CASE TRANSLATION: **BELGIUM**

Case citation:
Antwerpen 20 november 2013

Case number:
2012/CO/1054 Yahoo! Inc

Name and level of the court:
Hof van Beroep te Antwerpen, 12e kamer correctionele zaken (Court of Appeal of Antwerp, 12th chamber for criminal cases)

Date of decision:
20 November 2013

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

The Public Prosecutor

versus

Yahoo! Inc.

Based in the Unites States of America, CA 94089 Sunnyvale, 701 First Avenue,

Accused,

as counsel to Mr Jan Dhont Mr Bertold Theeuwes and Mr Gert Warson loco Mr Pieter Londers, all lawyers at the Bar of Brussels, on 24 April 2013 and 15 May 2013,

as counsel to Mr Jan Dhont and Mr Gert Warson loco Mr Pieter Londers, all lawyers at the Bar of Brussels, on 29 May 2013.

1. Matter complained of:

In the judicial district of Dendermonde and connected therewith elsewhere in the Kingdom, at least in the period of 10 December 2007 up to and including 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 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 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 46*bis* 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.

2. The appealed decision

2.1

By judgment of the Court of First Instance in Dendermonde, 13th chamber, sitting in criminal matters, dated 2 March 2009, given after full argument from both sides, the following has been decided:

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), a total of 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 ceased to be valid 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 46*bis* of the Code of Criminal Procedure, starting from the date this ruling shall become final.

2.2

The above mentioned judgment dated 2 March 2009 was appealed:

- on 4 March 2009, by the accused against all provisions;

- on 12 March 2009, by the Public Prosecutor against all provisions.

2.3

By judgment of the court of appeal of Ghent, chamber 3, after hearing full argument on both sides, the following has been decided:

…

25. Given all this, it has not been sufficiently established in this case that the material conditions for applying article 46*bis* of the Code of Criminal Procedure are fulfilled. There is no evidence that the conditions necessary to establish the guilt and criminality of the accused are fulfilled.

…

Rejecting all other and conflicting conclusions,

Declares every appeal admissible and deciding on them:

Annuls the appealed judgment and decides again:

Acquits the accused from prosecution concerning the fact described in the introductory summons.

Orders the costs of both instances, made by the public prosecutor, be borne by the State.

2.4

The aforementioned judgment dated 30 June 2010 was appealed before the Court of Cassation:

- on 12 July 2010, by the Public Prosecutor against all provisions.

2.5

By judgment of the Court of Cassation on 18 January 2011, the following has been decided:

…

6. “Provider of an electronic communications service” within the meaning of the aforementioned article 46*bis* of the Code of Criminal Procedure, is not only

the Belgian operator within the meaning of the law of 13 June 2005 on electronic communications, but anyone that provides services of electronic communications, including among other things the transmission of communications data.

Hence, the obligation to cooperate under article 46*bis* of the Code of Criminal Procedure is not restricted to operators of an electronic communications network or to providers of an electronic communications service that are also operators within the meaning of the aforementioned law of 13 June 2005 or that only provide their electronic communications services through their own infrastructure. This obligation also applies to anyone who provides a service which consists wholly or mainly in the conveyance of signals on electronic communications networks. The person who provides a service which consists of enabling its customers to obtain, or to receive or distribute information through an electronic network, can be a provider of an electronic communications service. …

Annuls the contested judgment.

Orders that this decision shall be mentioned in the margins of the annulled judgment.

Orders the defendant to pay the costs.

Refers the case to the Court of Appeal in Brussels.

2.6

By judgment of the Court of Appeal of Brussels on 12 October 2011, after hearing full argument on both sides, the following has been decided:

…

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 46*bis*, §2 of the Code of Criminal Procedure.

…

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.

2.7

Against the aforementioned judgment dated 12 October 2011 was appealed before the Court of Cassation:

- on 20 October 2011, by the Public Prosecutor against the provisions connected with the accused.

2.8

By judgment of the Court of Cassation on 4 September 2012, it has been decided as follows:

…

3. The circumstance that the Public Prosecutor sends his written request within the meaning of article 46*bis* of the [Belgian] Code of Criminal Procedure, whereby the cooperation is required from the operator of an electronic communications network or the provider of an electronic communications service established outside the Belgian territory, from Belgium to a foreign address, does not render the request invalid.

…

Annuls the contested judgment.

Orders that this decision shall be mentioned in the margins of the annulled judgment.

Leaves the costs at the charge of the State.

Refers the case to the Court of Appeal in Antwerp.

3. Proceedings before this Court

The matter was heard at the public hearings of 24 April 2013, 15 May 2013 (a.m. and p.m.) and 29 May 2013.

The Court has heard:

- the Public Prosecutor on its summary of the matter and its claim

- the defendant on its defense, developed by its aforementioned advisors.

The submitted briefs and exhibits have been taken into consideration.

4. Assessment

4.1 Admissibility of the appeals

The appeals, lodged in accordance with the formalities and time limits, are admissible.

4.2 Admissibility of the criminal claims

The defendant alleges in vain that the governmental appointment of Mr Kerkhofs, deputy Public Prosecutor at the Court of First Instance in

Dendermonde would not be legal.

The appointment in accordance with article 326 §4.3° of the Code of Civil Proceedings does not provide that this decisions should be taken or motivated any differently than justified by the necessities of the service.

The governmental appointment refers to the letter of the Attorney-General in Antwerp (dated 11 October 2012) and the concurrent advice of the Attorney-General in Ghent and the Public Prosecutor in Dendermonde.

The letter of the Attorney-General in Antwerp (dated 11 October 2012) refers to the importance and the principal and highly technical nature of the matter.

From this letter, it must be derived implicitly but undeniably that the needs of the service require this delegation. It is, however, not required that the letters to which the Minister refers to be physically attached to the governmental delegation.

The defendant purports in vain that the governmental delegation would be illegal and that according to article 159 of the Belgian Constitution it could not be applied.

Moreover, it is pointed out that there is no sanction provided in article 326 of the Code of Civil Proceedings.

Thus, the Public Prosecutor exercised the criminal claim in a regular manner at the public hearing.

4.3. Description of the facts

The determination of the date of the facts should be stated more precisely as follows:

"… at least in the period of 10 December 2007 until and including the date of the summons, being 16 September 2008, and in any case on 10 December 2007, on 10 March 2008 and as of 7 July 2008".

The facts in themselves are not modified by this more precise statement.

4.4 Reasoning on the merits

4.4.1 In criminal matters

1. Upon new investigation by the court during the public hearing, and by documents included in the file, the guilt of the accused of the charges laid against him, as described above, remains proven.

In this regard, reference is made to the adept reasoning of the first judge, which the accused does not refute in appeal and which is concurred by the court.

The court also refers to the detailed description of the facts by the first judge.

2. The Public Prosecutor asked the accused for data concerning the email accounts used in Belgium in a written manner, by e-mail, as well as by facsimile and by letter, in accordance with to article 46*bis* of the Code of Criminal Procedure. Besides, the law does not provide any required form.

Article 46*bis* of the Code of Criminal Procedure is clearly and accurately described and does not lead to any random interpretation. Therefore, there is no conflict with the Constitution and/or the provisions of the European Convention for Human Rights. Concerning the latter, the Public Prosecutor correctly refers to a similar case before the European Court for Human Rights (p. 24 – 26 of his brief).

The first judge correctly found that the accused is territorially present in Belgium so that the requirement for territoriality has been fulfilled. Because of the services that the accused offers also partially or mainly in Belgium, amongst others notably the free email services, he is obliged to cooperate in accordance with article 46*bis* of the Code of Criminal Procedure, given the fact that the accused qualifies as provider of an electronic communication service, amongst others by transmission of communication data. The reasoning that the accused would not have an office or establishment in Belgium is irrelevant.

The required data must be communicated in Belgium (portability) so that the offence is achieved in Belgium. The defendant disputes in vain that this data is portable, as the opposite indisputably derives from the text of article 46*bis* §2 from the Code of Criminal Procedure. From the phrase "having refused to communicate to the Public Prosecutor", derives an active obligation to communicate the required data where they are requested. The Public Prosecutor correctly refers to the judgment of the Court of Cassation dated 27 April 2010, where a similar situation exists in the context of the duty to notify provided by article 67ter of the Road Traffic Act. The judgment of the Court of Cassation dated 25 January 2012, to which the accused refers to allegedly infer the opposite, fully confirms the same conclusion as that of the judgment dated 27 April 2010. The offence was thus committed in Belgium, as correctly determined by the first judge and, consequently, the

Belgian legislation applies. For those reasons, it is not necessary to observe the lengthy procedure of an official action, which is, moreover, not obliged by the American legislation in the current situation (documents 3 and 6 in the file of the Public Prosecutor). Moreover, this is not an interrogation of an accused or a witness, in which case such a rogatory action would be necessary. Furthermore, the interrogation of the accused is not required to initiate the criminal procedure and because of that, the rights of the accused have not been violated as the accused can now fully exercise these rights before the judge on the merits.

All reasoning of the accused concerning the alleged extra-territoriality (jurisdiction of the Public Prosecutor, location of offence, violation of state sovereignty, mutual assistance in criminal matters) are irrelevant and refuted in the light of the above. A preliminary ruling by the Constitutional Court, as proposed by the accused, is therefore not necessary nor useful to rule on the merits of this matter.

The request of the Public Prosecutor in accordance with article 46*bis* §2 of the Code of Criminal Procedure was therefore addressed to the accused in a legal and valid manner. There is no violation of article 28*bis* §3 of the Code of Criminal Procedure to be established.

The offence occurred knowingly, which suffices as criminal intent and, consequently, the question of good or bad faith is irrelevant. It is certain that the defendant has systematically refused to provide the requested data.

This can be seen in the exchanged emails, facsimile transmissions and correspondence (documents 56 up to and including 115 of the criminal file). These documents are rightly used as evidence in this matter by the Public Prosecutor, given the fact that nothing opposes the use thereof. There is no legal obligation to inform the accused that the documents could be used in a court of law. The attitude of the defendant to refuse as a matter of principle also appears from the brief of the accused, be it however reasoned by an erroneous legal vision.

The accused keeps stating in vain that he does not offer services that partially or mainly consist of transmitting signals by means of electronic communication networks. The defendant offers, amongst others, a (web)mail service in Belgium which enables someone who registers himself to communicate electronically on the internet using an IP-address obtained from an internet access provider and the accused performs the sending and the transmission of this electronic communication (see further). This differs from the actual operations of an internet access provider (such as, for instance, Telenet, Belgacom), which only provides access to the internet by means of an IP-address. The IP-address granted in this manner is, however, only known by the internet service provider (such as Yahoo!). The defendant has consciously made this choice for commercial purposes, as correctly established by the first judge: if the accused does not want to be subject to the obligations in article 46*bis* §2 of the Code of Criminal Procedure, the defendant is at liberty to exclude the IP-range of Belgium (see number 4.3 of the appealed judgment).

The Public Prosecutor proves, by means of its exhibits 2 and 9, and there is no reason to doubt the credibility and objectivity of these documents, that sending of an email from sender to receiver occurs mainly, if not exclusively, via the mail servers of the accused and that in case an email is sent from one Yahoo! account to another Yahoo! account no other services are even used, which proves that the accused is mainly or even solely responsible for the transmission of the signals by means of electronic communication networks. These conclusions are not disputed by the expert of the accused, Jonas Mariën, or by the mere dissenting assertions of the accused.

Contrary to what the accused asserts on p. 61 of its brief, the accused was able to defend itself against the reasoning of the Public Prosecutor (amongst others, by consulting an expert of its own), so there is no violation of the defendant's rights (art. 6 of the European Convention on Human Rights).

The fact that the accused offers his webmail services in Belgium is reinforced because he sends advertisement messages with adapted language and environment, depending on the location. Also, www.yahoo.be seems to offer the same services as www.yahoo.com did in the past.

The facts have thus been proven.

3. The following is taken into account for the determination of the sentence:

- the legal personality of the accused,

- the clean criminal record of the accused,

- the circumstances and the gravity of the facts, that

indicate, as correctly described by the first judge, a tenacious and persistent refusal to apply the law solely to test the boundaries of lawfulness,

- the lapse of time since the facts, without exceeding the reasonable period of time.

Therefore the accused is sentenced to pay a fine of 8,000 Euro to be multiplied with the surtax.

Because the accused has no prior convictions for fines exceeding 24,000 Euro, is the sentence is partially deferred, as described hereafter, to discourage the accused from committing similar offences in the future and to encourage him to respect the Belgian legislation.

The Court will not grant the request from the accused to suspend the sentence, since such a favour does not adequately point out the social restrictions and obligations of the accused.

The Public Prosecutor no longer insists on restitution/daily fine.

5. Legal provisions

The court takes into account the following legal provisions, the articles:

- 11, 12, 14, 24, 31 to 37 and 41 of the law of 15 June 1935

- 46bis, 162, 185, 190, 190ter, 194, 195, 199, 200, 202, 203, 203bis, 210, 211, 427 of the Code of Criminal Procedure

- 1, 2, 3, 5, 7, 7bis, 38, 41bis, 66 of the Criminal Code

- 1 of the law of 5 March 1952

- 36 of the law of 7 February 2003

- 2 and 3 of the law of 28 December 2011

- 2 and 3 of the law of 26 June 2000

- 3 and 4 of the law of 30 October 1998

- 1, 8 an 18bis of the law of 29 June 1964

- 58 of the Royal Decree of 18 December 1986

- 28 and 29 of the law of 1 August 1985

- 91 of the Royal Decree of 28 December 1950

6. Decision

The Court,

Decides on the basis of the aforementioned reasons, within the limits of the appeals, as determined below, after given after full argument on both sides.

Declares the higher appeals admissible;

<u>On the criminal grounds</u>

Confirms the appealed judgment provided that the following changes be made:

States the determination of the date of the facts more precisely as follows:

"…, at least in the period of 10 December 2007 up to and including the date of the summons, being 16 September 2008, and in any case on 10 December 2007, on 10 March 2008 and as of July 2008";

Sentences the accused for the charges laid against him as described to a fine of EIGHT THOUSAND EURO, brought by a surtax of 45 per cent (x5,5) to FORTY-FOUR THOUSAND EURO, with suspension of execution during a period of THREE YEARS from now on the sum of FOUR THOUSAND EURO, brought by a surtax of 45 per cent (x5,5) to TWENTY-TWO THOUSAND EURO, which results in a fine of FOUR THOUSAND EURO, brought by a surtax of 45 per cent (x5,5) to TWENTY-TWO THOUSAND EURO, that remains effective;

Does not order the restitution and the accessory daily fine;

Obliges the accused to pay an amount of TWENTY-FIVE EURO, increased with a surtax of 50 per cent (x6), thus, amounting to ONE HUNDRED AND FIFTY EURO, as a contribution to the financing of the Fund for assistance to victims of deliberate violent acts and to occasional saviours;

Imposes to the convicted to pay compensation of FIFTY-ONE EURO and TWENTY CENTS;

<u>The costs</u>

Leaves the costs incurred by the appeal of the Public Prosecutor to be paid by the State;

Sentences the accused to pay the other costs of the criminal proceedings in both instances, those paid in advance by the public party, in total estimated at 184,11 Euro.

This judgment was given in Antwerp by the Court of Appeal, 12th chamber, composed of:

N. Snelders, President of the Chamber

L. Knapen, Judge

J. Daenen, Judge

And pronounced at the public hearing of 20 November 2013

by the President of the Chamber N. Snelders

In the presence of J. Kerkhofs, deputy Public Prosecutor at the Court of First Instance in Dendermonde, assigned to temporarily assume the function of Public Prosecutor at the Court of Appeal in Antwerp

Assisted by the Court Registrar J. Geysemans

J. Geysemans

J. Daenen

L. Knapen

N. Snelders

Professor Johan Vandendriessche is a member of the editorial board