

CASE TRANSLATION: BELGIUM

CASE CITATION:

Corr. Dendermonde 2 maart 2009, onuitg.

NAME AND LEVEL OF COURT:

**Rechtbank van Eerste Aanleg te
Dendermonde (The Court of First Instance
in Dendermonde)**

DATE OF DECISION: **2 March 2009**

Investigation of credit card fraud; provider of e-mail services in the United States of America; users of the service in Belgium; jurisdiction; virtual presence in a jurisdiction; Mutual Legal Assistance in Criminal Matters; whether provider of service is required to provide identification and registration data of the person who registered e-mail accounts, including the IP address, date and time of the registration; the e-mail address associated with the profile; any other relevant personal information that could lead to identification of the user; electronic communications network; provider of an electronic communications service

The Court of First Instance in Dendermonde, thirteenth chamber, sitting in criminal matters, made the following judgment during its public hearing on 2 March 2009:

Registry No. DE 20.95.16/08/26

IN THE MATTER OF THE PUBLIC PROSECUTOR
AGAINST:

Yahoo Inc.
701 First Avenue
Sunnyvale, CA 94089
United States of America

Matter complained of:

In the judicial district of Dendermonde and connected therewith elsewhere in the Kingdom, at least in the period from 10.12.2007 until the date of the summons, and in any case on 10.12.2007, on 10.3.2008 and on 7.7.2008,

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:

Having committed a breach of article 46bis § 2 of the Belgian Code of Criminal Procedure, by having refused, in the capacity of 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 46bis of the Code of Criminal Procedure, to have this advanced data to communicate the required data to the public prosecutor,

In this case, and as the operator of an electronic communications network or as provider of an electronic communications service active within the Belgian territory, after having been required, by order from the public prosecutor in Dendermonde dated 21.11.2007 pursuant to article 46bis of the Belgian Code of Criminal Procedure, with respect to the following e-mail accounts:

ptbeannl@yahoo.com;
shoolajohn@yahoo.com;
lan_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;

refused to communicate these data to the public prosecutor.

1. Procedure

The court took note of;

- the validly served writ of summons, bringing the case before this court and setting the date of the hearing on 26 January 2009;
- the minutes of the hearing and other documents in relation to the proceedings.

The court heard the following parties at the public hearing on 2 February 2009, the date upon which this case was heard in Dutch:

- the public prosecutor, represented by Jan Kerkhofs, in his presentation of the case and in his claim;
- the accused YAHOO! Inc., a company incorporated under the laws of the State of California (USA), in its pleas of defence, represented by its counsel Mrs Jan Dhont and Mr Pieter Londers, lawyers at the Brussels Bar.

2. Facts

The public prosecutor drafted the following report for justice on 25 August:

“On 3 October 2007, the local police of Aalst drafted a preliminary report with number DE.20.LB.01393407 in relation to apparent acts of fraud by using the internet (article 496 of the Criminal Code) and/or computer fraud (article 504quater of the Criminal Code) and computer forgery (article 210bis of the Criminal Code) (see amongst others exhibits 1 to 52) committed by persons unknown;

In the context of the investigation, there appeared to be serious indications that the apparent

(co)perpetrators used, amongst others, the following e-mail accounts:

ptbeannl@yahoo.com;
shoolajohn@yahoo.com;
lan_are@yahoo.com;
leo4john@yahoo.com;
garcialaurindo@yahoo.com;
raadwijkdr@yahoo.com;
robjanssennl@yahoo.com;

The aforementioned e-mail accounts belong to or are provided under the management of YAHOO! Inc, 701 First Avenue, Sunnyvale, CA 94089, USA, and whereby on the one hand my office established that the aforementioned accounts were used territorially in Belgium, and on the other hand that YAHOO was also present on Belgian territory, both commercially and as service provider, at least virtually through the internet;

Indeed, it has been established that YAHOO can be addressed and reached from within Belgian territory, and makes itself accessible to receive reports and questions regarding safety issues related to users of YAHOO by means of at least the following web addresses available in Belgium:

security@yahoo-inc.com
mail-spoof@cc.yahoo-inc.com
copyright@yahoo-inc.com
<http://help.yahoo.com/l/us/yahoo/privacy/general.html>
<http://help.yahoo.com/l/us/yahoo/abuse/abuse.html>

That my office subsequently, on 21 November 2007, pursuant to article 46bis of the Code of Criminal Procedure, addressed an order to YAHOO Inc., as operator of an electronic communications network or provider of an electronic communications service in order to obtain the following information regarding the aforementioned e-mail accounts: 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 (see, amongst others, exhibits 57 to 59);

That the following information was communicated to

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YAHOO in this order:

“Pursuant to article 46bis § 2 of the Belgian Code of Criminal Procedure, any operator of a telecommunications network and any provider of a telecommunications service in Belgium who is ordered to communicate the above mentioned required information, must provide this information to the public prosecutor or the officer of judicial police. Refusal to communicate this information is punishable with a fine of between 143.00 euros and 55,000.00 euros.” (see exhibit 59)

That this order in the Dutch language, together with a translation in English (translated by certified translator Jeanne Holbrecht – see exhibits 60 to 63), was sent to YAHOO Inc. on 29 November 2007 by the Regional Computer Crime Unit (Federal Criminal Police Dendermonde, department of Aalst) by using the above mentioned YAHOO interfaces available on the Belgian territory to report abuse and security issues and/or infringements;

On 29 and 30 November 2007, receipt notifications were received from YAHOO Inc.;

On 7 December 2007, it was explained by e-mail to YAHOO that it concerned an order from a Belgian magistrate to communicate all available identification data and registration details of the holders of the e-mail addresses concerned, and the legal department of YAHOO was requested to take the necessary action; (see amongst others exhibits 66 to 76);

On 10 December 2007, YAHOO Customer Care replied by e-mail that such a request should be addressed in writing to:

YAHOO! Custodian of Records
701 First Avenue
SUNNYVALE, CA 94089-1019
UNITED STATES OF AMERICA

(see exhibit 76)

In accordance with the request of YAHOO, by letter of 29 February 2008, the order from my office dated 21 November 2007 in the Dutch language together with the complete English translation (translated by certified translator Jeanne Holbrecht on 4 March 2008), was sent by postal mail and fax to YAHOO! Custodian of Records, 701 First Avenue, SUNNYVALE,

CA 94039-1019, UNITED STATES OF AMERICA (see exhibits 77 to 96);

That YAHOO replied by e-mail on 10 March 2008, apparently taking the following position (see exhibit 97):

- all the information requested relates to U.S. registered accounts, in relation to which the U.S. Electronic Communications Privacy Act (ECPA) prevents the disclosure without an order to this effect by a U.S. jurisdiction, implying that such requests must be made through the U.S. Department of Justice;
- an alternative would be to proceed with a civil “John Doe legal action”;
- YAHOO also refers to the fact that investigation of the e-mail header data can often reveal an IP address, enabling further identification through the internet access provider;

That my office thus concluded that YAHOO refused to comply with any provision of the order issued by my office under article 46bis of the Code of Criminal Procedure, that it ignored the position of my office in relation to the Belgian territory, and that it wrongly rejected the appropriateness of what had been ordered by my office;

That it is however my office that solely decides, within the limits of the law, on the appropriateness of the acts of investigation; that moreover it must be concluded that YAHOO failed to take into account the fact that the IP address used at the time of the creation of an account (information which only YAHOO has) allows a precise identification of the account holder, and that it is this information that is valuable and that it was required to communicate;

That my office, by letter of 25 June 2008, together with the certified translation of the letter (by certified translator Jeanne Holbrecht dated 26 June 2008), summoned YAHOO a last time to respond to the judicial order from my office (see exhibits 98 to 102);

That this letter contains the following content and reasoning (see exhibits 98 to 102):

“(…) My office is conducting a criminal investigation under which you were asked to provide your

cooperation.

On 21 November 2007, my office sent a written judicial order to your services to provide data in relation to e-mail accounts “@yahoo.com” that were used in Belgium.

The legal basis of this judicial order is article *46bis* of the Belgian Code of Criminal Procedure.

This judicial order was delivered to your services on 29 November 2007 through web addresses that are made available by you in Belgium and through which you can be reached in Belgium by the users of YAHOO!, in particular:

- 1) security@yahoo-inc.com
- 2) mail-spoof@cc.yahoo-inc.com
- 3) copyright@yahoo-inc.com
- 4) <http://help.yahoo.com/l/us/yahoo/privacy/general.html>
- 5) <http://help.yahoo.com/l/us/yahoo/abuse/abuse.html>

In the context thereof, this order was explained to your services on 7 December 2007 via your web interface mail-abuse@cc.yahoo-inc.com.

By e-mail of 10 December 2007 (from ‘Raoul’ yahoo! Customer Care – 42356018), YAHOO! Agreed to provide its cooperation if the request was made in writing, which was done by my office by letter of 29 February 2008, and communicated to you together with an English translation on 7 March 2008.

On 10 March 2008, you responded by e-mail (legalpoc@yahoo-inc.com) from Mrs. Julia Albert. Summarizing, your position is as follows:

- The information requested concerns, according to you, U.S. registered accounts, in relation to which the U.S. Electronic Communications Privacy Act (ECPA) prevents you from disclosing the information requested without an order to that effect from a U.S. jurisdiction, implying that such a request must be made through the U.S. Department of Justice,
- alternatively, you propose that a civilian “John Doe

legal action” be initiated;

YAHOO! does not, however, take any position in relation to the applicable principle on territoriality.

The assessment of your obligation to cooperate as an Internet Service Provider (ISP) is based on the finding that YAHOO! has a territorial presence in Belgium, be it virtually through the internet, as well as that Yahoo! is available to third parties within Belgian territory.

An ISP that is economically-virtually present on the Belgian territory is, in the opinion of my office, also judicially-virtually present on the Belgian territory.

An ISP who makes itself (virtually) reachable in Belgium for consumer (mail account for complaints, for questions) via a web interface, must also be considered to be able to reply to justice on the Belgian territory.

What is more, in your e-mail of 10 March 2008, you indicate yourself your digital/virtual accessibility via legalpoc@yahoo-inc.com.

My office requires – that is a U. S. citizen found and operating in Belgium, be it virtual – your cooperation in Belgium in accordance with Belgian law.

Under these circumstances, you must, as an ISP that is present and operating in Belgium, comply with the laws of the Belgian people on the Belgian territory.

The U.S. Electronic Communications Privacy Act (ECPA) is, in the opinion of my office, not applicable to electronic communications that may be considered to have taken place in Belgium and that was offered through a service that was provided and used in Belgium.

The U.S. Electronic Communications Privacy Act (ECPA) cannot, in the opinion of my office, derogate from the Belgian sovereignty in the field of criminal law and criminal procedure, which applies to any ISP or operator managing or offering a (tele)communications service on or over the Belgian territory.

From article *46bis* § 2 of the Belgian Code of Criminal Procedure, it follows that each operator of a telecommunications network and each provider of telecommunications services in Belgium, who is

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ordered to provide the information required mentioned above, must communicate the information which was requested to the public prosecutor or the officer of judicial police.

Refusal to disclose that information is punishable with a fine of between 143.00 euros and 55,000.00 euros.

My office requires you under these circumstances comply to immediately with the order directed at you on 21 November 2007, failing which you will be liable to criminal prosecution before the Belgian courts. I thank you in advance for your kind cooperation in this matter. (...)"

That on 7 July 2008, this letter was again sent to YAHOO, together with the original order of my office pursuant to article 46bis of the Code of Criminal Procedure, dated 21 November 2007, at the web address communicated by YAHOO to my office: legalpoc@yahoo-inc.com (see exhibits 113 to 115);

That YAHOO gave no further reaction towards my office, so it must manifestly be concluded that YAHOO refuses to comply with the order from the public prosecutor in Dendermonde pursuant to article 46bis of the Code of Criminal Procedure;

That obligation to cooperate under article 46bis § 2 of the Code of Criminal Procedure must be interpreted in such a manner that every operator of a telecommunications network providing services in the territory of the Belgian Kingdom and that makes itself and its services available to Belgian citizens inside the territory of the Belgian Kingdom – be it virtual/digital – must offer the same availability and accessibility to the Belgian judicial authorities;

An operator of an electronic communications network or a provider of an electronic communications service that is virtually present within the Belgian territory for economic purposes, must also be considered to be judicially present on the Belgian territory;

The obligation to cooperate under article 46bis of the Code of Criminal Procedure extends to every operator of an electronic communications network or provider of electronic communications services that offers services and that is virtually or physically present in Belgium;

Article 46bis of the Code of Criminal Procedure does not distinguish between the registration or nationality of the operator of an electronic communication network or provider of an electronic communications service, but focuses indiscriminately on every operator of an electronic communications network or provider of an electronic communications service operating or found within Belgian territory;

Consequently, YAHOO must provide cooperation to the Belgian judicial authorities in accordance with article 46bis of the Code of Criminal Procedure;

For these reasons, my office drafts a report against:

Yahoo! Inc.
701 First Avenue
Sunnyvale, CA 94089
United States of America

because:

in the judicial district of Dendermonde and connected therewith elsewhere in the Kingdom, at least within 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 as of 7 July 2008,

having committed a breach of article 46bis (§ 2) of the Belgian Code of Criminal Procedure, which reads as follows:

“§ 1. In detecting crimes and misdemeanours, the public prosecutor may, by a reasoned and written decision, if necessary by requiring the cooperation of the operator of an electronic communications network or of the provider of an electronic communications service or of a police service designated by the King, proceed or cause to proceed, on the basis of any information in his possession or through an access of the customer files of the operator or of the service provider, to:

1° the identification of the subscriber or a habitual user of an electronic communications service or of the means used for electronic communication;

2° the identification of electronic communications services to which a particular person is a subscriber or that are habitually used by a particular person. The reasoning reflects the proportionality in relation to the privacy and the subsidiarity in relation to any

other investigatory act.

In cases of extreme urgency, any judicial police officer can, after verbal and prior consent of the public prosecutor, in a reasoned and written decision commandeer these data. The officer of the criminal investigation department shall communicate this reasoned and written decision and the information obtained within twenty-four hours to the public prosecutor and also the reasons for the extreme urgency.

§ 2. Any operator of an electronic communications network and any provider of an electronic communication service that is required to communicate the information referred to in paragraph 1, provides the public prosecutor or the officer of the criminal investigation the data that were requested within a period to be determined by the King, based on the proposal of the Minister of Justice and the Minister responsible for Telecommunications.

The King determines, upon advice of the Commission for the protection of privacy and based on a proposal of the Minister of Justice and the Minister responsible for Telecommunications, the technical conditions for the access to the information referred to in § 1, available to the public prosecutor and for the police service designated in the same paragraph.

Any person who by virtue of his ministry is aware of the action or otherwise cooperates thereto, is bound to secrecy. Any breach of secrecy is punishable in accordance with Article 458 of the Criminal Code.

Refusal to disclose the information is punishable with a fine of twenty-six euro to ten thousand euros.”

3. Plea of the defence

The defence contested the accusations at the trial hearing of 2 February 2009 in its pleadings and in a brief submitted at the trial hearing. The reasoning of the defence can be summarised as follows:

1. The alleged criminal offence was not committed in Belgium.
2. The prosecutor must abide with the procedures provided in the Convention between Belgium and the USA on Mutual Legal Assistance in Criminal Matters.

3. The public prosecutor has no territorial jurisdiction. Yahoo! is not an operator of an electronic communications network established in Belgium or a provider of an electronic communications service established in Belgium within the meaning of article 46bis of the Code of Criminal Procedure.
4. The public prosecutor has no competence to act in this matter. Yahoo! is neither an operator of an electronic communications network or a provider of an electronic communications service within the meaning of art 46bis of the Code of Criminal Procedure.
5. The public prosecutor's order is disproportionate in light of the law of 8 December 1992 on the protection of privacy and violates the principle of subsidiarity.
6. No criminal offence has been specified since the period within which the data should be transferred.
7. Lack of a moral element. Yahoo! will not provide the information required which it possesses.

4. Merits of the prosecution

4.1

The defence stated in the brief that YAHOO! is not present in Belgium in any way whatsoever.

However, it was found that the above-mentioned e-mail accounts managed by Yahoo! were used in Belgium, so are within the Belgian territory. Additionally, the public prosecutor correctly states that YAHOO! is also present on the Belgian territory, both commercially and as a service provider, be it via the internet or 'virtually' in the common technical term of that medium. The public prosecutor sent an order in that regard, pursuant to article 46bis of the Code of Criminal Procedure to YAHOO! through their 'digital interface' that it makes available in Belgium. YAHOO! informed the public prosecutor that it would like to receive a written order by postal mail and thus seemed willing to cooperate.

The public prosecutor also communicated in the traditional written form to Yahoo! Inc., Custodian of Records, 701 First Avenue, Sunnyvale, CA 94089, USA,

both by postal mail and by fax.

Summarised, YAHOO! responded – by e-mail (!) – as follows:

- The information requested concerns, according to you, U.S. registered accounts, in relation to which the U.S. Electronic Communications Privacy Act (ECPA) prevents you from disclosing the requested information without an order to that effect from a U.S. jurisdiction, implying that such a request must be made through the U.S. Department of Justice,
- alternatively, a civilian “John Doe legal action” can be initiated;

YAHOO! did not take a position regarding the interpretation in the order of the territoriality principle under Belgian law.

4.2

It must be established that YAHOO! was/is present on the Belgian territory, be it through the internet (or virtually), and also available to third parties within the Belgian territory.

An Internet Service Provider (hereinafter: ISP) that is economically present in Belgium, must also be considered to be present for the purposes of justice. Indeed, an ISP who makes itself (virtually, via the internet) accessible to consumers in Belgium (e-mail account for complaints, questions, ...) via a web interface, must be deemed available to justice on the Belgian territory. Finally, the public prosecutor does not require anything in the U.S. from a U.S. citizen, but rather the public prosecutor requires something substantial in Belgium from a U.S. citizen that is found in Belgium, and that constitutes a trading company/service provider. In this interpretation of the concept of territory, the US entity must comply with the laws of the Belgian people in Belgium.

Despite the reasoning of the defence, the court considers that YAHOO! must be qualified as an operator of an electronic communications network or a provider of an electronic communications service, and that it belongs to the category of individuals or services to whom the obligations of art. 46bis of the Code of Criminal Procedure apply. YAHOO! is not only a portal or search engine, but it also offers a (free) e-mail service. This e-mail service is, together with

hotmail, one of the market leaders in this field of free service providers (source: nl.wikipedia.org/wiki/Yahoo!) and is surely a very important player in this field. It is clear that the legislator, in drafting the obligations deriving from art. 46bis of the Code of Criminal Procedure, also had such operators or providers in mind. This is logical given the share of the providers of such free email services of internet traffic (cf. hotmail, gmail, belgacom.net etc.).

Criminal law is also autonomous, implying that a criminal court is not bound by the definitions of the law of 13 June 2005 on electronic communications, let alone the interpretation thereof that is given by the defence (see pages 22 to 24, brief of the accused).

4.3

As a passing reference, it is the opinion of the court that it does not do to profile oneself “economically on the Belgian territory” – such YAHOO! does – and then, after summons, to consider oneself “on American territory for the purposes of justice” to escape obligations that are observed (without any problem) by other operators and service providers.

If YAHOO! considers that it cannot comply with the Belgian obligations, or if it does not want to comply with such obligation for privacy reasons, then YAHOO! is at liberty to block the IP range of the Belgian Internet Access Providers (Telenet, Skynet, ...) from their servers, so they are also cut off economically from within the territory, which is technically feasible. YAHOO! does not, however, make this choice for obvious economic reasons. At the trial hearing on 2 February 2009, the defence indicated that the presence of YAHOO! via the internet was made before the “hits”, that is the number of times the web site of YAHOO! is clicked by internet users in Belgium with a view of attracting advertisers.

4.4

It should also be noted that the information requested pursuant to article 46bis and/or 88bis of the Code of Criminal Procedure in this case in substance concerns data relating to the registration of electronic traffic on Belgian territory.

The defence can be followed in their reasoning on the principle of territoriality to the extent that the transfer

or seizure would be requested of objects or data located in the USA, and in which no Belgian territorial component is involved and if the holder of those objects or data is not accessible in Belgium (either really or virtually). This may relate to the situation of the transfer of the contents of an e-mail or web site and contents and identities, which is substantially different from the mere technical registration data of electronic communication (IP addresses and times). In this case, this situation does not apply, because it concerns telecommunications in Belgium, i.e. in the interior (see the contrary argument B. DE SMET, “Registratie en lokalisatie van telecommunicatie”, in *Commentaar strafrecht en strafvordering*, Kluwer, 2008, nr. 58, p. 26), so the public prosecutor, the investigating judge and, finally, the court hearing the case in Belgium have jurisdiction.

4.5

The court believes that the duty to cooperate pursuant to article 46bis and/or 88bis of the Code of Criminal Procedure extends to any ISP that provides services and that is available in Belgium. Article 46bis of the Code of Criminal Procedure provides no conditions or restrictions in relation thereto. This provision refers to “an operator of an electronic communications network” or “a provider of an electronic communications service”. Nowhere is it defined that this requirement only applies to an operator or provider having its registered office or operational office in Belgium.

4.6

The U.S. Electronic Communications Privacy Act (ECPA) does not apply to electronic communications that can be deemed Belgian and were conveyed through a service offered in Belgium.

In this respect, the U.S. Communications Electronic Privacy Act (ECPA) cannot prejudice Belgian sovereignty in relation to criminal law and criminal procedure.

To decide otherwise could lead to unacceptable situations:

- To the extent that it would be held that ISPs that have their registered office outside Belgium (but that are active on the Belgian territory and that are accessible) are not subject to the same duty to

cooperate as the Belgium-based ISPs, creates a discriminatory difference in treatment;

- To the extent that it would be held that ISPs that have their registered office outside Belgium (but that are active on the Belgian territory and that are accessible), are not subject to the same duty to cooperate as the Belgium-based ISPs, is an invitation for any ISP or ‘internet player’ to formally establish themselves in a nation outside Belgium that would offer legal advantages – what would be, no duty to cooperate on electronic communication – to offer services in Belgium from that country, and to be available for consumers on the Belgian territory, but not justice.

4.7

YAHOO! is free to refuse to cooperate with the Belgian courts for any reason whatsoever. However, this does not relieve YAHOO! from the obligations arising from article 46bis of the Code of Criminal Procedure from the moment YAHOO! obtains access to Belgian territory. Nor can YAHOO! escape in that case from the sanctions contained in article 46bis *in fine* of the Code of Criminal Procedure. Article 46bis of the Code of Criminal Procedure does not distinguish according to the registration or nationality the operator/ISP might have, but focuses indiscriminately on any operator who is found on Belgian territory (see above). However, nobody forced YAHOO! to offer services and to be present in Belgium (see above). YAHOO! makes the choice to be present as internet player in Belgium for clear economic reasons. This choice for the (economic) benefits that may ensue, also implies that it must meet the obligations that are associated with them, such as the duty to cooperate in criminal investigations.

4.8

By stating that the refusal could not have taken place on Belgian territory, the defence uses an overly static view of the commission of a criminal offence and the associated provision in relation to the territorial jurisdiction. The defence erroneously assumes that the territorial jurisdiction of the court can only be situated at the place where the perpetrator physically committed the act. A criminal offence is, however, situated where an act or event occurs that is a constitutive element of the criminal offence or that is an indivisible part of it.

As part of the investigation with reference DE.20.LB.013934/07, it was found that the apparent or potential (co-)perpetrators made use of e-mail accounts managed by YAHOO! and such accounts were used on Belgian territory, namely amongst others in the judicial district of Dendermonde. There is in other words evidence in this investigation that, by means of several e-mail accounts with YAHOO!, there was logged on to the web site of the company PARADISIO with a view to order computers via the internet. The information obtained showed that the computers were paid with the credit card data of victims from whom presumably the name, card number and security number were copied at a time when they were waiting for a payment. These elements form an indivisible whole with the acts committed by the (co)perpetrators involved in the use of a swindle from their computer. It is crucial for investigators to have the IP information of the e-mail accounts managed by YAHOO!, e-mail accounts that were used in Belgium, namely, by logging on to the server of the company PARADISIO in Hofstade, which is located in the judicial district of Dendermonde. To that end, the cooperation of YAHOO! was and is required and YAHOO! is obliged to provide such cooperation.

Moreover, the data requested pursuant to art. 46bis of the Code of Criminal Procedure must be delivered *into the hands of the – in this case – public prosecutor in Dendermonde*, which means that there is an obligation to bring the information, which implies that the ubiquity theory, as it is also applied by the Court of Cassation, situates the territorial jurisdiction in Dendermonde.

4.9

It has been established that YAHOO! refuses to provide the cooperation required under Article 46bis of the Code of Criminal Procedure. This is amply demonstrated by the response of YAHOO! to the public prosecutor and by the brief filed in the context of this matter.

Art. 46bis § 2 of the Code of Criminal Procedure provides that the required data must be provided by the operator of an electronic communications network and each provider of a telecommunications service within a period to be determined by the King, based on the proposal of the Minister of Justice and the Minister responsible for telecommunications.

The Royal Decree of 9 January 2003 implementing articles 46bis, § 2, first indent, 88bis, § 2, first and third indents, and 90quater, § 2, third indent of the Code of Criminal Procedure and Article 109ter E, § 2, of the Act of 21 March 1991 on the reform of some public economic companies, provides in article 3 that the data must be communicated in real time to the investigating judge, the public prosecutor or the judicial police officer. Real time means: the minimum time required for the execution of a particular action in accordance with the rules of the article, without interruption and for which appropriate means and staff were employed (article 1,4° of the Royal Decree).

The mere textual reason that the defence cites to argue that there is no implementing decree regarding the *providers of electronic communications services* is not serious. The offense of refusal to provide information is determined by article 46bis of the Code of Criminal Procedure. The law determines which persons are punishable in the case of refusal. The legislator has only left the determination of the period in which the data should be communicated to the care of the King. The Royal Decree of 9 January 2003 has determined this period, implying that the criminalisation of the refusal is fully applicable.

4.10

It is hard to see why the required investigation measure would be disproportionate in the light of privacy legislation. The reasoning that the defence develops in this regard relates to the appropriateness of the investigative measure, which can obviously only be assessed by the public prosecutor. In this context, it can be established that the defence even assesses the effectiveness of the investigative measure, for which it is not competent. Moreover, the protection granted by the principle of proportionality and subsidiarity is not aimed at the operator or the provider, but at the person whose identification is pursued by the measures taken in the investigation.

4.11

The alleged criminal offence only requires general intent. Namely, committing an act knowingly and willingly, that is consciously and well informed, without grounds for justification or grounds for exclusion of guilt having been made plausible or demonstrated.

The defence wrongly claims that the criminal intent and the moral element should be interpreted as the desire to commit a criminal act, but then interpreted it in such a manner that general intent is transformed into a special intent. The criminal offence of 'refusing to provide information' is thus narrowed down to 'the refusal of providing data with the intent to refuse to provide this information.' However, the general intent is also present when, for instance, there is a failure to end the unlawful situation, where the real decision-making power was available to do so. In the present case, the general intent implies that the failure to provide the data, even though the provision of the data was an obligation, means that there is a refusal.

It is established, as mentioned before, that YAHOO! has not provided the information requested, let alone in real time, which is as fast as possible and with the use of necessary and adequate resources.

5. Sentencing

5.1

The punishment must be determined by the nature and the objective seriousness of the proven facts, the surrounding circumstances and the personality of the accused, such as it appears from his criminal history, his family situation and his employment status, to the extent that these are known.

5.2

The facts are objectively grave. In an age where electronic communication and electronic data traffic plays an increasingly important role both as a means to commit all sorts of crime and as the purpose of crime, the cooperation of internet service providers and other internet players forms a crucial link in the chain of preventing crime. Such players, who are economically active on and by means of the internet and try to obtain an economic gain in doing so, may be expected to provide sincere cooperation with the judicial investigation services. Otherwise, the internet will become even more a territory where criminals may proceed undisturbed and unseen. Refusal to cooperate by not providing information, which is required, demonstrates a disloyalty and requires rigor of punishment. This applies all the more so, given the tenacity of these refusals. The criticism of the defence, pleading that the prosecution in this case made an exemplary process (p. 2, brief of the

accused), should therefore be bounced back to the accused. It is the accused who has tested the limits of legality. Such attitude, at the expense of crime prevention, requires a severe reprimand.

5.3

The punishment should not only serve the need for retribution, but also the purpose of special and general prevention. The punishment to be imposed must be of such a nature that it will deter the accused from committing such acts in the future and that it encourages him to show respect for the obligations that serve the general interest.

5.4

The defendant is a company incorporated under the laws of California (USA). It is a multinational company. It has a clean criminal record.

5.5

The court believes that to achieve the above stated objectives of sentencing in regard to the accused, the fine set out below should be imposed. In determining the fine, the court takes into account the manifest form of the refusal and the size of the company.

5.6

The order to pay the fixed fee is a compulsory addition to the criminal conviction in each criminal case, correctional and police matter. It has its own character and is not a punishment (see: Cass. 9 November 1994, J.T. 1995, 214, referenced to by: Ghent, third Chamber, 28 February 2008, registrar nr. C/304/08, not published). It must be imposed regardless of the date of the proven facts and, in particular, regardless of circumstance that the facts predate the entry into force of the legal provisions that oblige the court to impose that compensation on any convicted person. Article 2 of the Criminal Code is not applicable to this contribution.

6. Refund/Criminal performance bond

Pursuant to article 44 of the Criminal Code, the penalty prescribed by law is imposed, without prejudice to restitution. The restitution referred to in article 44 of the Criminal Code is not a penalty and seeks the termination of an unlawful situation.

At the trial hearing of 2 February 2009, in the context of the restitution duty, the public prosecutor verbally required a criminal performance bond of 10,000 euros for each day of failure to comply with the obligation to provide the information requested in the prosecution claim.

The conviction to restitution provides the public prosecutor an enforceable right, which is susceptible to forced execution. In principle, therefore, the public prosecutor can claim a criminal performance bond in case the main conviction is not complied with on the civil level, such as, the removal of waste from illegal dumping

The court cannot impose an interdiction to commit the same crime and to link this interdiction to a criminal performance bond. Indeed, the criminal performance bond cannot be imposed in order to avoid recidivism.

In this case, it must be established that the refusal of the accused to provide information created an unlawful situation, namely the public prosecutor does not enter into possession of the information which it required. Where that order forms part of a criminal prosecution, it must be established that the obligation imposed on the targeted operators and providers is of a civil nature. It is the refusal to comply therewith that is criminally sanctioned.

The restitution intends, as mentioned previously, to erase the traces of a criminal offence in order to repair, as it were, the damage cause to the society – in this case represented by the public prosecutor that performs a criminal investigation concerning the fraud. Consequently, the restitution concerns the public order. The restitution forms part of the public claim, but is a measure civil in nature, that can be reinforced, if required, with a criminal performance bond. In this case, the public prosecutor sought to impose a criminal performance bond.

The court is of the opinion that a criminal performance bond should be imposed. In the present case, this criminal performance bond does not seek to avoid recidivism. Recidivism would occur in the case of refusal by the accused to disclose the information required by a new claim of the public prosecutor. In this, there is an order under article 46bis of the Code of Criminal Procedure, the defendant refuses to provide the information required – which constitutes the criminal offence – and the result is that the public

prosecutor is deprived of the required data. It is the termination of the aforementioned state that the public prosecutor intends and that is reinforced by the criminal performance bond.

Given the manifest refusal of the accused, the test that the accused apparently has made of this case, the financial size of the business activities of the accused and the damage that the criminal investigation, in which context the information was required, has already suffered and continues to suffer (see also, the respect of the reasonable period of criminal investigations), a criminal performance bond must in this case be high enough to have any effect at all. The requested amount of 10,000 euros per day of delay in communicating the required data is appropriate under these circumstances.

Given the articles mentioned above in the indictments and listed below:

Law of 15 June 1935 on the use of languages in judicial matters, arts. 11, 12, 14, 21 to 23, 31 to 37 and 40 and 41; Code of Criminal Procedure, art. 3 V.T., 162, 179, 182, 184, 185, 189, 190, 190ter, 191, 194 and 195, 211, 365, 226, 227; Criminal Code, art. 2, 41bis, 44, 65, 100,

FOR THESE REASONS,

THE COURT, judgment given after full argument on both sides,

DECLARES the accused YAHOO! guilty of the criminal offenses defined in the aforementioned indictment;

ORDERS the accused YAHOO! in relation to these facts to pay a fine of 10,000 euros plus a surtax of 45 per cent (x 5.5), thus totalling 55,000 euro;

ORDERS the convicted to pay an amount of 25 euro, plus a surtax of 45 per cent (x 5.5), thus amounting to 137.50 euros, payable as a contribution to finance the Fund for financial assistance to victims of deliberate acts of violence;

ORDERS the convicted further to the payment of the cost of the criminal procedure, established at 25 euros pursuant to article 91.2 of the Royal Decree dated 28 December 1950 laying down general rules on legal costs in criminal matters (Belgian State Gazette of 30 December 1950, p. 9095)

- as replaced by article 1 of the Royal Decree dated 29 July 1992 (Belgian State Gazette of 31 July 1992, p. 17249);
- and amended by article 1 of the Royal Decree dated 23 December 1993 (Belgian State Gazette of 31 December 1993, p. 29318)
- and amended by article 1 of the Royal Decree dated 11 December 2001 (Belgian State Gazette of 22 December 2001, p. 44791)
- that now applies again, because the superseding provision of the Royal Decree dated 28 December 1950, as provided by article 98 of the Royal Decree dated 27 April 2007, has become nonexistent following its annulment by the Council of State on 17 December 2008.

ORDERS the accused to pay the costs of the prosecution, estimated by the public prosecutor at 38.62 euros.

ORDERS the accused to restitution, subject to a criminal performance bond of 10,000 euros per day of delay in communicating the data as 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, starting from the date this ruling shall become final.

Thus pronounced at the public hearing of

THE SECOND OF MARCH TWO THOUSAND AND NINE

Present:

Bart Jan Meganck, sole judge in criminal matters, Jan Kerkhofs, deputy Public Prosecutor, N. Van Biesen, Deputy Registrar,

N. Van Biesen

B. J. Meganck

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