

Mobile business in Spain

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I Who owns the customer?

The debate over who owns the customer, and equally importantly, who is responsible to the customer, is heating up in the mobile business sector. As with computer users before them, mobile users can now access all manner of content via the internet through the new generation of mobile devices. This has opened the **door for content providers to have direct access to the users**, thereby creating new relationship possibilities between content providers and mobile operators.

Now that users can access content directly, operators and content providers are increasingly looking to the service model with revenue sharing as a means of using their respective positions to attract users. This service model can be structured in many variations: mobile operators promoting the content of providers; content providers attracting traffic to operator's network with their content, services and applications; or either party providing advertising services to the other. In each case, the parties involved can **share access to the users, share revenues and add the users to their respective databases**. These specific details need to be well established in the relevant contracts.

Of course, along with this direct relationship with the user come **added responsibilities for the content provider**. A contract must be entered into with each user (usually in the form of

terms and conditions), privacy issues must be addressed, and the requirements of consumer protection laws must be met.

II Mobile 2.0 Advertising Models

Mobile 2.0 refers to services that integrate the social web (built around user-generated content and online communities) with the core aspects of mobility – personal, localized, measurable, always-on and ever-present. These services are starting to appear thanks to wireless devices (PDAs, Smartphones, cell phones, etc.) that enable multimedia features and are capable of delivering interactive services as well as access to the full range of mobile consumer touch points.

Until recently, advertising on cell phones has been pretty sparse. However, the combination of advances in wireless devices and the so-called 2.0 services, make **such devices a great platform for new advertising and marketing models**. In the near future, we will see a huge increase in advertising techniques on mobile devices, such as contextualized ads like Yahoo!'s and Google's services on the Internet, adver-gaming, adver-community, banners on WAP portal sites, 'toothing' campaigns, together with the 'more traditional' marketing campaigns on mobiles (e.g. SMS/MMS Push or Pull campaigns). We will also see the beginning of mobile specific sponsorships such as subscriber incentives, like free minutes for viewing ads.

Mobile advertising campaigns raise **particular legal issues, which will have to be addressed on a proactive basis and in-depth knowledge of the business**, such as: providing compulsory legal information, gathering consent from consumers (opt-in) and other personal data protection issues (e.g. use of geographic location data), intellectual property issues (e.g. trademarks and contextualized ads; ads in user-generated content), co-location of ads in mobile games and applications, and defining the liability for each actor of a marketing campaign (advertisers, agencies, content/service providers and network operators). New trends, new challenges.



III TV on Mobile Devices

Providing TV services to mobile devices consists of two main services: 1) the electronic communications **network services** supporting the broadcast of content, and 2) the **provision of audiovisual content** to users.

In order to offer electronic communications network services, the provider must obtain the relevant licence (as an "Operator") and set up the network or necessary infrastructure to distribute content to end-users. Prior to starting its activities, an Operator must submit a notification to the Spanish Telecoms Regulator, describing the services to be provided and the technology used. These services can be provided using current wireless technologies supported by mobile devices that can receive broadband data transmissions (in Spain, the most suitable technologies are UMTS and Wi-Fi/Wimax technologies).

Depending on the technology used, the Operator may also have to apply for the relevant licences for the use of the radio spectrum from the Ministry of Industry, Tourism and Commerce or otherwise reach an agreement with a licensed Operator (i.e. mobile operators currently authorized in Spain). If the Operator wants to provide audiovisual services to mobile devices by means of terrestrial waves (e.g. using the DVB-H standard), it must obtain the relevant licence to broadcast content within the chosen territory (national, autonomous community or local level). No licences have been granted yet, though two nationwide licences are planned to be granted in the near future.

With regards to audiovisual content provided to end-users' mobile devices, the Content Provider must comply with **applicable audiovisual regulations**, including those related to illegal or prohibited content, and scheduling of advertising and content.

IV Mobile billing and revenue models

The structure of the new mobile landscape is far more complex than the voice-only oriented business structure. The development

of new mobile services, particularly wireless entertainment and mobile 2.0 services, and the integration of Internet, mobility and communications in the same mobile device, has led to the necessity of defining new business and revenue models, beyond the traditional prepaid and post-paid models. The business challenge is **to bring together the device, the content/service and the transport levels with services (and billing models) that customers are willing to pay for.**

There are many alternative models to consider, examples of which include, at the device level, pull-based versus push-based models (i.e. "a la carte" models or micro-payment systems via SMS/MMS or premium rate calls); post-paid (i.e. subscription models) versus prepaid versus third-party subsidized models (e.g. ad-supported models); and, carrier billing systems or "billing-on-behalf-of" versus third party payment systems (e.g. banks and payment card companies).

At the content/service level, some alternatives to consider are fixed license fee versus revenue sharing; and various scenarios based on the type of content, service or application.

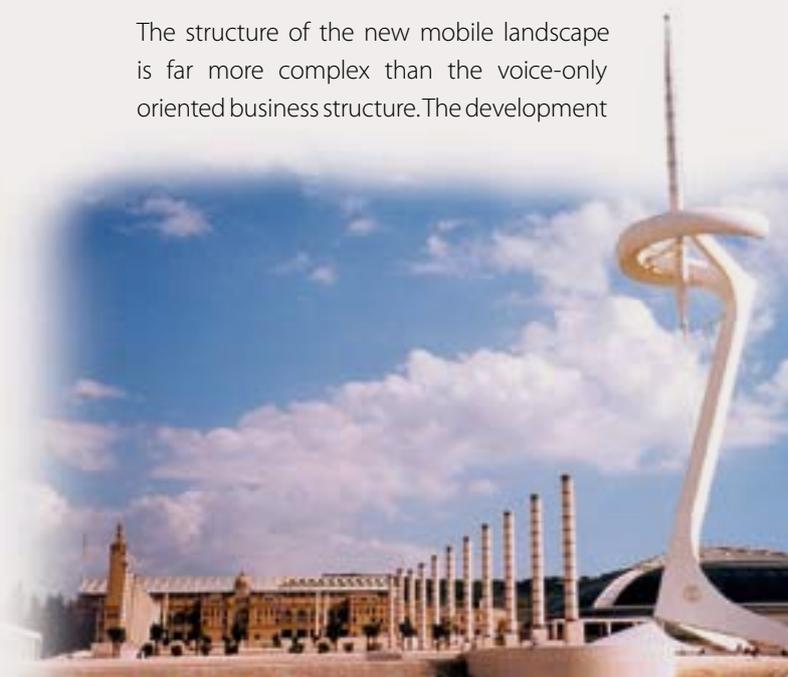
Finally, at the transport level, in this new landscape the network operator's charging systems must be able to handle a much higher amount of data in a given period than voice communications. Additionally, the emergence of new players/intermediaries, such as the MVNOs, confuses even more the responsibilities of each actor when it comes to billing the end users for the services used.

In each of these scenarios, ad-hoc agreements between the different parties will need to be put in place based on a sound knowledge of the sector and of the obligations and responsibilities involved in each billing and revenue model.

V MVNOs in Spain

Regulations dating from 2002 acknowledged the legal validity of the MVNO concept in Spain. However, it was not until February 2006 that a Resolution of the Spanish Telecommunications Regulator (the "CMT") set forth the regulations for the effective opening of the Spanish market to MVNOs. These regulations require:

- Delivering Notification to the CMT of the intention to provide MVNO services.
- Reaching an **agreement with at least one of the authorized mobile operators for the use of its mobile network**. The CMT did not impose any Reference Interconnection Offer nor require that the mobile operators hold negotiations on a non-discriminatory basis with each MVNO. Therefore, negotiations on the conditions of access to mobile networks are left to the operators and the market



rules. However, it should be mentioned that some form of regulatory intervention was foreseen if suitable tariffs and conditions cannot be agreed on. We can confirm that the successful negotiation of the terms of **this agreement is the key element for any MVNO.**

- Obtaining the necessary numbering resources: Mobile Network Code, Mobile numbering for users, etc.

Currently, some MVNOs have fulfilled all the necessary requirements and are providing services in Spain. Most of these MVNOs are characterized as being a new activity brand of big distributions channels (such as supermarkets) in order to more easily reach potential users.

However, lately the MVNO sector has moved to negotiate cooperation agreements with the most well-known brands and services in the market to provide those value added services that could not be provided by any other MVNO, such as specific content access and personal services outside of the normal MVNO activities.

VI Corporate strategies for growing your business

When acquiring a Spanish business the following should be kept in mind: (i) the letter of intent is the starting point, and its potential commitments may lead to the success or breakdown of the transaction; (ii) Spanish law has various pitfalls and a proper due diligence must be followed; (iii) payment terms, representations and warranties, management team and future milestones are definitely key issues; and (iv) speed is crucial, therefore, a good solution for ensuring a smooth closing is to structure the transaction so that the **terms are subject to the achievement of milestones.** Nothing is more unpredictable than the future, so this is a fair precaution for all parties.

As a start-up, you may want access to Spain's wide range of local and foreign venture capital firms, business angels' networks, and the so-called family office, which include firms with specific interest in the telecoms sector. Often, such firms request to invest both through equity and debt, in which case one option may be a **"participative" loan:** a hybrid of equity and debt with an adjustable interest rate determined by company profits. The interest accrued is tax deductible for corporate income tax purposes and participative loans are offered by both private and public entities, with the latter offering more favourable conditions.

Management team contribution is crucial in growing your business. Increasing their participation in equity and shareholder business decisions can be achieved in various ways. One option is through par-value stock and/

or preferential voting rights for some specific decisions in Management Buy Out/Buy In transactions. On the other hand, if the management does not get equity at the first stage, you may be able to balance all interests with systems such as equity ratchets or vesting schedules.

VI Tax overview for communications and technology companies in Spain

By establishing your business in Spain, you gain duty-free access to a market population of over 500 million people due to Spain's membership in the EU and adoption of the Euro as its official currency. In addition, Spain has signed **73 double taxation treaties** to date, including the extensive and unique network of tax treaties with Latin-American countries. This makes Spain a perfect gateway into the European market for non-EU companies, as well as a tax-efficient route for capital investments in Latin-America.

The standard **VAT rate in Spain is 16%**, with the exception of the Canary Islands, which do not apply VAT but rather a specific Sales Tax (IGIC) with a general rate of 5%. Since telecommunication and e-commerce services, when offered to individuals acting as end users, are located for VAT purposes in the territory where the company providing the service is established (regardless of where the end user is located) these low VAT rates have led a lot of companies operating in these sectors to establish themselves in Spain and benefit from the most competitive VAT rates in Europe.

The standard **Corporate Income Tax rate in Spain is 30%, but it is lowered to 25% for so-called small-sized entities** (companies with a turnover of less than Euro 8 million per year) and even further reduced when certain legally established tax benefits are applied. In addition, the Spanish tax framework for research, development and technological innovation is acknowledged as being the best among OECD countries. It includes tax credits of up to 25% for R+D costs -exceptionally up to 42%- as well as an allowance equivalent to 50% of the income derived from the licensing of certain intangibles such as patent royalties.



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The firm

Legal Link is a Spanish law firm with offices in Barcelona and Madrid specialized in telecommunications, technology, internet and media law. We also advise on commercial, corporate/M&A, tax, litigation and public law, and represent clients before local, regional, state and international authorities.

All the members of the firm have an international background and we speak fluent Spanish, English, French and Catalan.

We regularly work on matters including setting up or acquiring companies in Spain, corporate and commercial law, mobile, wireless and spectrum issues, content distribution and services provision through mobile networks, the internet and TV, intellectual property, advertising law, e-commerce and internet law, broadcasting, taxation and specific telecoms requirements such as: obtaining telecoms licences, negotiating interconnection agreements, service level agreements and maintenance agreements, software and hardware licensing and approvals, capacity contracts, co-location agreements, hosting services, switch or server partition agreements, numbering, local loop unbundling, pre-selection and portability.

The communications industry requires flexible, rapid and pragmatic solutions, and business-focused legal support. We seek to maintain a sound knowledge of the sector and its regulations in order to understand the global business of our clients and to be able to assist with strategy in relation to the Spanish market.

Social Responsibility:

Each year since 2004, Legal Link has contributed 0,7% of its annual turnover to a NGO for the third world.

