Web based e-mail; the judicial authority of a Belgian Public Prosecutor; restricted to within the territory of Belgium; article 46bis, §2 of the Code of Criminal Procedure

The Court of Appeal in Brussels, thirteenth chamber, sitting in criminal matters

In the case of the Public Prosecutor

Against

YAHOO! Inc., with registered offices at CA 94089 Sunnyvale (United States of America), First Avenue 701,

accused,

represented by Mr. Jan Dhont, Bertold Theeuwes and Gert Warson, lawyers at the Bar of Brussels;

Complained of:

In the judicial district of Dendermonde and connected therewith elsewhere in the Kingdom, at least in the period from 10 December 2007 until the date of the summons, and in any case on 10 December 2007, on 10 March 2008 and from 7 July 2008,

by having directly committed the crime or misdemeanour or having participated thereto or by having provided such assistance that the crime or the misdemeanour could not have been committed, or by having directly provoked the crime or the misdemeanour by means of gifts, promises, threats, abuse of authority or of power, machinations or criminal mischief, as a perpetrator within the meaning of

article 66 of the Criminal Code,

to have committed a breach of article 46*bis* § 2 of the Belgian Code of Criminal Procedure, by having refused, in the capacity of an operator of an electronic communications network or provider of an electronic communications service from whom the public prosecutor required the communication of the data referred to in paragraph 1 of article 46*bis* of the Code of Criminal Procedure, to communicate the required data to the public prosecutor in this case, and as an operator of an electronic communications network or as provider of an electronic communications service active on the Belgian territory, after having been required, by order from the public prosecutor in Dendermonde dated 21 November 2007 pursuant to article 46bis of the Belgian Code of Criminal Procedure, with respect to the e-mail accounts:

ptbeannl@yahoo.com

shoolajohn@yahoo.com

Ian_are@yahoo.com

leo4john@yahoo.com

garcialaurindo@yahoo.com

raadwijkdr@yahoo.com

robjanssennl@yahoo.com

to communicate the following information:

1. the full identification/registration data of the person who created/registered the account, including the IP address, date and time (+ time zone) of the registration;

2. the e-mail address associated with the profile;

3. any other personal information that could lead to identification of the user(s) of the account;

to have refused to communicate this data to the public prosecutor.

Given the appeals lodged on:

- 4 March 2009 by YAHOO! Inc against all provisions of the judgment,

- 12 March 2009 by the public prosecutor,

against a judgment given after full argument from both sides by the thirteenth chamber of Court of First Instance in Dendermonde, sitting in criminal matters, dated 2 March 2009 and having decided:

Declares the facts of which the defendant is complained proven.

Sentences the accused YAHOO! in relation to these facts to a fine of TEN THOUSAND EURO x 5,5 = 55.000 euro.

Contribution: 25 euro x 5.5 = 137,50 euro,

Costs: 38,62 euro,

Fee: 25 euro.

Orders the accused to communicate the information stated in the written order of 21 November 2007 of the public prosecutor in Dendermonde pursuant to article 46bis of the Code of Criminal Procedure, under forfeiture of a penalty of 10.000 euros per day of delay, as from the date this judgment becomes final.

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Given the judgment of 30 June 2010 of the Court of Appeal in Ghent.

Given the judgment of the Belgian Court of Cassation of 18 January 2011, which annuls the appealed judgment and refers the case to the Court of Appeal in Brussels.

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Having heard the report of judge S. Janssens.

Having heard the claim of the prosecution.

Having heard the accused, for whom pleaded Mr. Gert Warson, Mr. Jan Dhont and Mr. Bertold Theeuwes, lawyers at the Bar of Brussels.

Given the brief of the accused, received at the Court Registry on 6 September 2011.

Given the brief and the court file presented at the court audience of 6 September 2011 by the prosecution.

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The appeals have been lodged in a timely and regular manner, and are admissible.

The Belgian government exercises its sovereign power, in principle, from and within the Belgian territory.

The prosecution has in principle no jurisdiction to exercise its offices and, in particular, to conduct or order acts of investigation outside the Belgian territory.

In this matter, there is no evidence of a valid order from the Public Prosecutor directed against the accused on the Belgian territory to communicate information within the meaning of Article 46bis, §2 of the Code of Criminal Procedure.

The mere fact that it is technically possible, including for the Public Prosecutor, to reach the accused from the Belgian territory by electronic or other means of communication, is not sufficient for this purpose.

By failing to comply with a request from the Public Prosecutor to an address in the United States of America, the accused commits no breach of Article 46bis, §2 of the Code of Criminal Procedure.

The request for a preliminary ruling by the Constitutional Court with regard to the scope of Article 46bis, §2 of the Code of Criminal Procedure and its compliance with the Constitution, is not made, since the outcome of such a preliminary ruling is not relevant for the solution of the dispute and does not detract from what was mentioned above concerning the exercise of the powers of the prosecution.

After the investigation of the case by the court, it appears that the facts of the indictment are not proven against the accused.

FOR THESE REASONS,

THE COURT,

After hearing full arguments by both sides,

Given the statutory provisions mentioned below, namely the articles: 185, 190, 195, 210, 211, 212 of the Code of Criminal Procedure,

5 of the Criminal Code,

11, 12, 16, 24, 31 to 37 and 41 of the Law of 15 June 1935 concerning the use of languages in court proceedings,

Declares the appeals admissible.

Annuls the contested judgment.

And renders a new judgment.

Acquits the accused Yahoo! Inc. from all charges and discharges it from prosecution without costs.

Defers the costs of the public prosecution in both grades to the State.

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Thus pronounced at the public hearing of 12 October 2011.

In the presence of:

Mr. A Boyen
First President

Mr. S Janssens and Mr. P Hartoch
Judges

Mr. J. Kerkhofs
Deputy Public Prosecutor with the Court of First Instance of Dendermonde

Mr. K. De Leeuw
Court Registrar

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Second appeal verdict: 'virtual presence' in Belgium does not suffice to justify a duty to cooperate with criminal investigations

By Johan Vandendriessche

The translated decision of the Court of Appeals of Brussels of 12 October 2011 is the second appeal decision in a legal dispute between the Public Prosecutor of the judicial district of Dendermonde (Belgium) and Yahoo! Inc. for some years now.[1]

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 fraudulent acts had been committed by unidentified persons over the internet with the aid of Yahoo! e-mail addresses. As a next step, the Public Prosecutor requested Yahoo! 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. This request was made directly to Yahoo!, rather than through the usual mechanisms provided in the Treaty on Mutual Legal Assistance in Criminal Matters. Yahoo! rejected this request under reference to this Treaty. As a result of the refusal by Yahoo! to comply with this request, the Public Prosecutor decided to prosecute Yahoo! for failure to comply with its request. On 2 March 2009, Yahoo was sentenced to a fine of 55.000 euros. Yahoo 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 however did not acquiesce to this decision of the Court of Appeal of Ghent and 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.

The legal issues in this dispute involved 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.

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1   For a translation and commentary to the previous decisions in this legal dispute, see Johan Vandendriessche, *Digital Evidence and Electronic Signature Law Review, 8 (2011), 194 – 218.* This decision does not mark the end of this matter, as the Public Prosecutor of the judicial district of Dendermonde (Belgium) filed an annulment request with the Court of Cassation. On 4 September 2012, the Court of Cassation annulled the decision of the Court of Appeals of Brussels and sent the case for retrial to the Court of Appeal of Antwerp.

According to the Court of Appeal of Brussels, the fact that this person or company can be reached from the Belgian territory is insufficient to extend the authority of the Public Prosecutor to this person or company

In this respect, 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.

In the present case, the public prosecutor held 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 means of a virtual presence. For this 'virtual presence', the public prosecutor was also of the opinion 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 online customer service, as is the case with Yahoo!).

Yahoo!, however, took the view that, in the absence of a local presence, it cannot be held to cooperate directly with the public prosecutor. Any such request must, according to Yahoo!, be made through the channels provided in the Treaty on Mutual Legal Assistance in Criminal Matters.

The Court of Appeal of Brussels settled this discussion in favour of Yahoo! by deciding that the Public Prosecutor has no authority to address requests to persons or companies located outside the Belgian territory. According to the Court of Appeal of Brussels, the fact that this person or company can be reached from the Belgian territory is insufficient to extend the authority of the Public Prosecutor to this person or company. Consequently, a person or company located outside Belgium is not required to cooperate with the Public Prosecutor's direct request for information (i.e. not formulated under the mechanisms provided in the Treaty on Mutual Legal Cooperation in Criminal Matters).

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