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Brussels Court Declares Facebook Cookies Infringe Data Protection Laws, Imposes EUR 250,000 Daily Penalty to End Infringement

On 16 February 2018, the 24th Dutch-speaking Chamber of the Court of First Instance of Brussels (the **Court**) rendered an interesting judgment finding Facebook's use of cookies infringed Belgian privacy laws. The Court ordered Facebook to: (i) stop placing various infringing cookies on users' devices; (ii) stop collecting information from these cookies; as well as (iii) cease providing any 'misleading' information on how the company uses cookies. In addition, the Court demanded that Facebook delete any infringing information that had already been collected. If Facebook fails to comply with the order, it will have to pay a daily penalty of EUR 250,000.

The case before the Court saw Willem Debeuckelaere, in his capacity as President of the Belgian Privacy Commission (*commissie voor de bescherming van de persoonlijke levenssfeer/commission de la protection de la vie privée - the claimant*) opposing Facebook Ireland Limited, Facebook Inc. and Facebook Belgium BVBA (**Facebook**). The Privacy Commission intervened in the case to support the arguments of its president.

This case on the merits follows earlier summary proceedings between the parties. During these summary proceedings, the injunction imposed on Facebook at first instance (which made Facebook close its website to all non-registered users in Belgium) was overturned on appeal, largely on procedural grounds (*See, VBB on Belgian Business Law, Volume 2016, No. 7, p.7* available at www.vbb.com). However, the scope of these proceedings on the merits is broader than that which was contested during the summary proceedings and concerns not only the registration by Facebook of browsing histories of its non-members, but also of its members. In addition, these proceedings concerned the so-called "c_user", "xs", "sb", "fr" and "lu" cookies and "pixels", in addition to the "datr" cookie, which was the main subject of the summary proceedings.

Territorial Competence of the Court

In the summary proceedings, the Court of Appeal had refused the territorial competence of the court to rule over Facebook Inc. and Facebook Ireland. By contrast, the Court in the case on the merits accepted territorial jurisdiction over all

three Facebook entities. Indeed, the Court held that it was necessary for the Privacy Commission to be able to bring a claim before the national court in order to have effective supervisory powers. Under Article 32 §3 of the Belgian Law of 8 December 1992 protecting privacy regarding processing of personal data (*wet tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens/ Loi relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel* - the **DPL**), the president of the Privacy Commission can submit claims for infringement of the DPL with the Court.

Moreover, and with reference to the *Google Spain* case (C-131/12), the Court held that the Facebook group activities were linked with the activities of Facebook Belgium BVBA. The Court concluded that the processing of personal data took place in the context of the activities of Facebook in Belgium, and as a result, falls within the territorial scope of the DPL. Since the DPL authorised the President of the Privacy Commission to bring claims before the Court, the Court accepted territorial jurisdiction for this case.

On the Merits: No Informed Consent

In assessing the merits of the case, the Court held that Facebook could only place its cookies (and similar technologies, such as pixels) and access the information collected through the use of these cookies, subject to the prior informed consent of the data subjects and Facebook bears the burden of proving this informed consent.

In the case at hand, the data subjects are users as well as non-users of the Facebook social network. Indeed, Facebook also places cookies on devices of any visitors of third party websites which use Facebook plugins, such as news websites featuring Facebook “like” buttons.

In its defence, Facebook referred to its use of a cookie banner on its own website and for cookies (and similar technologies) placed on third party websites it explained that it relies on these third parties’ cookie acceptance mechanisms.

In assessing the information provided by Facebook through its own cookie banner, and the cookie policy to which this banner refers, the Court found that the policy was insufficiently clear on the processing operations. Indeed, the Court held that users could not reasonably be expected to understand that their behaviour would be tracked to the extent that it was based on the information that was provided. Furthermore, the Court held that the information was incomplete as it failed to inform data subjects about their rights to access and rectify their data.

Furthermore, the Court considered that the mechanism for collecting consent did not ensure “free, specific and unambiguous” consent from the data subject. Indeed, the Court considered that Internet users only had a choice to accept all cookies or none at all. Moreover, users that opted out of cookies through their browser settings could still be targeted by Facebook.

As regards third party websites, the Court follows the reasoning of the claimant that Facebook determines the “purposes and means” of their use of cookies on third party websites and therefore Facebook must be regarded as a “controller” of these cookies. As a controller, the Court held that Facebook took insufficient measures to ensure the third party website holders obtained consent for the use of Facebook’s cookies.

On this basis, the Court ordered Facebook, under sanction of a daily penalty of EUR 250,000, to (i) stop placing the different infringing cookies and similar technologies; (ii) stop collecting information from these cookies; as well as (iii) cease providing any ‘misleading’ information on how the company uses cookies. In addition, the Court demanded that Facebook delete any infringing personal data that had already been collected.

Facebook has indicated that it intends to appeal against this decision.

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