

ABOGADOS & CONSULTORES

CORRESPONSALES DE
WILKINSON BARKER KNAUER LLP
Washington, D.C.

Bimonthly Newsletter

Issue 002

January 2002

Edificio Teatro Las Palmas, Piso 5,
Avenida Las Palmas, Urbanización Los Caobos,
Caracas 1050, Venezuela.

Telephone: 58.212. 794.0674

Telecopier: 58.212. 793.2792

Venezuelan Legal Insight

LEGISLATIVE AVALANCHE

Through the so-called Enabling Law, which came into force on September 13, 2000, the National Assembly authorized the Venezuelan President for a one-year period to issue Law-Force Decrees (equivalent to laws) on several fields such as financial, economic, social, infrastructure, transportation, services, public security, science, technology and public sector. As a result, the Executive enacted a considerable number of laws, (a total of 53, 12 of which were later reprinted "due to printing error by the issuer"), whose form and content sharpened the already frequent conflicts between the public and the private sector. These conflicts reached their peak on December 10, 2001, when a general strike, led by Fedecámaras (federation of commercial chambers) and backed up by the Venezuelan Federation of Labor Unions, took place. Additionally, on January 23, approximately 150,000 people publicly demonstrated in Caracas against the government of President Chávez. Many of these laws have a significant impact on the telecommunications industry and public services. Now, the fate of the criticized laws depends on two institutions: The Supreme Tribunal of Justice, which is currently revising the constitutionality of some of these laws as requested by opposition groups, and the National Assembly that may proceed to review these laws as part of its legislative function.

INSIDE THIS ISSUE

- 1 Venezuelan Legal Insight
- 2 Regional Insight

For any follow up on these newsletter topics, please feel free to contact Carlos Seade at:

cseade@abogaconsult.com

Whatever the outcome, two factors should be taken into account: First, the new legal and economic order laid down in the new laws is characterized by stronger State intervention. Second, a certain penchant for changing everything from the past by modifying all existing laws, even if it cannot be justified. The same tendency was observed in the abundant legislation produced by the National Assembly during the last quarter of year 2001.

Below, the content of some laws enacted by the Executive Branch under the Enabling Law and some others passed by the National Assembly are summarized. This selection is due to their special relevance for the telecommunications sector as well as for other services based on network infrastructures.

- **Laws decreed by the National Executive**

Law-Decree N° 1.204 on Data Messages and Electronic Signatures (2/28/2001): It grants legal value to electronic signatures, data messages and to any intelligible information in electronic format. It also regulates Certification Service Providers and Electronic Certificates. According to this law, data messages have the same evidence value as written documents.

Organic Law-Decree N° 1.290 on Science, Technology and Innovation (9/26/2001): It forces companies with an annual gross income of more than 100,000 taxable units (nearly USD 1,730,000) to invest an annual amount of up to 20% of their before-tax annual profits in training and research and development in the fields of science and technology.

Law-Decree N° 1.436: General Law on Ports (11/23/2001): It lays down the regulation of ports and their infrastructure, and fixes the respective national and regional competences with the aim of modernizing the functioning of ports. It sets the concession and authorization rules for port operations, and also

indicates that commercial companies managing ports must create a capital reserve of no less than 30% of their annual profits in order to make investments and improvements related to port infrastructure.

Law-Decree N° 1.446: Civil Aviation Law (9/28/2001): It regulates activities related to air transportation, luggage, freight and mail, civil aircrafts for scientific, advertising, industrial, agricultural, sanitary, sports, instruction and tourism purposes. It also deals with issues regarding airport infrastructure and the concession and authorization regime.

Law-Decree N° 1.445 on the National Railroad Transportation System (10/30/2001): It regulates the planning, construction and exploitation of the national railroad system, declaring the last two of these activities to be of public and social interest, which means that private companies may participate. It also contains the rules for rights of way and expropriation.

Law-Decree N° 1.507 on the Harmonization and Coordination of Competences of National and Municipal Public Powers For the Domestic Supply of Natural Gas and Electricity (11/7/2001): Its purpose is to identify and to delimit municipal and national competences regarding the domestic supply of gas and electricity, and thus to clarify the role of municipalities in this field, which will help to solve numerous problems arising from different interpretations of the Venezuelan Constitution and the Organic Law on Municipal Powers.

Law-Decree N° 1.535 on Traffic and Transportation by Road (11/26/2001): It regulates traffic and ground transportation, including construction, road administration and related services. Drivers, pedestrians, passengers and operators of services related to ground transportation are subject to this law. It creates the National Institute of Traffic and Ground Transportation and demands a special registration for vehicles and drivers.

Law-Decree N° 1.528: Organic Planning Law (11/13/2001): It strengthens the directing powers of the State through the planning function. However, it recognizes the right of different social sectors to be informed, to work out proposals, to identify priorities and to suggest participation methods in planning issues. It sets the basis and guidelines for the construction, viability, improvement and organization of the planning function at different governmental territorial levels (National, Regional and Municipal).

Law-Decree N° 1.510: Hydrocarbon Organic Law (11/13/2001): It regulates the exploration, exploitation, refining, industrialization, transport, storage, commercialization and conservation of hydrocarbons and refined products and the infrastructure required to carry out these activities. It also increases the royalties that companies performing the aforementioned activities must pay to the State. Gaseous

hydrocarbons are excluded from this law.

- ***Laws passed by the National Assembly***

Organic Law on Electric Service (12/31/2001): This law, which was expected to be published before September 21, 2001, was finally passed on December 31, 2001, reforming the previous one. This delay of over three months kept the companies related to the electric sector in an uncertain legal situation with respect to their obligations. The reform introduced by this law has the primary object of prorogating the initially fixed deadlines for the creation of an Electric Energy National Commission, an Electric System Management National Center and the separation of generation, transmission, and distribution activities.

Organic Law on Drinkable Water Supply and Sanitation (12/31/2001): After a long waiting period, characterized by the inadequacy of unclear and fragmentary laws and regulations, the new law gathers in a very systematic and complete way all activities related to the supply of drinkable water and sanitation. Contrary to the public service of electricity, water supply and sanitation services are the responsibility of the municipalities, and these territorial entities have to decide whether to provide services directly or through third parties (which opens the possibility of granting concessions to private companies). Therefore, and considering that these services are granted by units of the Executive Power, this law fixes a five-year transition period, during which the transfer of services to municipalities or Metropolitan Districts must take place.

Organic Law on Public Administration (10/17/2001): It determines the principles and rules of public authorities as well as citizens' rights when dealing with them. This law systematically covers numerous administrative law principles developed through several decades by the Supreme Court (known today as Supreme Tribunal of Justice) and the First Court in Contentious and Administrative Matters. This law also has its novelties. One of them is the duty of any public authority which wants to dictate a regulation, to conduct a public consultation prior to its approval, and thus to allow all participants to express their opinions or observations. If this formality is disregarded, the regulation will be null and void. This is undoubtedly a significant legal instrument which formally recognizes important rights of the citizens.

Organic Tax Code (10/17/2001): The reform to the Organic Tax Code extends the tax liability of company directors and managing staff to the payment of fines and other penalties, making them jointly liable with the taxpayer (the company) for the payment of taxes, fines and other penalties, derived from assets managed by them. This liability is limited to the value of the assets they manage. On the other hand, it is important to mention that the new Code provides the possibility of

fixing an electronic domicile, which consists in a safe technological device which may serve as a mailbox for receiving administrative orders from tax authorities. Regarding tax infractions, the new Code classifies them as formal infractions, infractions related to excise taxes, payment infractions and tax crimes, especially tax fraud, sanctioned with imprisonment of up to 7 years.

Partial Reform Law of the Income Tax Law (12/28/2001): This reform refers to four specific aspects: taxable basis, dividends, transfer prices and inflation adjustment. It is worth questioning the constitutionality and legality of article 199 of this new law, which provides that it will come into force on the same date of its publication in the Official Gazette (December 28, 2001) and that it will be applied to the fiscal periods that start after the law has come into force (including the fiscal year that started on January 1, 2002). This provision seems to be in opened contradiction with article 317 of the Constitution and with article 8 of the Organic Tax Code; according to these articles, tax laws must fix an idle period before the new law comes into force. In other words, tax laws cannot come into force on the same day of their publication. In addition, the aforementioned articles provide that if new tax laws do not fix a term for coming into force, this term shall be of 60 calendar days from their publication in the Official Gazette, in accordance with the tax law principles of certainty and convenience. If article 199 is declared unconstitutional, this law will come into force 60 days after its official publication, that is, on February 27, 2002. Therefore, and since income taxes are based on taxable periods, this new law should only be applicable to periods beginning on or after February 27, 2002. Consequently, the new law would not apply to the taxable period that started on January 1, 2002 but to the period starting on January 1, 2003.

Special Law Against Information Technology Crimes (30/10/2001): It defines crimes committed against or through the employment of information technology systems or components. These crimes include illegal access, sabotage and damage of systems, informatic espionage, fraudulent manipulation of intelligent cards, violation of the privacy in telecommunications, diffusion or exhibition of pornographic material, misappropriation of intellectual property rights and so on.

TELECOMMUNICATIONS SECTOR

- **Public Consultations:** Complying with the provisions laid down in the Organic Law of Public Administration, in December 2001 the telecommunications regulatory body, CONATEL, conducted public consultations for discussing draft regulations on Universal Service and Special Telecommunications Taxes. These events were marked by the extensive and opened participation of different representatives of the telecom sector.

The purpose of the *Universal Service Draft Regulation* is to regulate the duties of assignment, subsidization and control of public services that may be assumed by telecommunications operators. On the other hand, the *Draft Regulation on Special Telecommunication Taxes* addresses taxpayers' legal obligations, specifies concrete mechanisms for fiscal control, defines the determination and calculation models of the tax on the use of the electromagnetic spectrum and establishes the tax amount to be charged for administrative services.

- **Regulation on Radio Broadcasting and Open Communal TV Public Service:** This regulation was dictated through Decree N° 1521 which was published in the Official Gazette N° 37.359 on January 8, 2002. Among other provisions, it exempts the operators of these services from the tax obligations as laid down in the Organic Telecommunications Law .

- **Transformation of Licenses and Concessions:** Through Resolution N° 93, published in the Official Gazette N° 37.342 on December 10, 2001, CONATEL made public the timetable that telecommunications operators with licenses or concessions obtained before June 12, 2000, must request their transformation and adaptation to the new regulatory regime of the Organic Telecommunications Law .

- **Alarm due to the imminent approval of the so-called Contents Law:**

After the incidents occurred on January 8, 2002, in front of the head office of "El Nacional" (one of the major newspapers in the country) where a group of activists demonstrated against media organizations, the alarm expressed by some sectors of society has now increased due to the imminent approval of the so-called "Contents Law," which could arbitrarily censor the content of communications. However, Jesse Chacón, General Director of CONATEL, affirmed that the draft of the Contents Law prepared by the regulatory body only regulates transmissions of audiovisual content and that interested sectors may express their opinion about this draft during the public consultation process, which may be in February 2002.

ELECTRIC SECTOR

- **Risk of Energy Crisis:**

Different sectors of the country are worried about a possible crisis in the energy sector as a result of the delicate situation of the reservoir called "el Guri" (which has reached unprecedented low levels) and the poor capacity of thermoelectric generation to satisfy growing demands. The meteorological forecasts for the current year do not seem very encouraging. Therefore, if the actual energy consumption continues, the low water levels of Guri might reach a point where some generation units of the plant will have to be stopped. This may lead to considerable cuts in energy supply

throughout the whole country. Now, the government has started a nationwide information campaign to promote the rational use of electricity. Experts agree that the short and medium-term solution would be the incorporation of new and efficient generation plants to the system.

NATIONAL BUDGET FOR THE YEAR 2002

- ***Oil Reference Price***

The national budget for the year 2002 took a referential oil price of USD 18.50 per barrel, which might seem reasonable at first sight, considering the OPEC band (USD 22 – USD 28). However, since the beginning of the current year, the oil prices have been lower than expected by the Government. If this situation continues, the budget deficit will soon be unbearable. This proves, once again, that Venezuela urgently needs to create reliable income alternatives to the oil industry.

- ***Budget Deficit***

The Government has announced the introduction of a new tax on banking debits, with a rate of 0.75%, applied to the majority of transactions performed through the financial system, as well as the elimination of some exemptions from the Value Added Tax Law and a 10% tax increase on luxury items. These measures are primarily due to the budget deficit caused by oil prices that turned out to be lower than expected (USD 18.50). These decisions were taken in spite of the substantial and extraordinary oil revenues during year 2001.

Regional Insight

BRAZIL

The Brazilian regulatory body of electricity service, ANEEL, will start a bidding process in July in order to grant concessions allowing the construction and operation of 11 hydroelectric plants with a total capacity of 2,200 MW for 35 years, representing an investment of nearly USD 1.37bn. These projects join the 11 hydroelectric projects successfully assigned in November 2001. In this manner, Brazil continues its

efforts to recover from the most severe energy crisis of its history, basically caused by two factors: Insufficient rain falls during the last few years and a lack of investments to meet growing energy demands.

COLOMBIA

Although the prepaid system for telephone services, in particular mobile and long distance, is rather common, the implementation of this system in other fields such as the domestic supply of electricity and water, is not only innovative, but also offers paying alternatives to consumers and new business opportunities for operators. The Medellín Public Companies are already taking action to allow their customers to prepay for such services.

PARAGUAY

The president of Paraguay, Luis González Macchi, gave instructions to the Telecommunications Regulatory Body and the National Secretary of Reform, to draw up regulations to promote the liberalization of telecommunications.

URUGUAY

The Government decided to postpone the bidding for the spectrum 2.5G and 3.0G, which was originally planned for January 28, 2002. It will be held on May 6, 2000. The Argentinean crisis and the low participation of interested companies were some of the reasons of the delay.

CUBA

Ignacio González Planas, head of the Department of Informatics and Communications, announced that one of the priorities for the current year was the installation of a fiber optic network at a national level, since the coaxial cable network, which was considerably damaged by hurricane Michelle hitting the island last November, was insufficient to cover internal communications.