

CASE TRANSLATION: BELGIUM

CASE CITATION:

Cass. 18 januari 2011, nr. P.10.1347.N

NAME AND LEVEL OF COURT:

Hof van Cassatie (Court of Cassation of Belgium)

DATE OF DECISION: 18 January 2011

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Web based e-mail; whether meaning of ‘operator of an electronic communication service’ and ‘provider of an electronic communications service’ is relevant; ability of a Belgian Public Prosecutor to obtain e-mails from another jurisdiction outside the scope of Mutual Legal Assistance in Criminal Matters

Court of Cassation of Belgium

Judgement

18 January 2011

Nr. P.10.1347.N

ATTORNEY-GENERAL OF THE COURT OF APPEAL IN GHENT,

plaintiff,

against

YAHOO! Inc., based in Sunnyvale, CA 94089 (USA),
701 First Avenue,

accused,

defendant,

as counsel to Mr 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 Ghent, Criminal Chamber, dated 30 June 2010.

The claimant forwards a ground for appeal in a memorandum that is attached to this judgment.

Chairman of the Department Edward Forrier has filed a report.

First Advocate-General Marc De Swaef has filed a brief.

II. DECISION OF THE COURT

Assessment

Admissibility of the plea

1. The defendant pleads a ground of inadmissibility of plea: the plea is directed only against the decision on the terms “operator of an electronic communication service” and “provider of an electronic communications service”; the plea is not aimed against the decision of the appeal judges that the defendant is not present in Belgium; also the assessment of the capacity of the defendant is an assessment of facts.

2. Contrary to what has been argued in the ground of inadmissibility, the appeal judges have not ruled that the Belgian courts have no jurisdiction. They investigate only for the purpose of assessing whether or not the defendant is an operator of an electronic communications network or a provider of an electronic communications service, and if the defendant provides such services in Belgium. They do not infer that there is any effect thereof in relation to the jurisdiction of the Belgian courts.

3. For the remainder, the plea does not request an

investigation of facts, but a legal assessment of the meaning of the terms “operator of an electronic communications network” and “provider of an electronic communications service”.

The ground of inadmissibility of the appeal must be dismissed.

First part

4. This part of the plea relates to a breach of Article 46bis of the Code of Criminal Procedure, as well as a violation of the general principle of the autonomy of criminal law: the contested judgment wrongly decides that the meaning of the terms “operator of an electronic communications network” and “provider of an electronic communications service” in article 46bis of the Code of Criminal Procedure has the same meaning and content as the law of 13 June 2005 on electronic communications.

5. Article 46bis of the Code of Criminal Procedure provides:

“§ 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.”

6. “Provider of an electronic communications service” within the meaning of the aforementioned article 46bis 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 46bis 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.

7. The appeal judges have essentially held that:

- the defendant provides a software application that permits the sending and receiving of messages with a Yahoo e-mail address at any location (Judgment paragraph 15);
- “nowhere (...) [has] it adequately been established that [the defendant], either as a network operator, or as a provider of a communications service, fulfils (or has fulfilled) any role or intervenes, or has intervened, in the transfer of data from Belgium to the portal site of [the defendant]” (Judgment paragraph 18, h);
- the defendant “for the purpose of its webmail service, [is] only using the (existing) infrastructure and the existing communications services (“networks” and “services” within the meaning of Article 46bis [of the Code of Criminal Procedure]” (Judgment paragraph 18, k);
- the defendant is not a provider of electronic communications services within the meaning of article 46bis of the Code of Criminal Procedure, because it only uses “the global (worldwide) network, built and managed by operators of networks and providers of electronic communications services that must be distinguished from [the defendant]”.

8. Based on these findings, the appeal judges could not have lawfully decided that the defendant is not a provider of an electronic communications service within the meaning of article 46bis of the Code of Criminal Procedure.

The plea is well-founded.

Second and third parts

9. The parts that cannot lead to a wider annulment or to an annulment without referral, require no answer.

Dictum

The Court,

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.

Determines the cost at 288.63 euros.

This decision was taken in Brussels by the Court of Cassation, second chamber, composed of the Chairman of the Department Edward Forrier, as chairman, Chairman of the Department Etienne Goethals, and judges Paul Maffei, Luc Van hoogenbemt and Koen Mestdagh, and pronounced at the public hearing of 18 January 2011 by Chairman of the Department Edward Forrier, in the presence of First Advocate-General Marc De Swaef, with the assistance of the Registrar Kristel Vanden Bossche.

K. Vanden Bossche

K. Mestdagh

L. Van hoogenbemt

P. Maffei

E. Goethals

E. Forrier

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