

ARTICLE:

THE EFFECT OF 'VIRTUAL PRESENCE' IN BELGIUM ON THE DUTY TO COOPERATE WITH CRIMINAL INVESTIGATIONS: SOME PRUDENCE MAY BE REQUIRED WHEN CONFRONTED WITH A REQUEST FROM A BELGIAN PUBLIC PROSECUTOR

By **Johan Vandendriessche**

Over the last few years, the public prosecutor of the judicial district of Dendermonde (Belgium) and Yahoo! Inc. have been involved in a legal dispute concerning Yahoo! Inc.'s obligation to cooperate with and disclose personal data to the public prosecutor pursuant to a direct request based on provisions of the Belgian Code of Criminal Procedure. To some extent, in doing so, the public prosecutor is bypassing the application of the mechanisms that are provided in the Treaty on Mutual Legal Assistance in Criminal Matters.

The facts surrounding this legal dispute are straightforward. As part of a separate criminal investigation into internet fraud, the public prosecutor of Dendermonde had established that unidentified persons had committed fraudulent acts over the internet with the aid of Yahoo! e-mail addresses. As a next step, the public prosecutor requested Yahoo! Inc. to communicate identification data in relation to those e-mail addresses in order to proceed with the identification of the persons that committed the fraudulent acts. Yahoo Inc. rejected this request under reference to the Treaty on Mutual Legal Assistance in Criminal Matters. As a result of Yahoo! Inc.'s refusal to comply with this request, the public prosecutor decided to prosecute Yahoo! Inc. for failure to comply with its request. On 2 March 2009, Yahoo! Inc. was sentenced to a fine of 55.000 euros. Yahoo! Inc. appealed against this decision of the Court of First Instance of Dendermonde and was acquitted by the Court of Appeal of Ghent on 30 June 2010. The public prosecutor subsequently filed a request with the

Belgian Supreme Court (the Court of Cassation) to obtain the annulment of the decision of the Court of Appeal of Ghent. The Court of Cassation annulled the decision of the Court of Appeal of Ghent on 18 January 2011 and sent the case to the Court of Appeal of Brussels for retrial on the appeal.¹

It can be inferred from this procedural history that the stakes of this legal dispute are high. The outcome of this discussion, which will create an important precedent, may influence the manner in which the public prosecutor will in the future request information to internet service providers, communication service providers or even cloud service providers offering services in Belgium, even if they do not have any local presence in Belgium.

The legal issues in this dispute all revolve around the interpretation and scope of article 46bis of the Code of Criminal Procedure, which imposes on the "operator of an electronic communications network" or the "provider of an electronic communications service" the obligation to cooperate with the public prosecutor, at the latter's request, in the detection of crimes and misdemeanours. The public prosecutor is entitled to request the disclosure of or access to any information held by these service providers (including, amongst others, the client database) in view of identifying (i) a subscriber to or a habitual user of a communications service and (ii) the complete list of services to which that person is subscribed or which he habitually uses.

The public prosecutor holds the view that this obligation to cooperate applies to any operator of an electronic communications network or provider of an electronic communications service that is located in Belgium, either by means of a local presence or by

¹ The translation of these decisions follows this note.

means of a virtual presence. For this 'virtual presence', the public prosecutor holds the view that it suffices that a company offers electronic communications services in Belgium and that it can be reached from Belgium (e.g. by e-mail through an on-line customer service, as is the case with Yahoo! Inc.).

Yahoo! Inc. holds the view that, in the absence of a local presence, it cannot be held to cooperate directly with the public prosecutor. Any request must, according to Yahoo! Inc., be made through the channels provided in the Treaty on Mutual Legal Assistance in Criminal Matters. Moreover, Yahoo! Inc. holds the view that it is neither an operator of an electronic communications network, nor a provider of an electronic communications service.

In relation to the discussion on the qualification of 'operator of an electronic communications network' and 'provider of an electronic communications service', the public prosecutor and Yahoo! Inc. have different opinions. The public prosecutor believes that these notions must be interpreted in a large and, being part of criminal law provisions, autonomous manner. Yahoo! Inc. on the other hand refers to the concepts as they are being used in Belgian communications law.²

The Court of First Instance of Dendermonde agreed with the public prosecutor and ordered Yahoo! Inc. to pay the maximum fine of 55.000 EUR. The Court of Appeal of Ghent, on the contrary, believed that it had not been sufficiently demonstrated that Yahoo! Inc. was in fact an operator of an electronic

communications network or a provider of an electronic communications service and acquitted Yahoo! Inc. The Court of Cassation subsequently held that 'provider of an electronic communications service' must not be limited to Belgian providers of an electronic communications service.³ Consequently, the discussion has been re-opened as a result of the re-trial before the Court of Appeal of Brussels.

Whilst this discussion may seem to be highly theoretical, the outcome of this legal dispute may have far reaching consequences for foreign electronic communications service providers. If the position of the public prosecutor is accepted, then this would imply that the public prosecutor's services would be entitled to obtain access to or request disclosure of client identification data from any 'operator of an electronic communications network' or 'provider of an electronic communications service' worldwide, bypassing any treaty on mutual legal assistance in criminal matters and the protection that is generally included therein for personal data, as long as there is a reasonable link with Belgium as a result of doing business in Belgium or through the existence of any other form of virtual presence in Belgium.

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² Law of 13 June 2005 on electronic communications (Belgian State Gazette of 20 June 2005), which has implemented the European regulatory framework on electronic communications.

³ The Advocate-General held in its opinion that the Court of Appeal of Ghent made the correct interpretation, but the Court of Cassation did not follow his opinion.