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Mobile commerce/payments effected with mobile devices **Possible future work**

Proposal by Colombia

Note by the Secretariat

Within the framework of preparation for the fifty-first session of Working Group IV (Electronic Commerce), the Government of Colombia has submitted to the Secretariat the attached document.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.



Annex

Introduction

According to document A/CN.9/728, at its fortieth session the United Nations Commission on International Trade Law (UNCITRAL) requested that the Secretariat closely follow legal developments in the area of electronic commerce, with a view to making suggestions in due course. At its forty-third session, the Commission requested that the Secretariat organize a colloquium on the topics discussed in document A/CN.9/692 — electronic transferable records, identity management and the use of mobile devices in electronic commerce — and that it prepare a note summarizing the discussions in the colloquium in order to provide information enabling the Committee to adopt a decision which would give the Working Group on Electronic Commerce a “*clearly defined mandate*” in this regard.

Taking into account that one of the Commission’s functions is to modernize and harmonize the rules of international trade, the Colombian delegation wishes to propose to the delegations of the States members of the Commission and those attending Working Group IV (Electronic Commerce) that, following completion of work on the draft rules on electronic transferable records, rules on mobile commerce or mobile payments be considered as a possibility for discussion in subsequent sessions of Working Group IV.

Similarly, online banking processes effected through mobile financial services must be taken into account when reviewing rules on mobile payments, in order to harmonize legislation with current technological trends and payment mechanisms for local and cross-border electronic commerce.

It might also be useful if the Commission and the States members of UNCITRAL Working Group IV provided general guidelines on the adoption of appropriate legal regulations, particularly on the use of mobile devices for financial purposes or as a means of payment in the completion of electronic commerce transactions.

Electronic commerce conducted with mobile devices

- The growth of mobile devices

The Communications Regulatory Commission (CRC) of Colombia has indicated that the accelerated development of technological convergence at an international level has facilitated the integration of communication and media services, a situation which has led to the emergence of a more sophisticated consumer group that demands immediate and continuous access to ICT-related services. Moreover, the document notes, there has been significant growth in the market for content and applications, which has significantly altered the dynamics of the markets and businesses in all productive sectors.¹

¹ www.crcom.gov.co/uploads/images/files/Reporte_Industria_2013_11.pdf. Communications Regulation Commission - Republic of Colombia ICT Industry Report - November 2013. At www.mintic.gov.co.

The worldwide penetration of mobile telephone services is approaching 100 per cent, which means that in the short term there will be as many mobile phone lines as people,² a trend that is widespread in most of the world's countries, with a few exceptions. In the case of Colombia, by the end of 2012 penetration had reached 103 subscribers per 100 inhabitants, very similar to the continent's aggregate penetration.³

The impact of mobile devices on development is recognized in United Nations scenarios, for example in the 2009 Information Economy Report of the United Nations Conference for Trade and Development (UNCTAD),⁴ which shows that in recent years mobile devices have been useful in developing countries in making up for the failures of limited communications infrastructure. This is in addition to the rapid growth in the number of users of such devices, a trend that has led to an increased supply of smartphone services, such as the use of mobile devices for sending and receiving electronic communications via Short Messaging Services (SMS), browsing the Internet through Wireless Application Protocol (WAP), and performing contactless transactions based on Near Field Communication (NFC) applications. In most of these cases, the communication may be qualified as of an electronic nature like data messages in accordance with UNCITRAL texts.⁵

UNCITRAL⁶ notes the need for legislation that enhances the predictability of the legal status of transactions conducted with electronic means, including those effected with mobile devices, as some less developed countries do not yet have general electronic commerce laws, and other countries, having explicitly indicated that mobile commerce is among the forms of electronic commerce covered by technology-neutral legislation, have passed special legislation on the matter. Legislation would be the most appropriate way to update and harmonize all such regulations, without the inconvenience of individual regulatory efforts.

In Colombia, for example, the Financial Inclusion Act has been adopted, which seeks to promote digital payments using the installed capacity of existing networks throughout the country where mobile phone penetration will have a significant impact, with a view to promoting the use of digital devices as financial tools for processing basic financial transactions.⁷

² Ibidem.

³ Ibidem. The reports of the Ministry of Information and Communication Technologies of Colombia (MINTIC) indicate that by the end of the first quarter of 2014 the total number of subscribers to mobile telephone services was 51,594,619 and that, according to the number of subscribers to mobile telephone services, there are 108.3 service subscribers per 100 inhabitants. There is now major penetration in the use of mobile devices, especially smartphones, in many developed countries and to a lesser, although significant, extent in developing countries.

⁴ In document A/CN.9/692. Available at http://unctad.org/en/docs/ier2009_en.pdf.

⁵ Document A/CN.9/692. Present and possible future work on electronic commerce. UNCITRAL, 2010.

⁶ Idem, para. 69.

⁷ Act No. 1735 of 2014, *Por el cual se dictan medidas tendientes a promover el acceso a los servicios financieros transaccionales y se dictan otras disposiciones* (Establishing measures to promote access to financial transaction services and other measures).

On this issue, the International Telecommunication Union (ITU) has indicated that between 2010 and 2011⁸ mobile-cellular subscriptions registered continuous double-digit growth in developing-country markets, but an overall slowdown in comparison with previous years. According to the ITU, the number of mobile-cellular subscriptions increased by more than 600 million, almost all in developed countries, to a total of around 6 billion, or 86 per 100 inhabitants, globally. Mobile-cellular penetration increased by 11 per cent worldwide, compared with 13 per cent the previous year. Overall, the increase in the number of service providers has resulted in competition in the sector and has lowered consumer prices significantly, which has been a key factor in the spread of mobile-cellular services, according to the ITU study.⁹

- Mobile payments and mobile commerce

UNCTAD points out that mobile commerce has been defined as “*commercial transactions and communication activities conducted through wireless communication services and networks by means of short message services (‘SMS’), multimedia messaging service (‘MMS’), or the Internet, using small, handheld mobile devices that typically had been used for telephonic communications*”,¹⁰ which also involves accessing data via such devices, which boosts the apps sector.

Moreover, in document A/CN.9/728 the following definition of **mobile commerce** was suggested as a starting point for future discussions: “*any commercial transaction and communication activity conducted through wireless communication services and networks using handheld mobile devices designed to be used in mobile or other wireless communications networks*”.¹¹ This definition extends the scope of application of mobile commerce by not limiting it solely to smartphones, but by also including any device which uses wireless mobile networks, such as Wi-Fi, NFC, and Bluetooth, including text messages or chat forums and social networks.

However, means of payment based on text messages and services (SMS or MMS), as well as near field communications (NFC), are emerging worldwide. ISACA, an ICT-based non-governmental organization, has noted that the widespread use of **smartphones** and the convenience and mobility that these devices offer users and consumers by providing services over and above simple communication are the main factors behind the growing interest in payments effected with such devices.¹² Furthermore, payment solutions provider Adyen¹³ indicates in the latest edition of

⁸ International Telecommunication Union (ITU), Measuring the Information Society 2012 Executive Summary. At www.itu.int/dms_pub/itu-d/opb/ind/D-IND-ICTOI-2012-SUM-PDF-E.pdf.

⁹ At www.itu.int/dms_pub/itu-d/opb/ind/D-IND-ICTOI-2012-SUM-PDF-E.pdf.

¹⁰ OECD, Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce, June 2008. Cited in Document A/CN.9/728. United Nations Commission on International Trade Law, forty-fourth session. Vienna, 27 June - 15 July 2011. Present and possible future work on electronic commerce. Note by the Secretariat.

¹¹ Document A/CN.9/728. United Nations Commission on International Trade Law, forty-fourth session. Vienna, 27 June-15 July 2011. Present and possible future work on electronic commerce. Note by the Secretariat. Paragraph 35.

¹² Emerging Technologies. ISACA Emerging Technology White Paper November 2011. At www.isaca.org/chapters8/Montevideo/cigras/Documents/cigras-2012-03-mobile-payments-wp-espaol.pdf.

¹³ Adyen is an Internet-based omni-channel payment solutions provider. See www.adyen.com.

its Global Mobile Payments Index¹⁴ that the number of mobile payments continues to increase worldwide.

Similarly, the consultancy firm *Flurry Mobile*¹⁵ reported the worldwide growth of smartphones and tablet devices in its most recent report.¹⁶ In January 2013, China and the United States had roughly the same active smart device installed base, that is, 222 million in the United States compared to 221 million in China. According to the firm's estimates, by the end of February 2013 China would have 246 million devices compared to 230 million in the United States, followed by the United Kingdom, considered the third largest market in the world with 43 million devices.¹⁷

ISACA's report¹⁸ indicates that in the European Union in particular the relaxation of restrictions imposed on payment operators is changing the landscape of mobile payments in that region. Specifically, a number of new actors (including mobile phone operators and department stores) will be officially recognized as payment service providers (PSP), although they are not traditional credit institutions (as defined by European Union Directive No. 2000/12/EC) and it is clear that they will be permitted to operate in direct competition with traditional credit/financial institutions, in compliance with the requirements set forth in the Directive.

According to an OECD study, Latin America already relies on additive mobile banking models (which incorporate mobile banking solutions into the existing financial distribution offer). The study notes that, “[a]mong the transactions most commonly offered through mobile channels, in addition to cash management operations (which remain very popular), are domestic money transfers and payments, especially for utility bills, and the purchase of air time, probably the most popular service according to initial indications.”¹⁹

Colombia and mobile financial services — MFS

Mobile financial services, according to the OECD “[i]nclude mobile banking services, services provided through mobile wallets and access via mobile phone to financial services such as loans, securities trading or the sending and receiving of

¹⁴ www.ayden.com/home/about-ayden/press-room/press-releases/mobile-payments-index-july-2014.html. The Adyen Global Mobile Payment Index is published quarterly based on data from payments made through the company.

¹⁵ Cited by a national publication in REDACCIÓN TECNOLOGIA, Publication. eltiempo.com. Section: Tecnosfera. Date of publication: 19 February 2013. Author: REDACCIÓN TECNOLOGÍA. Colombia.

¹⁶ Accessible at www.flurry.com/bid/94352/China-Knocks-Off-U-S-to-Become-World-s-Top-Smart-Device-Market.

¹⁷ Idem.

¹⁸ Emerging Technologies. ISACA Emerging Technology White Paper. November 2011. At www.isaca.org/chapters8/Montevideo/cigras/Documents/cigras-2012-03-mobile-payments-wp-espaol.pdf.

¹⁹ *Telefonía Móvil y Desarrollo Financiero en América Latina* (Mobile Phones and Financial Development in Latin America) - Authors (International Financial Analysts): Emilio Ontiveros Baeza, Alvaro Martín Enríquez, Santiago Fernández de Lis, Ignacio Rodríguez Téubal and Verónica López Sabater. Editing Coordinator: Jaime García Alba (Inter-American Development Bank) At www.oecd.org/dev/americas/42825577.pdf. Accessed 13 December 2014.

*remittances.*²⁰ One of the most important cases to be highlighted is that of the Kenyan mobile-phone based banking service “*M-Pesa*”, which was created in 2005 by Safaricom²¹ — a subsidiary of the English company Vodafone — and launched in March 2007.²²

Electronic commerce conducted via mobile devices, and mobile payments in particular, is of especial importance to the competitiveness of Colombia, given the impetus it provides to banking processes and to the significant penetration of smartphones and tablet devices in Colombia, which in turn increases the use of electronic media as a transaction channel. Similarly, in the Colombian Government’s National Development Plan 2010-2014: Prosperity for All, mobile financial services (MFS) are discussed in the chapter on Information and Communication Technology, which was the basis for the CRC’s document “Promotion of Financial Services provided via Mobile Networks and Complementary Measures for the Provision of Content and Applications. Yellow Paper on Coordination of Financial and Accounting Analysis”²³ of October 2013.

The CRC document considers MFS to be a promising market, bearing in mind that nearly half the world’s population uses mobile communications and that developing countries in particular have registered the largest increase in the implementation of these services due to the high penetration of information and communication technologies, which, according to the document, act as a bridge to providing other services, especially those targeting the poorer classes.²⁴

- Financial Inclusion: Colombia

Colombia adopted Act No. 1735 of 2014 — the Financial Inclusion Act — which, according to its preamble,²⁵ defines financial inclusion as access to and use of responsible financial services by the majority of the population, which is highly important as it contributes significantly to the country’s economic development as it allows both the consumption capacity of households and investment potential to increase.

This Act establishes **companies specializing in electronic deposits and payments** and supervised financial bodies with light regulatory requirements, which may attract public savings only in order to offer services for payments, money orders, transfers, collection and savings, and therefore may administer their resources in

²⁰ Idem.

²¹ “The company Safaricom, established in Kenya, is one of the main integrated communications companies in East and Central Africa. Safaricom was founded in 1997 and by the end of 2012 employed over 1,500 people, mainly located in Nairobi and in other major cities such as Mombasa, Kisumu, Nakuru and Eldoret. Since its inception, Safaricom has been successful in its aim to satisfy its subscribers, which has resulted in an increase in the subscriber base, with more than 17 million currently subscribed to the network. Safaricom offers a full range of services, from fixed and mobile voice services to data services, on various platforms.” At www.worldmanuals.com/safaricom1 [*Translator’s note*: invalid url].

²² For further information: <http://digital.law.washington.edu/dspace-law/handle/1773.1/1199>.

²³ *Promoción de servicios financieros sobre redes móviles y medidas complementarias para provisión de contenidos y aplicaciones. Documento Amarillo Coordinación de Análisis Financiero y Contable*. At www.crcm.gov.co/uploads/images/files/DocSoporte_SFM.pdf.

²⁴ Idem. Pp. 13 and 14.

²⁵ At [www.legismovil.com/BancoMedios/Archivos/pl-181-14s%20to%20\(inclusion%20financiera\).pdf](http://www.legismovil.com/BancoMedios/Archivos/pl-181-14s%20to%20(inclusion%20financiera).pdf).

order to provide various transaction services.²⁶ Banks, mobile operators, postal operators or any interested party may set up a company specializing in electronic deposits and payments provided they meet all the legal conditions required to form a financial institution, inasmuch as the resources received by these companies must be deposited in demand deposits managed by credit establishments or in an account of the Central Bank (Bank of the Republic), if so authorized by the Bank's Board of Directors.^{27,28}

Working Group I document A/CN.9/800 — Micro, Small and Medium-Sized Enterprises (MSMEs) — Possible Future Work — states that the Working Group recognizes and welcomes the mandate given by the Commission to establish a legal framework conducive to facilitating the activity of MSMEs throughout their life cycle, beginning with the implementation of simplified rules for the establishment and operation of these companies, in addition to other topics such as “*financial inclusion, including mobile payments, access to credit, alternative dispute resolution and simplified insolvency rules*”,²⁹ which implies that the work on mobile payments to be developed in Working Group IV may serve as the starting point for the other UNCITRAL Working Groups upon request.

We may therefore conclude that there is a significant relationship between the growth of platforms designed to provide more than voice services and the growth in global demand for intelligent mobile devices such as smartphones and tablets, which relationship will enable the development of new business models that would necessarily involve regulation of the legal and technological security of commercial transactions, job creation, protection of personal data, consumer protection, *habeas data* and intellectual property rights.

Conclusion

We therefore request that the delegations of the States members of the United Nations Commission on International Trade Law (UNCITRAL), particularly those attending Working Group IV, take this paper into consideration for possible future work, once the study of the regime for electronic transferable records has been completed, and that the potential for mobile commerce or mobile payments be discussed in the following sessions with a view to developing a regime to harmonize and unify the individual systems under review.

²⁶ Ministry of Finance and Public Credit Colombia. *ABC Proyecto de Ley de Inclusión Financiera: Sociedades Especializadas en Depósitos y Pagos Electrónicos* (ABC Draft Financial Inclusion Act: Companies Specializing in Electronic Deposits and Payments.) 4 September 2014. At: www.minhacienda.gov.co/portal/page/portal/HomeMinhacienda/saladeprensa/09032014-abc-inclusion-financiera.

²⁷ According to this Act, companies specializing in electronic deposits and payments shall have a minimum capital of five thousand eight hundred and forty-six million pesos (\$5,846,000,000).

²⁸ Mobile payment systems are also being discussed in the United States: Mobile Payments in the United States: Mapping Out the Road Ahead. Darin Contini and Marianne Crowe, Federal Reserve Bank of Boston, Cynthia Merritt and Richard Oliver, Federal Reserve Bank of Atlanta, and Steve Mott, BetterBuyDesign. March 25, 2011.

²⁹ A/CN.9/800. Report of Working Group I (MSMEs) on the work of its twenty-second session (New York, 10-14 February 2014).