internet, comes under the regulation of this provision.

Second, the draft should be examined in its part concerning the suggested complementations to Article 39 from the TA. The exclusive provisions of Paragraph 2, Section 4 state that all telecommunications services are subjected to an individual licensing when "a voice service is granted, access to such a service and/or any offered service in general". As commented above, since Internet Telephony unconditionally corresponds to the legal definition of voice service, it is clear that all telecommunications operators offering Internet Telephony service should obtain an individual license.

Finally, the suggested text for amendment of Paragraph 10 of the Additional provisions of the Telecommunications Act is quite disturbing. According to it an assumption may be made that Internet Telephony as a service will also be included in the monopoly of BTC. The stipulated amendment of Paragraph 10, Section 3 of the Additional provisions of the Telecommunications Act reads, "On grounds of Article 18, Paragraph 4 of the Constitution of Republic of Bulgaria a state monopoly is imposed upon:

1. The provision of fixed voice service (urban, interurban, international and transitional) under public conditions until December 31, 2002;

2. The transborder transmission of speech in real time for the purpose of provision of international voice services by public telecommunications operators until December 31, 2002.

At first, Section 1 does not give the impression that Internet Telephony is included in the monopoly. The wording of Section 1, in relation to the unclear legal definition of *fixed voice service* regulated in Paragraph 1, Section 20 of the Additional provisions of the Telecommunications Act, clearly refers to "*the transference of speech in real time via any type of a fixed telecommunications network, or between two fixed end points of a fixed telecommunications network or networks (as well as voice services, carried out through a fixed end point of a public telecommunication network, at any end of the call or the line), regardless of the technology used, which allows a user to speak to another user*". Here it should be mentioned that against every principle for the preparation of legislative texts in the middle of the text after the word *networks* appears a text in brackets, which may lead to a broader interpretation of the term *a fixed voice service* with the inclusion into its scope of every type of voice service, provided that there is a fixed end point at one end of the line. With some categories of Internet Telephony – Phone-to-PC or Phone-to-Phone it can be definitely claimed that there is a fixed end point at one end of the line. It is not clear whether the vagueness of this definition is intentional or is due to imprecise wording.

Furthermore, we should examine Section 3 from the above Paragraph. It leads to reasonable doubt as to whether there is a stipulated inclusion of Internet Telephony in the monopoly of BTC. The reason for this doubt is the text: "the transborder transfer of speech in real time for the purpose of provision of international voice services...". Only in view of the nature of the provider of the voice service, i. e. *a public telecommunications operator* it could be assumed that the field of application of the monopoly is restricted only in respect to these operators. Here too, the text's unclear wording allows for various interpretations and is hazardous for the market. Anyhow, the changes in the terminology used in the legislation (e.g. *an ordinary voice service* substituted by *a fixed voice service*) are not accidental.

A conclusion can be made by the stated above that with the stipulated amendments Internet Telephony regime will be altered, and definitely not towards liberalization.

Worth mentioning is that every change in Internet Telephony regime in a direction contrary to that of liberalization comes into conflict with the European and world tendencies and is in contradiction with the EU Directives (see Directive No. 338/90).

As mentioned above, in a Notice issued by the EC some definitions of Internet Telephony were provided with the purpose of accommodating the definition of voice telephony, regulated in Directive No. 338/90 regarding the competition at the market for telecommunications services, to Internet Telephony. The Commission reached the conclusion that not only does Internet Telephony not correspond to the definition of voice telephony given in the interpretative provisions of the Directive, but that it requires a specific approach for regulation. Internet Telephony, being a technology that witnesses an extremely fast distribution and improvement, is still in its infancy and any premature regulation could seriously hinder its development. The Commission clearly states that the major goal, which the current regulations for telecommunications services pursue, as well as the future ones will, is to give priority to competition. Undisputedly, competition brings about new and diverse services at lower prices. Competition should be given priority in relation to services regulation.

European legislators are extremely cautious towards the implementation of a set of regulations for Internet Telephony and do not attempt to include this relatively new service into the existing frame, regulating similar, yet fundamentally different services. This fact, however, does not seem to bother our legislators, who readily add every type of voice transmission in real time to the category of *voice service*, without taking into account the specificity of *the manner, the technological differences and the quality of its provision*. Is it possible that a better quality transmission of voice data is carried out with the current quality of the voice telephony offered by BTC via the PSTN of analogue lines, so that the user is satisfied? One does not need any special knowledge to give a negative answer to this question.

Logically, we ask the question: why should a licensing regime or monopoly be imposed when only a month ago the Government declared its support for bringing the licensing regimes to the minimum? The answer to this question is to be sought in the Government's desire for making the offer for the sale of BTC more attractive. The bad news is that this is done at the users' expense, who will not be able to use the new technology services, but will have to put up with BTC's monopoly and high prices for two more years.

In addition to the said above, we will allow ourselves to state boldly that the expansion of BTC's monopoly would be in contradiction with the Constitution of Republic of Bulgaria, as well as with the very principles set forth in the TA. The reason for this conclusion provides Article 18, Paragraph 4 of the Constitution: "A regulated by law state monopoly can be imposed upon railway transport, the national postal and telecommunications networks, the usage of nuclear power, the production of radioactive products, weapons, explosives and biological substances with a strong impact". Since the imposition of a state monopoly is an exception from the principle of free economic initiative, then every broader interpretation of the regulations allowing the imposition of monopoly would be out of the question. Therefore, according to the Constitution a state monopoly can be imposed *only upon the national telecommunications networks but not upon the telecommunications services*. The law itself clarifies the difference between a telecommunications service and a telecommunications network (see Articles 2, 3 and Paragraph 1, Sections 1 and 9 of the Transitional and Final Provisions of the TA). In this case the imposition of a state monopoly upon any telecommunications service whatsoever would be in conflict with the Constitution. What is more, the law would be in contradiction with its own objectives, provided in Article 2, Paragraphs 1 and 2. The law's objective is that it guarantees the existence of preconditions for satisfying the society's needs for telecommunications services and that conditions are provided for a liberalization of the telecommunications activities and services, the creation of a free market, a loyal competition, equal rights for the operators, etc.

To draw a general conclusion, according to the Draft for Amendment and Supplementation of the Telecommunications Act, Internet Telephony will be subjected to individual licensing. The presence of ambiguity in the text of Paragraph 10, Sections 1 and 3 calls for a broader interpretation and its treatment as an imposition of a state monopoly upon Internet Telephony until December 31, 2002.