

World Data Protection Report

International Information for International Businesses

Monthly news and analysis of data protection and privacy issues from around the world

Volume 11, Number 4

April 2011

The Belgian Yahoo! Case: Supreme Court Provides Broad Interpretation Of Concept Of ‘Electronic Communication Service Provider’

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On January 18, 2011, the Belgian Supreme Court rendered a key decision in the Yahoo! case¹ regarding the interpretation of the concept of “electronic communication service provider” under Belgian criminal law. The Supreme Court gave an extremely broad interpretation of Article 46 *bis* of the Belgian Code of Criminal Procedure, as a result of which many Belgian as well as multinational companies offering services or products in Belgium via the internet may be required to disclose the identity of their customers in the context of criminal investigations conducted in Belgium.

Criminal Court Decision

The Supreme Court decision follows a judgment by the Criminal Court of Dendermonde² that imposed a €55,000 (U.S.\$80,260) fine on Yahoo! Inc., with a daily penalty fine of €10,000 (U.S.\$14,593) for non-execution, for refusing to disclose the personal data of certain e-mail users to the Belgian Public Prosecutor.

For the purposes of a fraud investigation, the Public Prosecutor had requested Yahoo! to disclose detailed account information to identify e-mail users using pseudonyms in connection with their Yahoo! email accounts. Yahoo! initially refused to disclose the requested information, which led the Public Prosecutor

to initiate proceedings before the Criminal Court of Dendermonde. Although Yahoo! did not have any legal entity or representative in Belgium, the Criminal Court of Dendermonde held that Yahoo! Inc. had violated Article 46 *bis* of the Belgian Code of Criminal Procedure, which imposes on electronic communication service providers a duty to cooperate with the Public Prosecutor, and to disclose the identity of their customers when requested in the course of a criminal investigation.³

Court of Appeal Reversal

The judgment from the Criminal Court of Dendermonde was reversed on appeal by the Court of Appeal in Ghent,⁴ which concluded that Yahoo! was not an electronic communication service provider under Article 46 *bis* of the Code of Criminal Procedure.

To reach that conclusion, the Court interpreted Article 46 *bis* restrictively, in light of the EU Telecom Package⁵ as transposed into Belgian law by the Electronic Communication Act of June 13, 2005.⁶ The Court of Appeal took the position that an electronic communication service provider is a company that provides services consisting of “the transmission or routing of electronic signals or information on an electronic communication network”. After a technical analysis of Yahoo!’s webmail services, the Court of Appeal concluded that Yahoo!’s webmail service did not transmit

or route signals, but relied on the internet to send e-mail communications, and therefore did not qualify as a provider of electronic communication services.

The Public Prosecutor subsequently asked to refer the case to the Belgian Supreme Court in order to clarify the concept of “electronic communication service provider”.

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Supreme Court Decision

The Supreme Court reversed the decision of the Court of Appeal, providing an extremely broad interpretation of the concept.

According to the Supreme Court, “electronic communication service provider” may refer to any company that “provides a service allowing customers to obtain, receive or disseminate information through an electronic network”.⁷ Therefore, Article 46 *bis* of the Code of Criminal Procedures does not apply only to electronic communication service providers that are also operators in the sense of the Belgian Electronic Communication Act, or that provide their electronic communication services via their own infrastructure.

The main rationale of the Supreme Court was that criminal law must be interpreted autonomously. The concept of “electronic communication service provider” should therefore not necessarily follow the meaning given by the EU Telecom Package as implemented by the Belgian Electronic Communication Act, but may receive a broader interpretation instead.

Implications of Supreme Court Interpretation

The Supreme Court’s interpretation is likely to have a significant impact on companies virtually present in Belgium through websites that are accessible to Belgian users.

In light of this broad interpretation, any company operating a website available in Belgium through which individuals can obtain, receive or disseminate information may fall under the scope of Article 46 *bis* of the Belgian Code of Criminal Procedure, and be obliged to cooperate with the Public Prosecutor by disclosing the identity of its users upon request. This could potentially include any provider of a webmail service, instant messaging service, social network service, P2P network, web forum, blog or 2.0 electronic platform, but also more generally any company operating a website available in Belgium.

While this case will legitimately allow the Public Prosecu-

tor to obtain the identity of internet users in a number of cases, it potentially has major side-effects.

For instance, it may have important extra-territorial consequences, as it appears to give a blank cheque to the Public Prosecutor to apply Belgian law as soon as a company provides an internet-based service in Belgium that enables customers to obtain, receive or disseminate information through an electronic network. Little or no consideration was given to the legal instruments applicable to judicial and criminal cooperation, or to the data protection rights of individuals and how to balance these rights against the public interest (combating crime, in particular). Moreover, this broad interpretation of the concept of “electronic communication service provider” does not appear to be in line with the definition of the EU Telecom Package.

However, the Supreme Court’s interpretation is final, and the case has been referred back to another Court of Appeal. Now, the Brussels Court of Appeal has to decide on the merits of the case and apply the Supreme Court’s interpretation to the Yahoo! case.

Meanwhile, any company that offers services via the internet that are available in Belgium and that enable customers to obtain, receive or disseminate information through an electronic network should consider the implications of this case and carefully analyze the potential impact on its business.

As a pre-emptive measure, companies doing business in Belgium via the internet may want to create an internal policy describing the process to be followed in case of a request by the Belgian Public Prosecutor under Article 46 *bis* of the Code of Criminal Procedure. Such a policy may help to ensure that appropriate internal mechanisms are in place to follow up on requests from the Public Prosecutor in a timely manner.

NOTES

¹ Supreme Court, Criminal Law Section, January 18, 2011, Nr. P.10.1347.N, available at http://jure.juridat.just.fgov.be/view_decision?justel=N-20110118-1&idxc_id=249937&lang=fr.

² Criminal Court of Dendermonde, March 2, 2009, Nr. DE 20.95., available at http://jure.juridat.just.fgov.be/view_decision?justel=N-20090302-14&idxc_id=235056&lang=fr.

³ Article 46 *bis* provides that “for the purposes of a criminal investigation, the Public Prosecutor may, upon a motivated and written decision, with the help of the operator of an electronic communication network or of the provider of an electronic communication service, use any data he holds or access the data of the subscribers of the operator or of the service provider in order to proceed to the identification of a subscriber or of a regular user of an electronic communication service or of a particular means of electronic communication [...]”.

⁴ Court of Appeal in Ghent, June 30, 2010, Nr. 20100630-1, available at http://jure.juridat.just.fgov.be/view_decision?justel=N-20100630-1&idxc_id=242315&lang=fr.

⁵ For more information on the EU Telecom Package, please see http://ec.europa.eu/information_society/policy/ecom/index_en.htm.

⁶ Electronic Communication Act of June 13, 2005, *M.B.*, June 20, 2005.

⁷ Free translation of “De persoon die een dienst aanbiedt die erin bestaat zijn klanten toe te laten via een elektronisch netwerk informatie te verkrijgen of te ontvangen of te verspreiden, kan ook een verstrekker van een elektronische communicatiedienst zijn”.

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