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News

1. COMPANY LAW

TURKEY
Recent Amendments to the Capital Markets Legislation

During the final months of 2003, the Turkish Capital Markets Board (the CMB) promulgated a number of new regulatory acts. Below are highlights from those new acts.

Public Offering

The Communiqué on Sale and Registration of Shares with the CMB has been recently amended by Communiqué Series I No: 32.

According to the Communiqué, in the case of an initial public offering or a secondary public offering through a book building method where the demand exceeds the number of shares offered to the public, offerors would be entitled to sell additional shares, provided that the relevant announcement is published in the prospectus. However, the total number of additional shares cannot surpass 15% of the shares offered to public prior to the issuance of the extra shares.

Additionally, upon the public offering of the shares, the Communiqué authorizes those broker agents that are listed in the prospectus and involved in the public offering to purchase the offered shares from the Istanbul Stock Exchange (ISE) in order to enable price stability, provided that the relevant announcements are published in the prospectus.

The broker agents are entitled to realize such purchases for a period of only thirty (30) days starting from the date of trading of the shares on the ISE and can initiate such purchases if and when the trading price of the shares is below the public offering price. The agents cannot sell those shares below the public offering price within the aforementioned 30-day period.

Cumulative Voting

The Law on Capital Markets authorizes the CMB to issue regulations regarding cumulative voting systems in order to establish a balance between the majority and minority shareholders of publicly held companies and to secure the rights of the minority shareholders by enabling them to be represented in the management of the company.

The Communiqué Related to the Cumulative Voting Principles to be Applied in the General Assembly Meetings of Undertakings, which was prepared in line with this principle and granted discretion for the use of cumulative voting principle in publicly held companies, has recently been amended through Communiqué Series IV No: 31.

According to the Communiqué, publicly held companies which are willing to apply cumulative voting in their general assembly meetings must amend their articles of association to that effect.

Companies whose shares are not being traded on the ISE but who have continuously had over 500 shareholders over the last two years are required to implement cumulative voting systems and thus amend their articles of association accordingly at their first ordinary general assembly meeting.

Profit Distribution

Pursuant to the CMB's resolution dated 30 December 2003, publicly held companies are required to distribute at least 20% of the distributable profit from their activities in 2003. The distribution can be made (i) in cash, (ii) by distributing bonus shares to be issued through the increase of the company's share capital in an amount not less than 20% of the distributable profit, or (iii) by distributing a certain amount of cash and a certain number of bonus shares.

The CMB bases this decision on (i) Article 15 of the Capital Markets Law, which states that "the ratio for the first dividend to be stated in the articles of association of listed companies cannot be lesser than the ratio determined and announced by the CMB", and (ii) Article 5 of the Communiqué on the Principles of the Distribution of Dividends in Listed Joint Stock Corporations, which empowers the CMB to force publicly held companies to distribute in cash the first dividend to be set aside from the profits of the preceding year.

Prior to the issuance of this decision, profit distribution was not compulsory and the decision regarding distribution of profit was left to the discretion of the general assembly of shareholders.

International Financial Reporting Standards

The Communiqué on Accounting Standards, another of Turkey's undertakings (according to the letter of intent addressed to the International Monetary Fund on 30 July 2002), has been issued in order to comply with European Union requirements. It asks all the corporations whose shares are traded on stock exchanges and/or organized markets to prepare their consolidated financial tables in accordance with International Financial Reporting Standards (IFRS) by 1 January 2005.

The Communiqué will enter into force on 1 January 2005. However, corporations are entitled to apply the provisions of this Communiqué and prepare their financials according to IFRS rules starting from their annual or interim accounting year-end as of 31 December 2003.

According to the Communiqué, corporations are required to prepare balance sheets, income, cash flow and equity charts, together with footnotes. The corporations' biannual and annual financial statements would be fully prepared, whereas the quarterly financial statements would be in summary form. In addition, biannual financials would be subject to a limited audit, whereas annual financials would be subject to permanent audit.

For more information visit : www.spk.gov.tr

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2. COMPETITION

ITALY
Compensation for damages

A landmark decision was issued recently by the Court of Appeals of Rome on compensation of damages for violation of competition rules in the field of telecommunication services. In the case at hand, Albacom, a national telecommunications licensed operator, filed a lawsuit against incumbent Telecom Italia for alleged violation of competitive regulation in the provision of data transmission services. The Court, following a thorough assessment of the behavior of the incumbent in the offering of services in the relevant market, stated the criteria to calculate damages which must be applied in case of direct losses due to unlawful exclusion of a competitor from the market. In particular, damages must be calculated applying the percentage of the market share held by the operator in the subject market, evidently prior to any alteration for anticompetitive behaviour of other operators or to the turnover of the dominant operator during the period of the alleged abuse (which in the case in issue, was equal to the total relevant market turnover).

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ITALY
Insolvency Act

On 23rd December 2003 the Italian Government issued a Law Decree on the reform of insolvency, provisionally effective with a view toward compulsory conversion into law by Parliament within 60 days. The Decree modifies the existing rules applicable to the management of companies subject to an "extraordinary administration" procedure, which is a particular insolvency procedure applied by Italian law. The scope of the Decree is to simplify the access to the "extraordinary administration" procedure in favour of companies employing more than 1000 people and with general financial debt exceeding EUR 1 billion. The Decree sets forth an accelerated procedure for the adoption of a restructuring plan and provides for additional powers to the "extraordinary administrator", including the draft of a restructuring plan in order to ensure the operation of the company and to safeguard of employees. The Decree makes direct reference to Law No.270/99 on extraordinary administration, which provides, inter alia, that all State measures granted as part of the "extraordinary administration" proceedings and contained in an industrial restructuring plan for individual undertakings must remain subject to a prior notification to the European Commission, due to the need to verify if State measures may fall short of EU antitrust and state aid principles.

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3. COMPUTER CRIME

CANADA
ISPs not Obliged to Disclose IDs of Alleged Music Downloader

Federal Court Refuses to Force ISPs to Disclose IDs of Alleged Music Downloaders

On 31st March 2004, Justice von Finckenstein of the Federal Court of Canada rendered a decision in BMG Canada Inc. et al. v. John Doe et al., 2004 FC 488, refusing the Motion of the Plaintiffs, collectively members of the Canadian Recording Industry Association (CRIA), to force the Defendants, five Canadian Internet Service Providers (hereinafter "ISPs") to disclose the identities of certain customers who have allegedly infringed copyright laws by illegally trading in music downloaded from the Internet. The Motion was brought about following an investigation commissioned by the Plaintiffs which found that individuals operating under certain pseudonyms for the purposes of downloading music with software such as KaZaA or iMesh were using Internet Protocol (IP) addresses registered with the Defendant ISPs. The unsuccessful Motion follows on the heels of a number of similar (but successful) Motions taken by the Recording Industry Association of America (RIAA), in its efforts to discourage peer-to-peer file sharing.
Both parties submitted, as common ground, that the individual ISP account holders were entitled to the confidentiality of their identities by virtue of their contracts for service with the ISPs as well as sections 3 and 5 of the Personal Information Protection and Electronic Documents Act (hereinafter PIPEDA), Canada¿s federal privacy legislation, yet they all acknowledged that section 7(3)(c) of PIPEDA could also be availed in this case to force an ISP, by means of a court order, to disclose the personal information of a customer without that person¿s consent.

With respect to the test which should govern the granting of such a Motion for an "equitable bill of discovery" under Rule 238 of the Federal Court Rules, 1998, SOR/98-106, the Court found favour in that outlined in the House of Lords decision in Norwich Pharmacal Co. v. Customs and Excise Commissioners, [1974] A.C. 133 and the Canadian decision which adopted its ratio, Glaxo Wellcome PLC v. Canada (Mininster of National Revenue) (1998), 81 C.P.R. (3rd) 372.

This test is composed of the following five criteria:
- the applicant must establish a prima facie case against the unknown alleged wrongdoer;
- the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander;
- the person from whom discovery is sought must be the only practical source of information available to the applicants;
- the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs;
- the public interests in favour of disclosure must outweigh the legitimate privacy concerns.
With respect to part (a) of the test outlined above, the Federal Court found that a prima facie case against the unknown alleged wrongdoer was not established. First, the affidavits from the organization investigating anonymous "downloaders" were comprised of hearsay testimony which could not be admitted into evidence. Secondly, the Court was not convinced that the Plaintiffs could decipher the actual identities of the internet users operating under pseudonyms by determining the IP addresses they may have used to effect downloads of music files and by then locating the ISPs to which the IP addresses in question were allegedly allotted. Thirdly, reiterating that downloading a song for personal use is not an copyright infringement by reason of section 80(1) of the Copyright Act, the Court did not receive any evidence of illegal activity, namely that the "alleged infringers either distributed or authorized the reproduction of sound recordings." In perhaps the most controversial element of the decision, the Court emphasized that placing a copy of a song on a shared directory where it can subsequently be accessed via a "peer-to-peer" (or, P2P) service "does not amount to distribution."

With respect to part (b) of the test outlined above, the Court found that the ISPs are directly involved with the alleged infringers of the Plaintiffs copyright and are not mere bystanders within the meaning of the Motion under consideration, yet, in reference to part (c) of the said test, the Court could not categorically determine that the ISPs are necessarily the only practical source of information available to the Plaintiffs.
As regards part (d) of the aforementioned test, the Court found that the process of determining the actual names of the ISP¿s clients who were allegedly using the IP addresses isolated by the Plaintiffs¿ investigation to download music from the internet would be an extremely arduous and costly one, necessitating reimbursement by the Plaintiffs to the Defendants in the event that the Court would have issued an Order for the ISPs to furnish the names of the individuals targeted by the Plaintiffs.

Finally, the Court declared that, "given the age of the data, its unreliability and the serious possibility of an innocent account holder being identified," the privacy concerns of the individuals in question outweigh the public interest concerns in favour of disclosure. Thus, the Plaintiffs failed to establish part (e) of the test, as well.

The decision represents a significant setback for CRIA in its efforts to curb peer-to-peer file sharing of copyright-protected work in Canada. CRIA is expected to appeal the result.

For more information visit : http://decisions.fct-cf.gc.ca/fct/2004/2004fc488.shtml

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4. CONTRACT LAW

ITALY
New franchising regulation

On 21st April 2004 the Italian Parliament enacted a new regulation on franchising (Law No. 19/2004). The Law specifies the contents, terms and general principles affecting franchising contracts, defined as "a contract, however named, between two legally and economically independent parties, whereby one party grants to another, for economic consideration, a set of industrial or intellectual property rights, related to trademarks, trade names, shop signs, utility models, industrial designs, copyright, knowhow, patents, technical and commercial consulting and assistance, in view of having the franchisee participating to a network among a number of franchisees operating in a set territory for the purpose of merchandising specific goods and services". Under the new general provisions, the franchising contract must be stipulated in writing, under penalty of nullity, and must comply with the following rules:
- the term must not be shorter than three years, unless an earlier termination is due to a breach of the terms of the agreement;
- a minimum set of terms, such as the amount of investment and entry fees due by the franchisee, the calculation and payment modality of royalties, minimum obligations of the franchisor, possible exclusive territorial rights, the know-how provided by the franchisor to the franchisee, eventual protection and property use criteria, technical and commercial assistance, point of sale specifications, training, contract renewal, termination or assignment general terms;
- pre-contractual and negotiation behaviour obligations.

For more information visit : www.assofranchising.it

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5. CONVERGENCE

CANADA
Status of VoIP to be Decided by CRTC

On 7th April 2004, the Canadian Radio-television and Telecommunications Commission (CRTC) issued the Telecom Public Notice CRTC 2004-2, which sets forth the preliminary view of the Canadian communications regulator regarding the regulatory status of Voice-over Internet Protocol (VoIP) telephony services. The CRTC¿s initial view is that the adherence of VoIP to the North American Numbering Plan (NANP) as well as its provision of universal access both to and from the Public Switched Telephone Network (PSTN) renders it "functionally the same" service as circuit-switched voice telecommunications (traditional telephone) service and, thereby, subject to the same regulatory scheme. This finding accords with the CRTC¿s practice to remain neutral with respect to the technology in question while focussing exclusively on the service being provided. It is noteworthy that this finding contrasts with that of the CRTC's equivalent in the United States, the Federal Communications Commission (FCC) (See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, FCC 04-97, 14 April, 2004).

If the CRTC were to maintain this finding following public hearings on the subject, it would mean that providers of VoIP would have to register with the CRTC given the specified class within which they operate. Moreover, they would be responsible for the tariffs applicable to their class, for a contribution for the subsidization of high-cost residential local services in rural and remote areas, and, possibly, for the adherence to rules of 9-1-1 emergency access, wherever the technology permits. Finally, to the extent that VoIP service providers provide access to the PSTN, they would be considered local exchange services, and therefore subject to the regulatory framework for local competition set forth in Local competition, Telecom Decision CRTC 97-8, 1 May 1997.
The preliminary views of the CRTC will be the subject of a public dialogue, to be held on 21st and 22nd September, before the Commission makes its final decision in this matter, most likely by the Spring of 2005. Additionally, initial comments on the views outlined by the CRTC in its public notice are due by 18th June.

For more information visit : http://www.crtc.gc.ca/archive/ENG/notices/2004/pt2004-2.htm

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UNITED KINGDOM
Ofcom Questions and Answers On VoIP and VoB Services

The Office of Communications (Ofcom) is currently considering whether and how to regulate voice services using Internet Protocol (VoIP) and provided over broadband (VoB). As part of this review, in late June 2004 it plans to consult on the status of such services within the scope of publicly available telephone services (PATS) and the question of how emergency calls may be affected.

Meanwhile, in questions and answers published by Ofcom in May, Ofcom recommends that providers of VoB services that fall within the PATS definition ("service available to the public for originating and receiving national and international calls and access to emergency organisations") should consider how they comply with the regulatory conditions applicable to PATS. Those providers of non-PATS VoB that could be regarded as substitutes for traditional telephone services are encouraged to provide clear consumer information about what they do or do not offer with respect to public access to emergency organisations.

In its forthcoming consultation, Ofcom can therefore be expected to consider the extent to which PATS obligations should apply to VoIP and VoB service providers. This includes not only access to emergency organisations and services, but also publication of information on pricing terms and conditions, billing methods, measures for end users with disabilities, and number portability, as well as essential requirements for network security and integrity.

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6. ELECTRONIC COMMERCE

AUSTRALIA
Electronic Authentication Framework

The Australian Government Information Management Office (AGIMO) has recently published its draft Electronic Authentication Framework.
The Australian Government is working towards the implementation of an Australian Government Authentication Framework (AGAF) that provides a "whole-of-government" approach to authentication of on-line transactions. The Government recognises that different authentication techniques are needed for different types of transactions, depending on how much risk is involved. The AGAF aims to ensure that Australian Government agencies apply a consistent approach when making decisions about appropriate authentication methods. The AGAF is designed to ensure that Australian Government agencies implement authentication mechanisms that correspond with the level of risk in

the transaction.
By adopting a consistent approach for selection of authentication mechanisms, the Australian Government will provide consistency of experience and expectation for businesses using government online services.

For more information visit : http://www.agimo.gov.au/__data/assets/file/30581/AGAF_Overview_for_Business.pdf

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UNITED KINGDOM
Ofcom confirms policy on misuse of e-communications networks

In a recent policy statement Ofcom has set out its approach to using its powers against those who misuse e-communications networks under the Communications Act 2003. The new powers will not normally be used where there is an alternative legal remedy, so for example they would not normally be used in relation to spam (covered by data protection legislation) or hacking/ denial of service attacks (Covered by Computer Misuse Act 1990), and are aimed at activity that gives rise to annoyance, inconvenience or anxiety but which falls short of a criminal offence.
The type of activity addressed by these powers includes:
- silent calls or short duration calls which are abruptly terminated before they are answered;
- calls that mislead the user into returning a call which may be charged at high rates;
- fax scanning calls; and
- automated calls that simply contain recorded messages for marketing purposes.
The policy sets out Ofcom's view of what constitutes such misuse and gives further non-exhaustive examples of the types of behaviour caught, and sets out the penalties that may be applied.

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7. INTELLECTUAL PROPERTY

FRANCE
Private Copying: Not a Right But an Exception

In its decision of 30th April 2004, the "Tribunal de Grande Instance" ("Tribunal") of Paris (lower Civil Court) expressly admitted, for the first time, the validity of anti-copying measures on media carrying protected works.

The case was initiated by a buyer of a DVD of the movie "Mulholland Drive", who realised that he could not copy the DVD due to an anti-copying system on the DVD, and by a French consumer association, the UFC, which received several claims from consumers. They sued the producers and the distributor of the DVD for having introduced an anti-copying system into the DVD, on the grounds that:

- article L.122-5 of the French Intellectual Property Code gives the buyers of works protected by copyrights a "right to make private copies" of such works (1); and
- the producers and the distributor did not mention on the DVD the existence of the anti-copying system, thereby infringing French consumer law (2).

The decision rendered by the Tribunal should be viewed in light of a draftt law to be discussed by the French Parliament this year (3).

Validity of anti-copying systems

The Tribunal first analysed the provisions of articles L. 122-5 (applicable to authors) and L. 211-3 (applicable to holders of related rights) of the French Intellectual Property Code.

In this respect, the Tribunal indicated that these articles only provide for a restrictive list of exceptions to the (generally) exclusive rights of authors and holders of related rights. The French legislator did not intend to grant anyone the right to make private copies of a protected work, but only determined certain conditions under which a copy of a protected work may be made, notwithstanding the exclusive rights of the author on the reproduction of its work.

The Tribunal then argued that the law was drafted in 1957 and that at that time, it was not possible to envision recent technological developments permitting the copying of protected work, as well as the technical systems to prevent such copying.

In addition, the Tribunal based its decision on the Berne Convention of 1886, as revised, and EC Directive 2001/29/EC "on the harmonisation of certain aspects of copyright and related rights in the information society", not yet implemented in France. These texts provide in particular that the reproduction of protected works may be allowed by national law if it does not affect the normal exploitation of the work and does not cause any prejudice to the legitimate

interests of the author.

Directive 2001/29/EC does not provide for any right to make private copies of protected works, but merely gives Member States the ability to insert provisions to that effect in their national laws and regulations. In addition, the Directive expressly provides that a fair compensation is due to authors for private copying, which takes into account the application or non-application of technological measures preventing or restricting acts not authorised by the rightholders.

In view of these principles, the Tribunal ruled that:
- the marketing of DVDs is a normal exploitation of movies;
- copying on digital media necessarily harms the normal exploitation of the movie; and
- such harm constitutes a significant damage, since it affects the means of marketing needed to write off the production costs.

Finally, the Tribunal indicated that the payment of remuneration for private copying when buying blank media has no effect on the scope of the exception.

Consequently, it ruled that the introduction of anti-copying systems on DVDs does not violate the French Intellectual Property Code.

Consumer information

The claimant also tried to argue on the grounds of article L. 111-1 of the French Consumer Code, which provides that the consumer has to be informed of the essential characteristics of the product. According to the claimant, the producers and/or the distributor had a legal obligation to mention the existence of an anti-copying system on the DVD.

In response, the Tribunal indicated that the possibility of copying a DVD does not constitute an essential characteristic of the product, in particular as the consumer has no legal right to make a private copy.

The decision of the Tribunal cannot really be compared to previous decisions of French courts, which condemned CD producers and distributors on the grounds of the French Consumer Code or on the grounds of the legal warranty for hidden defects for using anti-copying measures.

Indeed, these decisions were based on the fact that these systems, intended to protect the CD from being copied, actually affected the reading of the CD on certain car radios or other CD readers. In the case before the Tribunal, it does not appear that the reading of the DVD was affected by the anti-copying system.

Prospective law

In France, there is pending legislation which would restrict the exception of private copying. A draft law relating to "copyright and related rights in the information society" was presented on November 12, 2003 to implement Directive 2001/29/EC.

This draft law tries to combine private copying and technical protection measures by providing that:

- holders of copyrights or related rights shall ensure that the public can benefit from the exception of private copying, provided (i) the beneficiaries have legal access to the protected work, phonogram, video recording or programme; (ii) the exception does not affect the normal exploitation of the protected work; and (iii) no unjustified prejudice is caused to the legitimate interests of the author or the holder of related rights;
- rightholders are entitled to take measures in order to limit the number of copies;
- rightholders have no obligation to ensure that the public will benefit from the exception in case the work is made available to the public according to contractual provisions agreed on by the parties, so that the parties can access to the work from any place and at any time they wish (interactive services).

The first reading of this draft law is scheduled for Summer 2004.

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ITALY
Modification of Copyright Law for Internet Uses

On 21st May 2004 the Italian Parliament enacted Law No. 128/2005 amending the Copyright Act to protect materials, such as photos, graphics and texts published on the Internet. The purpose of the Law is to prevent the illegal circulation of audiovisual material on the Internet. In particular, it forces anyone publishing any copyrighted material to affix a special guarantee label. Internet service providers will be directly required to collaborate with the authority to prevent copyright abuse. The sanctions levied for infringement range between 50.000 and 250.000 euro. Finally, the Law fixes a three percent tax on all DVD and CD recorders as well as the related software. The Law has been criticized

by several lobby groups, such as the Internet Providers Association and certain government figures.

For more information visit : www.altalex.it

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8. MARKET ACCESS

NEW ZEALAND
Investigation - regulation of mobile call termination rates

The Commerce Commission has announced it will undertake an investigation into whether mobile phone call termination rates in New Zealand should be regulated.

The Telecommunications Act 2001 (the "Act") established a telecommunications-specific regulator (known as the Telecommunications Commissioner) within New Zealand's antitrust regulatory body, the Commerce Commission. The Act provides for access seekers or access providers of "designated" or "specified" services to apply to the Commerce Commission for a determination of the terms on which the service must be supplied. Determinations on designated services can include both price and non-priced terms, whereas designations on specified services can only include non-priced terms.

Under the Act, the Commerce Commission may, on its own initiative or if requested to do so by the Minister of Communications, investigate whether or not new telecommunications services should be regulated.

The Commerce Commission has set down its grounds for deciding to investigate mobile termination rates. These include:

- the current mobile termination rates appear to be well above cost-based estimates of mobile termination rates in comparable jurisdictions.
- telecom New Zealand (the incumbent telecommunications operator) and Vodafone, as the only owners of mobile networks, appear to have a substantial degree of market power given the "calling party pays" arrangement for terminating calls to mobile phones.

Due to the prevalence of mobile phones in New Zealand, the cost of calls to mobile phones comprises a significant portion of New Zealand consumers' telecommunications expenditure. There are 1.7 million fixed lines and 2.8 million mobile phones in New Zealand.

Commencement of the investigation will begin formally with publication of a notice in the Gazette.

For more information visit : http://www.comcom.govt.nz/publications/display_mr.cfm?mr_id=1329

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9. PRIVACY

AUSTRALIA
New eMarketing Code to Supplement Spam Act

Industry, regulators and consumer groups in Australia have come together to establish a broad-representative committee to develop an Email and Mobile Marketing Code of Practice to sit alongside the recently introduced Spam Act 2004.

The eMarketing Code is due to be completed by mid-2004 and will be binding on all organisations that use either email or mobile as a primary form of marketing, or third party organisations that market on behalf of clients. A draft version of the Code will be released for public comment during June and members of the participating organisations will be canvassed for their views along with the community as a whole.

For more information visit : http://www.adma.com.au/data/portal/00000947/content/58527001083795149625.pdf

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AUSTRALIA
The Fight Against Spam

The Australian Communications Authority (ACA) and the Australian High Tech Crime Centre (AHTCC) have decided to step up cooperation in the fight against spam.

The ACA has stationed staff at the AHTCC in Canberra, the Federal capital, allowing for an exchange of information about cyber offences with police investigators and joint work on cases.

Several private sector companies - among them Brightmail, Sophos, SurfControl and Microsoft - have also agreed to help in fighting spam by providing technical expertise and information.

The Spam Act 2003 came into force on 10th April 2004 in Australia and bans the sending of unsolicited commercial electronic messages with an Australian link. The ACA is responsible for implementing and enforcing the legislation.

For more information visit : http://smh.com.au/articles/2004/05/10/1084041321020.html

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CANADA
Alberta Privacy Law found Substantially Similar Under PIPEDA

On 10th April 2004, the Governor in Council issued an Order stating that any organization in the province of Alberta, other than a federal work, undertaking or business, to which the Alberta Personal Information Protection Act, S.A. 2003, c. P-6.5, applies is to be exempt from the application of Part I of the federal Personal Information Protection and Electronic Documents Act (hereinafter "PIPEDA") "in respect of the collection, use and disclosure of personal information that occurs within the province of Alberta."

This action was prompted by the finding that the content of Alberta¿s aforementioned privacy legislation with respect to the "collection, use or disclosure of personal information within the province or territory" was "substantially similar," in the words of paragraph 26(2)(b) of PIPEDA, to the content of the said federal privacy law. The purpose of such a provision is to encourage "provinces and territories to develop their own privacy laws in a manner that addresses their particular needs and circumstances" while attempting to maintain a certain uniformity throughout the landscape of Canadian privacy legislation, and, ultimately, injecting "trust and confidence into the Canadian marketplace."

The "substantially similar" criterion is composed of several elements set forth by Industry Canada on August 3, 2002, namely that the provincial or territorial law in question grants privacy protection which is consistent with that in the federal Act, incorporates the ten principles in the Canadian Standards Association¿s (CSA) Model Code for the Protection of Personal Information, CAN/CSA-Q830-96, found at Schedule I of PIPEDA, provides for an independent and effective oversight and redress mechanism with powers to investigate, and restricts the collection, use and disclosure of personal information to purposes that are legitimate.

The effect of the Order is that all complaints and investigations connected to intra-provincial privacy-related practices of Alberta organizations will be dealt with exclusively by the Information and Privacy Commissioner of Alberta. Complaints and investigations involving federal works, businesses, undertakings or cross-border transactions will continue to constitute the jurisdiction of the Privacy Commissioner of Canada.

For more information visit : http://canadagazette.gc.ca/partI/2004/20040410/html/regle3-e.html

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NEW ZEALAND
Telecommunications Information Privacy Code

A Telecommunications Information Privacy Code ("TIPC") has been issued by the New Zealand Privacy Commissioner and is due to come into force in November 2003. The TIPC regulates the telecommunications industry in its dealings with the personal information of customers and users of telecommunications services.

The Privacy Act 1993 (the "Act") establishes a number of "information privacy principles" in relation to the collection, use and disclosure by public and private sector agencies of information relating to individuals. Part 6 of the Act allows the Privacy Commissioner to issue codes of practice prescribing standards for a particular industry that are more or less stringent than the standards imposed by the general information privacy principles. The TIPC is such a code.

The TIPC applies to information about an identifiable individual that is subscriber information, traffic information or the content of a telecommunication (together defined as "telecommunications information"). The matters covered by the TIPC include:

- ensuring that telecommunications users need not pay to keep their details from being published in a telephone directory (which used to be the case);
- requiring "blocking" options to be available without cost if caller identification services are also available;
- prohibiting the use of traffic data for unauthorised direct marketing; and
- requiring internal complaints handling processes to meet certain minimum standards.

The TIPC does not purport to cover all privacy issues that may arise in respect of telecommunications. Many general issues will continue to be addressed under the Act. For example, the TIPC does not cover ordinary businesses in respect of their use of the telephone or email. However, the Privacy Commissioner has indicated that the TIPC is a "solid base" from which additional telecommunications privacy issues might be addressed in the future.

For more information visit : http://www.legislation.govt.nz
http://www.privacy.org.nz

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10. TELECOMMUNICATIONS

MEXICO
An End to the US-Mexico Telecommunications Dispute

On 1st June 2004, the World Trade Organization (WTO) formally adopted the panel report (released on 2 April 2004) regarding the telecommunications dispute between the US and Mexico. On that same day, both countries reached agreement to implement the recommendations contained in the report. The agreement provides that Mexico will eliminate the proportional return system, the uniform tariff system and the current mechanism to settle international interconnection rates. In addition, Mexico agreed to introduce resale-based international telecommunications services by 2005. Finally, the US accepted that Mexico would maintain its restriction on the use of leased lines to route international traffic in order to prevent unlawful bypass.

For more information visit : www.secofi.gob.mx
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MEXICO
Fewer Requirements For the Authorization of LD Gateways

On 27th March 2004, the Mexican Telecommunications Regulator (Cofetel) published a resolution in the Federal Official Gazette modifying the International Long Distance Rules, which lowered the requirements for long distance concessionaires to obtain authorization to operate an international gateway. According to the original rules, long distance concessionaires could only route international traffic through international gateways. The resolution removed the requirement of complying with all obligations contained in the concession title. Now, long distance carriers must only prove that they have connected, with owned infrastructure, at least three cities in three different states within Mexico and that they have executed an international interconnection agreement approved by Cofetel. The purpose of the modification is to deregulate the requirements with which the long distance operators must comply concerning the authorization of international gateways.

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PORTUGAL
Rights of Way

By enacting Law 5/2004, on 10th February 2004, which approved the electronic communications legal regime (REGICOM), the Portuguese legislature addressed the issue of taxing rights of way in the public domain.

REGICOM establishes that the rights and charges regarding the installation, crossing or passing over of systems, equipment and other resources which provide publicly available electronic communications networks and services at a fixed location forming part of public or private municipal domain, may lead to the establishment of a municipal fee in respect of such rights of way.

A new municipal tax called Rights of Way (TMDP) substituted for existing municipal taxes. The TMDP is peculiar in that, although due by virtue of the installation of networks infrastructure in municipal lands, it applies to all the fixed operators even those who have not made any actual installation.

TMDP shall match a percentage levied on the amount of each invoice for publicly available electronic communications at a fixed location, issued to end users at the relevant municipality. Each municipality shall approve the percentage (not to exceed 0.25%) annually until the end of December of the preceding year. Furthermore, in the municipalities where the TMDP is collected, the amounts due must be included in the invoices of end users and operators shall pay the relevant amount to the municipality up to the end of the month following that of invoicing.

REGICOM further clarifies that the State and the Autonomous Regions shall not collect fees or other charges equivalent to TMDP in relation to the installation of network infrastructures in (surface or underground) areas pertaining to the private or public domain of the State or the Autonomous Regions.

It is worth noting that the provisional rules of REGICOM establish that municipalities shall approve the percentage to be applied for the year 2004 within 90 days from the publication of the statute. The end of such 90 day period occurred on the 11th May 2004 and since no approval was granted by this deadline, we believe it will be somewhat difficult to put in

pratice the collection of the TMDP during the current year.

In a transitory rule established under REGICOM it was mandated that ANACOM (the telcom regulator) was to have published, within 60 days from the publication of the REGICOM (i.e. until 11th April 2004), a regulation defining the procedure to be adopted regarding the monthly collection and delivery, to municipalities, of the TMDP. ANACOM published nothing by that date.

In any case, on 6th May 2004, ANACOM approved a Draft Regulation on the procedures regarding the monthly collection and delivery to municipalities of the revenues resulting from the application of TMDP. This draft regulation is now under public consultation and comment.
We note that the Draft Regulation determines that the TMDP percentage shall be applicable over the value of each invoice, excluding VAT, of all the end users of such municipality. For those purposes, the same Draft Regulation elucidates that the amounts corresponding to other services that are not considered as "electronic communication services" (e.g., equipment sale/rent, web construction etc.) are not to be taken in consideration. In addition, the wholesale services, public pay phones and prepaid calling cards will not be subject to TMDP either.

As expected, the wide variety of networks and services in the market raise several difficulties concerning the situations in which the TMDP shall apply. Trying to prevent those difficulties, the new regulation requires that the companies and municipalities shall cooperate to establish an appropriate information support which must be kept updated. Therefore, such regulation establishes that the operators must provide, in their invoices, all necessary information so that the municipality is able to verify the basis on which the charge is levied.

Additionally, the draft regulation sets out that ANACOM will approve an audit system to be carried out in the companies subject to TMDP which will to verify if those companies are acting in accordance with the REGICOM and the new regulation procedures.

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SPAIN
News From Spain

This article deals with the most relevant pieces of Spanish regulation and news of May 2004 as regards the communications sector.

New TV station for Asturias

On 28th May 2004 the Spanish government approved a Royal Decree granting the administrative concession enabling broadcast terrestrial TV in the geographic scope of the Autonomous Community of Asturias. The TV station will be operated by the government of the Autonomous Community through a corporation incorporated for such purpose. There are ten Autonomous Communities where public TV stations are licensed.

Consultation from the Telecommunications Market Commission on VoIP

The Telecommunications Market Commission ("TMC") has opened a consultation procedure to assess whether Voice over Internet Protocol ("VoIP") should be regulated. The closing date for responses is 20 August 2004.

The TMC acknowledges that VoIP services are being rendered without being subject to the regulation applicable to voice services. This was justified, amongst other reasons, because of the different quality conditions of VoIP and voice services. Nevertheless, the current scenario shows that the quality of VoIP service has improved and these services may substitute for traditional telephone services, at least for some segments of the market. One of the remarks set out by the TMC is that VoIP could be a "killer application" for the development of broadband access. On the other hand, the lack of regulation of VoIP could have negative effects on telephone network operators, whose resources are used by VoIP service providers without remuneration.

Thus, the TMC is now assessing if VoIP services should be regulated and if so, what should be the scope of such regulation. Similar consultation procedures have also been recently launched by other European regulators (e.g. Ofcom in the UK and RegTP in Germany). The European Comission has also reviewed the matterwith a non-binding document expected to be adopted later this year.

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UNITED KINGDOM
Ofcom launches Telecoms Review

Ofcom has launched a comprehensive and wide-ranging review of the UK telecommunications sector. Its findings will shape Ofcom's future strategy.This review aims to establish a clear strategic framework for Ofcom's approach to telecoms regulation, including how Ofcom intends to promote competition in telecoms and to further the interest of

consumers and citizens. It will therefore guide the many detailed policy issues and cases that Ofcom will have to deal with. The review will cover all aspects of the telecoms sector and the interactions between different aspects. However the primary focus will be on the fixed sector as that is the main focus of existing regulation. The review will build on the separate market reviews recently undertaken by Oftel/Ofcom to implement the EU Directives in the telecoms sector. It is not designed to re-open these reviews. Instead, its objective is to take an over-arching look at the sector as a whole, in order to establish an overall strategy to ensure a clear and coherent approach to regulatory interventions at all levels.
The review, which has three distinct phases, is planned to be finished by the end of 2004 and will address five fundamental questions.
- what are the key attributes of a well-functioning telecoms market in serving the interests of citizen-consumers?
- where can effective and sustainable competition be achieved in the UK telecoms market?
- is there scope for a significant reduction in regulation, or is the market power of incumbents too entrenched?
- ow can Ofcom incentivise efficient and timely investment in next generation networks?
- at varying times since 1984, the case has been made for structural or operational separation of BT, or the delivery of full functional equivalence. Are these still relevant questions?

In its Phase 1 consultation document of 28th April 2004, Ofcom invites comments on the questions raised by 22nd June 2004.

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