

CASE TRANSLATION: BELGIUM

Case citation:
Nr. P.13.2082.N

Name and level of the court:
Hof van Cassatie van België (Court of Cassation of Belgium)

Date of decision:
1 December 2015

Members of the court:
Judge Filip Van Volsem, as acting chairman, Judges Alain Bloch, Peter Hoet, Antoine Lievens and Erwin Francis

Court Registrar:
Frank Adriaensen

Lawyer for the appellant:
Mr Jan Dhont and Mr Bertold Theeuwes

Belgium; Yahoo!; 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; Charter of the United Nations; United States of America; mutual assistance in criminal matters

Court of Cassation of Belgium

Judgment

Nr. P.13.2082.N

Yahoo! Inc., whose registered office is at CA 94089 Sunnyvale (United States of America), 701 First Avenue,

accused,

[appellant],

as counsel to Mr Jan Dhont and Mr Bertold Theeuwes, lawyers at the Brussels' bar.

I. PROCEEDINGS BEFORE THE COURT

The appeal is directed against the ruling of the Court of Appeal in Antwerp, Criminal Chamber, dated 20 November 2013, rendered on relegation after the judgment of the Court [of Cassation] of 4 September 2012.

The [appellant] forwards two grounds of appeal in a memorandum that is attached to this judgment.

Judge Erwin Francis presented his report.

Advocate-General Luc Decreus, has presented his conclusions.

II. DECISION OF THE COURT

Assessment

First ground

1. The ground invokes a violation of article 2, §1, of the Charter of the United Nations, signed on 26 June 1945 and ratified by the law of 14 December 1945, and of article 46bis of the [Belgian] Code of Criminal Procedure, as well as a violation of the rule of customary international law, that is part of the Belgian legal system and that determines that a State may in principle not perform any executive jurisdiction outside its territory: the indictment and conviction and sentence of the [appellant], as a company located on US territory, with a view to the enforcement of article 46bis of the Code of Criminal Procedure regarding the obligation to cooperate, entails such an unlawful exercise of executive jurisdiction outside the Belgian territory, and fails to recognize the principle of the sovereign equality of States; the claim that the Public Prosecutor has sent to the [appellant] cannot be considered to have the legal effect that the [appellant] was obliged to provide the required information under penalty of the criminal sanctions imposed by article 46bis of the Code of Criminal Procedure; this provision should be interpreted in this sense.

2. Article 46bis code of criminal procedure provides as follows:

- in paragraph 1, first section, the Public Prosecutor, when investigating crimes or misdemeanors, is entitled to request the cooperation of the operator of an electronic communications network or the provider of an electronic communications service by means of a reasoned and written decision in order to obtain the information mentioned in that [paragraph];
- in paragraph 2, first section, that each 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, shall provide the Public Prosecutor with this information.

3. This provision stipulates also in paragraph 2, fourth section, that the refusal to communicate the required information is punished with a fine. This sanction is intended to enforce the cooperation obligation of the operators and providers and qualifies the provisions of article 46bis, § 2, of the Code of Criminal Procedure the nature of a coercive measure.

4. As a general rule, a State can only impose coercive measures to enforce compliance with its own laws on its own territory, and by imposing such a measure on the territory of another State, it appropriates itself an extraterritorial jurisdiction that violates the sovereignty of that State.

5. A State imposes a coercive measure on its own territory when there is a sufficient territorial connecting factor between that measure and that territory. The minimal required territorial connection factor is determined, amongst others, by the nature and the scope of the coercive measure.

6. The criminal sanction provided by article 46bis, § 2, section 4, of the Code of Criminal Procedure only serves to enforce, on the above-mentioned operators and providers that are active in Belgium, a measure to only obtain identification data following a criminal offence that falls within the scope of the investigation authority of the Belgian criminal jurisdiction. This measure does not require Belgian police officers or magistrates, nor by persons acting on their behalf to be physically outside the jurisdiction. Nor does this measure require the performance of any physical act abroad. This is therefore a coercive measure with a limited scope, the implementation of which requires no intervention outside the Belgian territory.

7. Article 3 of the Criminal Code provides that the criminal offence committed on the territory of the Kingdom by Belgians or by foreigners, shall be punished in accordance with the provisions of the Belgian laws.

The criminal offence established in article 46bis, § 2, section 4 of the Code of Criminal Procedure, is committed at the place where the requested information must be received. Consequently, the operator or the service provider, who refuses to communicate this information, is punishable in Belgium irrespective of his place of establishment.

8. It follows, on the one side, that the measure that consists in the obligation to provide the information referred to is taken on Belgian territory in relation to any operator or service provider that actively directs his economic activity to consumers in Belgium and, on the other side, that a Belgian judge who convicts an operator or service provider established abroad for failing to comply with this obligation and thus enforces compliance with a measure taken in Belgium, does not exercise extraterritorial jurisdiction.

The ground is legally flawed to that extent that it invokes a different legal interpretation.

9. Invoking the reasons of the decision under appeal and adducing reasons of their own, the judges in appeal, among other things, consider that the [appellant], as a provider of a free webmail service, is present on the Belgian territory and subjects itself voluntarily to the Belgian law because it actively participates in the economic activity in Belgium, including by using the domain name “www.yahoo.be”, the use of the local language, showing advertising based on the location of the users of its services and its accessibility for those users in Belgium by installing a complaint box and a helpdesk.

Reiterating the reasons given in the decision that is under appeal (consideration 4.2 and 4.4), the judges in appeal also consider that:

- the Public Prosecutor does not require anything in the United States of America from a citizen of that country, but substantially requires something in Belgium from a company from [the United States of America] offering services on Belgian territory and found in Belgium;

- *“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 (...), so the public prosecutor, the investigating judge and, finally, the court hearing the case in Belgium has jurisdiction.”*

On the basis of these reasons, the judges in appeal could decide, that by declaring the [appellant] guilty and condemning the [appellant] to a criminal sanction for infringing article 46*bis*, § 2 of the Code of Criminal Procedure, they did not exercise extraterritorial jurisdiction they are not entitled to.

To this extent, the legal ground cannot be accepted.

Second ground

10. The second ground invokes the violation of article 17.1 of the Agreement of 28 January 1988 between the Kingdom of Belgium and the United States of America on mutual assistance in criminal matters and of article 46*bis* of the Code of Criminal Procedure: the decision wrongly declared the [appellant] guilty and sentenced him to a criminal sanction for failing to comply with the request of the Public Prosecutor on the basis of article 46*bis* of the Code of Criminal Procedure; that request could only have the legal effect that the [appellant] was required to provide this information under penalty of a criminal sanction if the request were to be served on the [appellant] in accordance with the procedure laid down in article 17.1 of the aforementioned Agreement; article 46*bis* of the Code of Criminal Procedure should be interpreted in this manner; the dictum of the judgment implies that the claim had compelling effect, while it has not been communicated in accordance with the relevant procedure.

11. The ground is entirely derived from the illegality that has been unavailingly invoked in the context of the first ground, and is not, therefore, inadmissible.

Ex officio examination of the decision on criminal procedure

12. The substantial or under penalty of nullity prescribed legal forms have been observed and the decision has been rendered in accordance with the law.

Dictum

The Court,

Rejects the appeal.

Orders the [appellant] to pay the costs

Determines the costs at 97,41 euros.

This decision has been rendered in Brussels by the Court of Cassation, Second Chamber, composed of the judge Filip Van Volsem, as acting chairman, and judges Alain Bloch, Peter Hoet, Antoine Lievens and Erwin

Francis, and pronounced at the public hearing of 1 December 2015 by Filip Van Volsem, acting chairman, in the presence of Advocate-General Luc Decreus, with the assistance of the Registrar, Frank Adriaensen.

F. Adriaensen	E. Francis	A. Lievens
P. Hoet	A. Bloch	F. Van Volsem

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Johan Vandendriessche is a member of the editorial board

Note: a decision by the Court of Cassation only verifies whether or not the decision under appeal correctly mentioned the reasons for its decision.