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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 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 compliment 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

Court of Appeal of Antwerp confirms Yahoo!'s obligation to cooperate with law enforcement agencies

On 20 November 2013, the Court of Appeal of Antwerp partially confirmed the Criminal Court of Dendermonde's judgment dated 2 March 2009. The Criminal Court convicted Yahoo! and obliged it to disclose the identity of the persons who committed fraud via their Yahoo! e-mail accounts.

1.1. Meaning of “electronic communications service provider”

The public prosecutor of Dendermonde had requested that US-based Yahoo! disclose the identity of those using their Yahoo! e-mail accounts to commit internet fraud. The public prosecutor's charge against Yahoo! was based on Article 46bis of the Criminal Procedure Code, which obliges electronic communication services providers to disclose identification data to law enforcement agencies when these agencies

request for them. 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 considered an electronic communications service provider and is consequently obliged to comply with law enforcement agencies' request for such information.

Yahoo!, however, refused to disclose the identification data, arguing that it is not subject to Article 46bis of the Criminal Procedure Code because it was not an electronic communications service provider. According to Yahoo!, the term “electronic communications service provider” in Article 46bis of the Criminal Procedure Code had the same meaning as the term “electronic communications service provider” in Article 2 of the Electronic Communications Act of 13 June 2005. This was on the basis that Article 2 states that a provider of information society services, such as providers of free e-mail addresses, are not considered a provider of electronic communications services, Yahoo! asserted that it was not obliged to disclose identification data to the public prosecutor.

The Criminal Court of Dendermonde did not follow Yahoo!'s argument, but Yahoo! challenged the decision

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successfully before the Court of Appeal of Ghent. However, the public prosecutor appealed this decision before the Court of Cassation, and the Belgian Supreme Court held on 18 January 2011 that the term “electronic communications service provider” in Article 46bis of the Criminal Procedure Code has an autonomous meaning. Therefore, it does not have the same meaning as that in Article 2 of the Electronic Communications Act. In the Supreme Court’s opinion, a provider of a service which allows its users to gather, disclose or distribute information by using an electronic communications network, is considered an electronic communications service provider within the meaning of Article 46bis of the Criminal Procedure Code.

1.2. Validity of the Court of Cassation’s order

The case was then referred to the Court of Appeal of Brussels. On 12 October 2011, this Court found that the Court of Cassation’s order had not been validly communicated to Yahoo!. In the Court of Appeal’s opinion, the mere fact that it is technically possible for the public prosecutor to contact Yahoo! from the Belgian territory by means of electronic or other means of communication is not sufficient. The public prosecutor lodged a second appeal before the Court of Cassation, which found, on 4 September 2012, that the public prosecutor’s sending of his written request within the meaning of Article 46bis of the Criminal Procedure Code (whereby the cooperation is required from an operator established outside Belgium) from Belgium to a foreign address does not render the request invalid. The case was then referred to the Court of Appeal of Antwerp. This Court confirmed the applicability of Article 46bis of the Criminal Procedure Code and fined Yahoo! €44 000, €22 000 of which are conditional during the next three years.

1.3. Conclusion

The Court of Appeal of Antwerp concurred with the Criminal Court of Dendermonde that Yahoo! was “virtually” located in Belgium by offering electronic communications services in Belgium and that the offence of refusing to provide the public prosecutor with the required identification data took place in Belgium. The Court added that if Yahoo! is not willing to comply with the requirements of Article 46bis of the Criminal Procedure Code, it may decide to exclude Yahoo!’s IP-range from Belgium. The Court, however, did not order the disclosure of identification data since the public prosecutor did not insist on it anymore.

The case can be found on <http://www.ie-forum.be>

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2. Denmark

2.1. New Danish Act on Internet Domains

On 1 March 2014, a new Danish Act on Internet Domains (the “Act”) entered into force. The Act amends the rules on internet

domains almost ten years after the last revision of the relevant regulations in Denmark.

In recent years the Internet Corporation for Assigned Names and Numbers (“ICANN”) has introduced hundreds of new generic top-level domains such as “.google”, “.sexy”, and “.NYC”. These developments have prompted a reform of the ageing internet domain legislation in Denmark.

The purpose of the Act is to regulate the generic top-level domains that ICANN may assign to Denmark in the future. It also settles the legal framework for the Danish government’s involvement with ICANN, in particular where the government may have a say in blocking assignments of domains associated with Denmark. This would include domains like “.danish”, or domains including Danish cities such as “.copenhagen”.

Furthermore, the Act changes the regulation of the administration of the original top-level domain “.dk.” Among other things, it imposes stricter rules by requiring the administrator of the “.dk”-domain (currently a not-for-profit organisation) to ensure that all legally required information stored about the registrants is true, updated and accessible to the public. It also adds a broader obligation on the administrator to participate in the advancement of internet development for the benefit of the general public.

The future developments for top-level generic domains and ICANN regulation in general are still difficult to predict due to the planned removal of ICANN from the U.S.A. to international regulation. The Act, however, addresses this uncertainty by introducing a flexible regulation capable of governing new national top-level domains and generic domains assigned to Denmark within the boundaries of the ICANN rules.

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3. France

No contribution for this issue.

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4. Germany

4.1. German Federal Court of Justice upholds prison sentence of operator of internet subscription scam

On 5 March 2014, the German Federal Court of Justice (Bundesgerichtshof, BGH) upheld a criminal judgement which sentenced a defendant who had operated several websites as part of a subscription scam to a suspended two-year prison sentence for attempted fraud.

According to the findings of the Court, users had to register their full details (e.g. full names, addresses, dates of birth and email addresses) in order to use the websites (e.g. an online

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