

Workshop 2: Data protection and criminal justice: what are the issues?

Reconciling interests: do data protection requirements prevent effective crime investigations?

**Data retention:
implications of court decisions?**

Jan Kerkhofs

Federal Magistrate, Belgian Federal Prosecutor's Office, Cyber Unit

Jan.Kerkhofs@just.fgov.be



CYBER UNIT

Data retention in Europe



- Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006:
*“Member States shall ensure that the categories of data specified in Article 5 are retained for periods of **not less than six months and not more than two years** from the date of the communication.”*
- Annulled by the Court of Justice of the European Union on **8th of April 2014** + new ruling on **21st of December 2016** Sweden and UK



Data retention in Europe

- Court of Justice of the European Union (CJEU)
 - Cases: British case (C-623/17), two French cases (C-511/18 en C-512/18), and the *preliminary questions* of the Belgian Constitutional Court (C-520/18)
 - Huge difference between data retention regimes in member states
 - Data retention period (Belgium 12 months CT)
 - Intelligence information (UK) vs. court files (B)

How are investigations affected
by (a lack of) data retention?:
some random case examples...



Threat with a terrorist attack

emmejihad

ExcuseMeMyEnglish – A research blog about jihad in and out of Belgium

Terrorist threat against New Year celebrations in Belgium

Posted: 2013/12/30 | **Author:** [Guy Van Vlierden](#) | **Filed under:** [News](#) | **Tags:** [Houssien Elouassaki](#), [Madjlis Shura Muhajirien](#), [Shariah4Belgium](#), [Syria](#) | [Leave a comment](#)

A Belgian muslim extremist close to a network of Syria fighters threatens with a terrorist attack during the New Year celebrations in the cities of Antwerp and Brussels.

In a private Facebook message sent on Sunday to the Belgian newspaper 'Het Laatste Nieuws', the extremist pointed out that the firework spectacle along the river Scheldt, the city's Central Station and the main shopping street Meir are possible targets, while in Brussels the Atomium monument was named. "I'm warning muslims against attending these events and against joining non-believers there", he wrote.

Threat with a terrorist attack

* Google Confidential and Proprietary *
#####


GOOGLE SUBSCRIBER INFORMATION


Name: [REDACTED]
e-Mail: [REDACTED]@gmail.com
Status: Enabled
Services: Android, Gmail, Google Calendar, Google Talk, Web History,
YouTube, iGoogle
Secondary e-Mail: [REDACTED]@gmail.com
Created on: 2011/07/03-17:33:36-UTC
IP: 109.128.221.109, on 2011/07/03-17:33:36-UTC
Language Code: fr

* Google Confidential and Proprietary *
#####

[Home](#) » [Whois Lookup](#) » 109.128.221.109

IP Information for 109.128.221.109

IP Location:  Belgium Brussels Adsl Go Plus

ASN:  AS5432 BELGACOM-SKYNET-AS BELGACOM S.A. (registered Oct 23, 1995)

Resolve Host: 109.221-128-109.adsl-dyn.isp.belgacom.be

IP Address: 109.128.221.109     

Whois Server whois.ripe.net

ONE-CLICK MONITORING

Create an [IP Monitor](#) to monitor future changes to “109.128.221.109”.

[Log in](#) or [Open an Account](#)

```
inetnum:      109.128.0.0 - 109.128.255.255
netname:      BE-BELGACOM-ADSL1
descr:        ADSL-GO-PLUS
descr:        Belgacom ISP SA/NV
country:      BE
```

Threat with a terrorist attack

[REDACTED]-account.txt

-----BEGIN PGP SIGNED MESSAGE-----

Hash: SHA1

account_id: 275579486
created_at: 2011-04-01 15:28:10 +0000
updated_at: 2013-10-27 05:34:41 +0000
email: [REDACTED]@hotmail.com
created_via: web
screen_name: [REDACTED]
creation_ip: 217.136.206.249
time_zone: Greenland

-----BEGIN PGP SIGNATURE-----

Version: GnuPG v1.4.5 (GNU/Linux)

iD8DBQFSS1RFWJWPIge+SVERASzuAKDbwefUvVX2IRLVyskmoJ/lsvvajACeMn1Y
+4iHO6zct+c7foYJ5JGLObs=
=pjnh



-----END PGP SIGNATURE-----



[Home](#) > [Whois Lookup](#) > 217.136.206.249

IP Information for 217.136.206.249

— Quick Stats

IP Location	 Belgium Mons Proximus Nv
ASN	 AS5432 BELGACOM-SKYNET-AS, BE (registered Oct 23, 1995)
Resolve Host	249.206-136-217.adsl-dyn.isp.belgacom.be
Whois Server	whois.ripe.net
IP Address	217.136.206.249

```
% Abuse contact for '217.136.200.0 - 217.136.207.255' is ' abuse@skynet.be '
```

```
inetnum:      217.136.200.0 - 217.136.207.255
netname:      BE-BELGACOM-ADSL1
descr:        ADSL-GO-PLUS
descr:        Belgacom ISP SA/NV
country:      BE
              CN3068-RTBE
```

The cyber caliphate...



ABOUT
EUROPOL

ACTIVITIES &
SERVICES

CRIME AREAS
& TRENDS

PART
AGRE

[HOME](#) > [NEWSROOM](#) > ISLAMIC STATE PROPAGANDA MACHINE HIT BY LAW ENFORCEMENT IN COORDINATED TAKEDOWN ACTION

ISLAMIC STATE PROPAGANDA MACHINE HIT BY LAW ENFORCEMENT IN COORDINATED TAKEDOWN ACTION

27 April 2018

Press Release

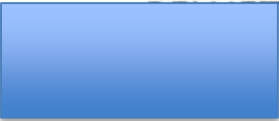

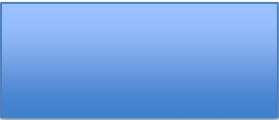


On 25 April 2018 law enforcement authorities of the European Union Member States, Canada and the USA launched a joint action against the so-called Islamic State (IS) propaganda machine in order to severely disrupt their propaganda flow. The takedown operation was coordinated by the European Union Internet Referral Unit (EU IRU) within the [European Counter Terrorism Centre \(ECTC\)](#) at the Europol headquarters.

Led by the Belgian Federal Prosecutor's Office and with the support of Eurojust, the operation involved authorities from Belgium, Bulgaria, Canada, France, the Netherlands, Romania, the United Kingdom and the USA in a coordinated effort to hinder IS's central capability to broadcast terrorist material for an undetermined period of time.

The cyber caliphate...

Number of requests *Number of responses*

<i>Provider</i>	<i>Aantal aangevraagd</i>	<i>Aantal ontvangen</i>	<i>Procent</i>
	13	13	100%
	452	Niet meer beschikbaar wegens termijn overschreden	0%
	3	3	100%
	23	23	100%
	28	1	4%
	75	18	24%
	11	Geen antwoord ontvangen	0%
	2057	625	30%
	1334	58	4%
TOTAAL	3996	741	19%



Death threat IS on 27/10/2013

Wij ontvangen via de FCCU navolgend antwoord van MSN België aangaande Uw vordering ter identificatie van de gebruiker van bovenstaande hotmail account.

Registratiegegevens :

Login [redacted]@hotmail.com

First name : [redacted]

Last name : [redacted]

State : --

Zip : 1800

Country : BE

Timezone : Europe / Brussels

Registered from IP : 109.129.233.187

Date registered : 26/05/2012 te 10:58:14 AM

Last login IP : 130.180.191.31

Too late

Belgacom (identifiable – localizable)

Syria



Hacking of a DP NGO co-worker

*“I am writing you regarding your report of ****, on an alleged hacking offence by **** surveillance authorities using tools developed by ****. According to leaked service logs, a Belgian IP address ***.***.*** might have been infected by these attackers.*

Article 46bis of the Belgian Code of Criminal Procedure authorises the prosecutor to issue a production order against the service provider, with a view of identifying the actual victim of the intrusion.

According to Belgian data retention law, subscriber data and transactional data can only be logged and retained by internet access and service providers for a period of twelve months. After this period providers are compelled to destroy all data (art. 126 of the Belgian Electronic Communications Act, as amended by article 5 of the Act of July 30th, 2013).

*The alleged intrusion took place on ****, i.e. more than 12 months before we received your report. This means that, to our regret, we are no longer able to identify the actual victim using IP address ***.***.*** at the time of the intrusion.*



Hacking of a DP NGO co-worker

...

Therefore, we are closing the investigation.

In addition to that, I have to inform you about a recent decision of the Belgian Constitutional Court of June 11th (case 84/2015), annulling the aforementioned data retention legislation (art. 126). The Court considered the twelve-month retention of subscriber and transactional data, though issued with a view to countering serious and organized crime effectively, to be contrary to the right to privacy of citizens.

I am afraid that, as a consequence, for the sake of the privacy of the perpetrator and the victim, Belgian prosecutors currently will no longer be able to identify and inform any victim of an unlawful intrusion, even if it were to have taken place only months before it was reported to law enforcement.

The balance with other rights

Request for a preliminary ruling from the Cour constitutionnelle (Belgium) lodged on 2 August 2018 — Ordre des barreaux francophones et germanophone, Académie Fiscale ASBL, UA, Liga voor Mensenrechten ASBL, Ligue des Droits de l'Homme ASBL, VZ, WY, XX v Conseil des

child
alert



ministres
(Case C-520/18)
“2. *Must Article 15(1) of Directive 2002/58/EC, in conjunction with Articles 4, 7, 8, 11 and 52(1) of the Charter of Fundamental Rights of the European Union, be interpreted as **precluding** national legislation such as that at issue, which lays down **a general obligation for operators and providers of electronic communications services to retain the traffic and location data** within the meaning of Directive 2002/58/EC, generated or processed by them in the context of the supply of those services, if the object of that legislation is, in particular, to comply with the positive obligations borne by the authority under Articles 4 and 8 of the Charter, consisting **in providing for a legal framework which allows the effective criminal investigation and the effective punishment of sexual abuse of minors and which permits the effective identification of the perpetrator of the offence**, even where electronic communications systems are*”

How long is long?

Reasons why freezing is not an alternative



U.S. Department of Justice

Criminal Division
Office of International Affairs

27.4.2013

MEW:MDR:JEC:MB:AEM:aem
182-41520 (Please report when responding)

Washington, D.C. 20530

May 23, 2013

VIA FEDERAL EXPRESS

Vicky Vanbrousegem
Judicial Cooperation Unit
Directorate General of Criminal Law
and Human Rights
Ministry of Justice
115, Boulevard de Waterloo
B-1000 Brussels, BELGIUM

Re: Request from Belgium for Assistance in the Matter of Wouter Neyt
Your Reference 6CRP/12/110.000


Dear Vicky:

On October 15, 2012, the Office of International Affairs received the above-referenced request, seeking non-content internet records from the e-mail account wouterneyt@yahoo.com. Enclosed please find records responsive to the request. Please provide these materials to the appropriate authorities in Belgium for analysis.

If you have any questions, please feel free to contact me at Marcus.Busch@usdoj.gov or +1 (202) 353-9370, or Abigail Marion, the paralegal assigned to this matter, at Abigail.Marion@usdoj.gov or +1 (202) 616-3633.

Sincerely,

Mary Ellen Warlow
Director
Office of International Affairs

By: 
Marcus Busch
Trial Attorney

Enclosures: Yahoo! records

- **Crime takes place: 2012-07-02**
- Police report: 2012-07-06
- Police finds traces to Yahoo.com account: 2012-07-12
- Investigating Judge gets the case: 2012-08-14
- Yahoo! attorney is mailed: 2012-08-16
- Yahoo! answers follow procedure: 2012-08-16
- Rogatory commission is made in Dutch: 2012-08-20
- Yahoo! confirms freezing of information: 2012-09-13
- Translation in English is ready to be sent to USA: 2012-09-14
- Official rogatory with all the stamps is send out: 2012-09-17
- USA trial attorney confirms reception: 2012-09-27
- First clarification is asked and answer is given: 2012-10-08
- **Answer was given on: 2013-05-23**



Thank you
Questions?