Subject: [espc-leg] Netherlands: First Company Found in Violation of Dutch Cookie Rules 6-2-14
Date: June 3, 2014 9:18:19 AM EDT

All –

Please pass along to your legal departments. This is a big deal. Let me know if you'd like to discuss.

Reed

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Netherlands: First Company Found in Violation of Dutch Cookie Rules 6-2-14

On May 13, 2014, the Dutch Data Protection Authority (College bescherming persoonsgegevens (DPA)) published the findings of its investigation into the compliance of an online advertising agency YD Display Advertising Benelux B.V. (YD) with the Dutch cookie rules. The DPA found that YD violates the Dutch Telecommunications Act (Telecommunicatiewet (TW)) and the Dutch Data Protection Act (Wet bescherming persoonsgegevens (WBP)) by using personal data of Internet users for behavioral targeting without first obtaining their prior unambiguous consent. This is the first time that the DPA is conducting an investigation into compliance with the Dutch cookie rules. The DPA announced in a press release that a formal hearing with YD will follow. After the hearing, the DPA will consider possible enforcement measures, taking into account whether YD's violations persist or not.

What are the Dutch cookie rules?

The Dutch cookie rules currently require the provision of clear and

unambiguous information about the purposes for which cookies or similar technologies are used. In addition, cookies may only be placed or accessed after obtaining the prior unambiguous consent of the user. The consent cannot be obtained via browser settings or by means of a vague reference to general terms and conditions, privacy, and/or permission statements. Even when the user is given the option to consent, but does not take any action, this cannot be deemed as valid consent (i.e., implied consent is not sufficient).

With regard to cookies used to analyze online behavior, the Dutch legislature introduced a legal presumption that such tracking cookies process personal data. As a result, the WBP is presumed applicable to tracking cookies. Companies processing such data need to show that they have a legal basis for such processing – in this case either the unambiguous consent of an individual or a legitimate company interest which outweighs the privacy interests of the individual.

What does YD do?

YD mediates between advertisers in various sectors and websites when placing online ads. The company is active in the Netherlands, Germany, Spain, and France and promises advertisers that it can approach specific target groups in real time, select the most favorable placement of an ad, and personalize the content of an ad banner in a millisecond. In this regard, YD is collaborating with advertisers and other parties, such as ad networks.

In order to identify each user and display individualized ads, YD places and reads various types of cookies on the user's browser. YD also uses pixels and records the data collected in server log files with additional information, such as the last visited URL and the user's IP address. At least one of YD's own cookies contains a unique user identifier number, based on which YD can keep track of which ads that specific user has seen (i.e, clicked on) and whether the user has visited the websites of particular advertisers. In order to determine a user's interests, YD also keeps track of that user's visits to advertiser's

websites and, in some cases, even records whether the user has viewed a particular category of product or service. In days that follow such visit, YD displays the ads of that particular advertiser on various other sites (retargeting). In situations where YD keeps track of which specific products and services the user is interested in, it can adjust the content of its ad banners to suit that particular user.

The investigation focused on the following questions:
•	Are the data YD collects and processes personal data, as defined in the WBP?
•	Does YD comply with the Dutch cookie rules, as provided in the TW?
•	Does YD have a legal basis for processing of personal data collected through cookies?

What did the DPA conclude?

The following are the main findings of the DPA's 135-page report:

•	The DPA concluded that YD processes personal data, such as IP addresses, URLs, and other cookie data (e.g., viewed products or services with date and time, browser information, device used, language of the operating system and raw geographic data derived from IP addresses), all combined under a unique YD user identifier number in a 'micro-profile'. For example, by collecting URLs, YD can profile a particular user's surfing behavior, which can be an indication of that user's interests, preferences, social background, income, or family composition. When such behavioral data are linked to a unique user ID, they can be reasonably and without disproportionate effort linked back to an identifiable natural person. Hashing of IP addresses, which are personal data on their own, is not sufficient, since the DPA managed to crack YD's hashes of IP(v4) addresses within 3 hours by means of a program written by the DPA's own employees.

•	YD also qualifies as a data controller since it determines the purposes and means of data processing. The DPA noted in this regard

that YD has contractual and factual control over the processing of data. For example, YD is free to determine the design of personalized banners and which banners will be displayed for each particular user. The agreements with advertisers do not contain provisions which would address YD as a data processor, such as how the processing will take place, how long the data will be retained or advertisers' right to supervise and ensure YD's full compliance. In addition, YD's privacy and cookie policy addresses the users directly and offer them rights, such as the right to correct and delete their personal data. These are all characteristics of a data controller.

• The DPA noted that YD does not give the users the opportunity to accept or decline the placing of cookies, which violates the statutory consent requirements under the WBP and the TW. The opt out opportunity given to users via an Evidon opt-out page was not sufficient.

• The DPA also found that YD's privacy and cookie policy does not satisfy the notice requirements under the WBP. According to the DPA, the information provided was either incorrect or insufficient and vague. For example, the policy provided that cookies cannot be traced back to an individual and that YD does not build, keep, maintain, or use any personal profiles based on users' history, both of which are factually incorrect. Also, the list of personal data collected was incomplete – there is, for example, no mention of URLs, viewed products or services with date and time, browser information, device used, language of the operating system, or geographic data derived from IP addresses. In addition, the policy was mostly provided in the English language in the beginning of the DPA's investigation. Although YD has made changes in its policy during the investigation, and translated it into the Dutch language, the DPA found such changes to be insufficient.

The DPA's press release and decision are available in Dutch only at: http://www.cbpweb.nl/Pages/pb_20130513_yd-cookies-privacy.aspx.

D. Reed Freeman

Morrison & Foerster LLP

2000 Pennsylvania Avenue, NW | Washington, DC 20006-1888

P: +1 (202) 887.6948 | C: +1 (703) 304.2974

RFreeman@mofo.com | www.mofo.com

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