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Judgment in Case E-6/16 *Fjarskipti hf. v The Icelandic Post and Telecom Administration*

WEB-BASED SMS SERVICE MAY CONSTITUTE ELECTRONIC COMMUNICATIONS

In a judgment delivered today, the Court answered questions referred to it by Reykjavík District Court (*Héraðsdómur Reykjavíkur*) on the interpretation of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (“the Directive”).

Fjarskipti hf. (“the Plaintiff”) operates a web domain from where its customers may send SMS messages to a mobile phone. In November 2013, the web domain was hacked, and information from thousands of customers was stolen and published on the internet. The Icelandic Post and Telecom Administration (“the Defendant”) requested information from the Plaintiff regarding the hacking. However, the Plaintiff argued that its web domain fell outside the Defendant’s supervisory jurisdiction. In response to this, the Defendant adopted a decision concluding that the web domain and the SMS service provided there were covered by the terms electronic communications network, electronic communications service and public communications network, which are laid down in the Directive. The web domain and the service provided consequently fell under the Defendant’s jurisdiction. The decision was upheld following an administrative appeal. The Plaintiff then brought an action before Reykjavík District Court, which decided to make a reference to the Court on the interpretation of those three terms.

The Court pointed out that for a system to be an electronic communications network under Article 2(a) of the Directive, it must constitute a transmission system, switching or routing equipment or other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means. The Directive’s objective of a technologically neutral regulatory framework, as well as the wording of Article 2(a) itself, speak in favour of a broad interpretation. Since both the software on the Plaintiff’s web domain and the Plaintiff’s telephone network are essential for the conveyance of an SMS, the Court held that they appear to form part of a single electronic communications network.

The Court further held that for a service to be considered an electronic communications service under Article 2(c) of the Directive, it must (i) normally be provided for remuneration, (ii) consist wholly or mainly in the conveyance of signals on electronic communications networks, and (iii) not entail providing or exercising editorial control over content.

Finally, for an electronic communications network to constitute a public communications network under Article 2(d) of the Directive, it must be used wholly or mainly for the provision of publicly available electronic communications services. In this regard, the Court held that a service is publicly available when any part of the public may choose to make use of it. As to the criterion that the network must be used wholly or mainly for the provision of such services, it is necessary to take into account the extent to which the network is used for the provision of publicly available services in contrast to other services.

The full text of the judgment may be found on the internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.