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ABSTRACT

The regular article tracking developments at the national level in key European countries in the area of IT and communications – co-ordinated by Herbert Smith Freehills LLP and contributed to by firms across Europe. This column provides a concise alerting service of important national developments in key European countries. Part of its purpose is to complement the journal's feature articles and briefing notes by keeping readers abreast of what is currently happening "on the ground" at a national level in implementing EU level legislation and international conventions and treaties. Where an item of European National News is of particular significance, CLSR may also cover it in more detail in the current or a subsequent edition.

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1. Belgium

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1.1. *Court of Cassation definitively confirms Yahoo!'s obligation to cooperate with law enforcement agencies*

On 1 December 2015, the Court of Cassation dismissed an appeal lodged by Yahoo! against the ruling of the Court of Appeal of Antwerpen of 20 November 2013. The Court of Appeal partially confirmed the judgment issued in 2009 by the Criminal Court of Dendermonde that convicted Yahoo! and obliged it to disclose the identity of the persons who committed fraud via their Yahoo! e-mail addresses.

The public prosecutor of Dendermonde had requested Yahoo!, which is established in the US, to disclose the identity of certain people who used Yahoo! e-mail addresses to commit Internet fraud. The public prosecutor's claim was based on Article 46*bis* of the Criminal Procedure Code ("CCP"), which provides that electronic communication services providers are obliged to disclose identification data to law enforcement agencies upon their request. Although Yahoo! is established in the US and has no branch or office in Belgium, the public prosecutor was of the opinion that Yahoo! is to be considered such an electronic communications service provider and is consequently obliged to comply with his request.

Yahoo!, however, refused to disclose the identification data by claiming that it is not subject to Article 46*bis* of the CCP, since it was not an electronic communications service provider. According to Yahoo!, the term "electronic communications service provider" in Article 46*bis* of the CCP had the same meaning as the term "electronic communications service provider" in Article 2 of the Belgian Electronic Communications Act of 13 June 2005 ("BECA"). Since this Article 2 provides that a provider of *information society* services (such as providers of free e-mail addresses) are not to be considered provider of *electronic communications* services, Yahoo! claimed that it was not obliged to disclose identification data to the public prosecutor.

Yahoo!'s argument was not followed by the Criminal Court of Dendermonde, but Yahoo! successfully challenged the decision before the Court of Appeal of Ghent. However, the public prosecutor lodged an appeal before the Court of Cassation that,

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on 18 January 2011, found that the term "electronic communications service provider" set forth in Article 46*bis* of the CCP has an autonomous meaning. Therefore, it does not have the same meaning as is used in Article 2 of BECA. In the Court's opinion, a provider of a service that allows its users to gather, disclose or distribute information by using an electronic communications network, is to be considered an electronic communications service provider within the meaning of Article 46*bis* of the CCP.

The case was then referred to the Court of Appeal of Brussels, which on 12 October 2011, held the view that the order had not been validly communicated to Yahoo! In the Court's opinion, the mere fact that it is technically possible, amongst others, for the public prosecutor to contact Yahoo! from the Belgian territory by means of electronic or other means of communication, is not sufficient. However, the public prosecutor lodged a second appeal before the Court of Cassation that, on 4 September 2012, found that the circumstance that the public prosecutor sends his written request within the meaning of Article 46*bis* of the CCP, whereby the cooperation is required from an operator established outside the Belgian territory, from Belgium to a foreign address, does not render the request invalid. The case was then referred to the Court of Appeal of Antwerpen that confirmed the applicability of Article 46*bis* of the CCP and punished Yahoo! with a fine of 44.000 euros, whose 22.000 euros are conditional during three years. It's worth mentioning that, pursuant to the Court, if Yahoo! is not willing to comply with the requirements of Article 46*bis* of the CCP, it may decide to exclude IP-range from Belgium.

In its decision of December 2015, the Court of Cassation found that, unlike Yahoo!'s opinion, there was no issue of extraterritorial jurisdiction at stake. Indeed, according to the Court, the request for disclosure to an operator of an electronic communication network or an electronic communications service provider who is active in Belgium does not imply any intervention outside the territory of Belgium, such as sending civil servants abroad. Also, notwithstanding the place of location of such an operator or provider, its refusal to comply with such a request constitutes an offense that takes place in Belgium. Finally, the Court of Cassation agreed with the Court of Appeal that Yahoo! "voluntarily" submits itself to the Belgian law because it actively participates in the economic life of Belgium, notably by using the domain name .be or by displaying ads based on the location of its users.

1.2. *Facebook ordered by the Brussels Court to stop collecting personal data of non-members*

Facebook uses "datr-cookies" to collect personal data of non-members. The datr-cookies are automatically installed on the browsers of non-members when they visit a Facebook.com webpage. Facebook also makes use of the so-called "social plugins" on third party websites, which allows Internet users to use some of the functionalities offered by Facebook, such as "like", "share" or commenting on a webpage.

Whenever non-members visit a website that integrates a social plugin of Facebook, this social plug-in will communicate the information contained in the datr-cookie with Facebook, including the IP address of the Internet user and the URL of the website concerned. This way, Facebook is capable of collecting a significant amount of personal data on non-members.

On 13 May 2015, the Belgian Privacy Commission had already issued a recommendation in which it identified Facebook's data processing actions as a violation of the Belgian Data Protection Act ("DPA"), and in which it urged Facebook to immediately cease these practices.

After it became clear that Facebook would not comply with the recommendation, the Privacy Commission launched a claim against Facebook at the Brussels Court of First Instance for violating the DPA in relation to its processing of personal data of non-members.

In its judgment, the Brussels Court first determined that the DPA is applicable. It decided that the processing of personal data is inextricably linked to the activities of Facebook Belgium BVBA, even though the Irish Facebook entity performs the actual data processing and Facebook Belgium BVBA only performs marketing and lobbying related activities.

Next, the Brussels Court ruled that the data processing by Facebook violates the DPA, for the following reasons:

- non-members were not provided with prior, clear and complete information on the data processing;
- non-members did not express their informed and unambiguous consent with the data processing;
- the data processing was not necessary with a view to Facebook's legitimate interests, given that the interests of the non-members outweighed the interests of Facebook, namely the security of Facebook services offered. The Brussels Court decided there were better and less intrusive methods to ensure security; and
- the data processing did not serve a legitimate purpose given that it was inadequate, irrelevant and disproportionate to the intended purpose as portrayed by Facebook.

As a result, the Brussels Court ordered Facebook to cease within 48 hours:

- the instalment of datr-cookies with non-members when they visit the facebook.com domain, without providing prior and adequate information on this installment and the use that Facebook makes of the datr-cookies via social plug-ins; and
- the collection of the datr-cookie (and thus the personal data it contains) via social plug-ins placed on third party websites.

Finally, the judgment imposes a penalty of €250,000 each day that Facebook fails to comply with the ruling.

Facebook has already announced that it will appeal the decision of the Brussels Court. Facebook has also said that if they are blocked from using the datr-cookie, they would have to treat visits to its service from Belgium as untrusted logins, requiring a range of other verification methods to establish that people are legitimately accessing their accounts.

1.3. *Failure to submit a notification as an electronic communication service provider does not constitute a violation of a public order provision*

Pursuant to article 9 of the Act of 13 June 2005 on electronic communications (the "Act"), an electronic communication

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