

Court of Cassation of Belgium

Judgement

Nr. P.17.1229.N

defendant,

plaintiff,

represented by Ms. Huguette Geinger, attorney at the Court of Cassation, and Mr. Johan Verbist, attorney at the Court of Cassation, with an office in 2000 Antwerp, Amerikalei 187/302, where the plaintiff chooses domicile, with as counsel Mr. Steven De Schrijver, attorney at the Brussels bar, and Mr. Frédéric Thiebaut, attorney at the Antwerp bar.

I. CONTESTED DECISION

The appeal in cassation is directed against the judgment of the Antwerp Court of Appeal, correctional chamber, of 15 November 2017.

In a statement annexed to this judgment, the plaintiff lodged two pleas.

Advocate General Luc Decreus submitted a written conclusion on 30 January 2019.

On 15 February 2019, the counsel for the plaintiff filed a note as referred to in Article 1107 (2) of the Judicial Code at the Registry of the Court of Justice after a written conclusion from the Public Prosecutor's Office.

At the hearing of 19 February 2019, counsellor Erwin Francis reported and the aforementioned Advocate General issued the conclusion.

II. DECISION OF THE COURT

Judgement

First plea

Second part

1. This part alleges infringement of Article 56 TFEU: the assessment of the judgment concerning the plaintiff's obligation to cooperate on the basis of Articles 88bis and 90quater of the Code of Criminal Procedure necessarily implies that, if the plaintiff does not have an establishment in Belgium, it must have some infrastructure or physical presence if it wishes to offer its electronic communication services in Belgium; this must be considered as a prohibition, or at least an obstacle, or a way of making the plaintiff's activity as a provider of services in Belgium less attractive, contrary to the prohibition on restricting the freedom to provide services laid down in Article 56 TFEU;

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Gedaan te Buggenhout, op 27 maart 2019
FOD Justitie ID nummer : 30366 - Angelo Antinoro, beëdigd vertaler



Article 2, § 1 and § 2, of the Royal Decree of 9 January 2003 laying down the possibilities for the legal obligation to cooperate in judicial orders relating to electronic communication (hereafter referred to as the Royal Decree of 9 January 2003) stipulates that every provider of an electronic communication service must designate several persons by name and charge them with the duties arising from this duty of cooperation; these persons form the "Justice Coordination Unit"; the second section of paragraph 2 of that article stipulates that that unit must be established on the territory of the Kingdom; on the basis of that provision at least, the plaintiff is obliged to establish a Justice Coordination Unit on Belgian territory, which must be regarded as an infrastructure or at least a physical presence for the purposes of providing the technical cooperation in question; this provision also implies a prohibition, at least a hindrance or making the plaintiff's activity as a provider of services in Belgium less attractive.

The plaintiff asks the Court of Justice of the European Union to refer the following question to the Court of Justice for a preliminary ruling: *"Does Article 56 of the Treaty on the Functioning of the European Union prevent a Member State from imposing on a provider of telecommunications or electronic communications services within the meaning of the Articles 88bis and 90quater of the Code of Criminal Procedure, which is established in another Member State and does not have any establishment or physical presence in the aforementioned Member State that would allow it to intercept communication in the territory of that Member State, on the grounds of national legal provisions (i.e. a legal provision or an implementation decision taken on the basis of this legal provision) the obligation to provide a so-called "Justice Coordination Unit" and/or any other infrastructure and/or physical presence (in the form of a branch, servers, communication networks) in the territory of the latter state for the sole purpose of being able to intercept communications in the territory of that Member State on the direct order of the competent authorities there, provided that the interception of communications may take place outside the territory of that Member State and in a way that forms a lesser burden on the service provider, in particular if the order for interception of communication is addressed to the service provider through the procedures explicitly provided for this purpose in the applicable European conventions and instruments on mutual legal assistance in criminal matters?"*

2. The judgment finds that:

- the plaintiff is economically active in Belgium, although not physically through, for example, an establishment;
- the recorded data requested from the plaintiff and the cooperation with a wiretapping measure on the basis of Articles 88bis and 90quater of the Code of Criminal Procedure can be situated in Belgium without question, since it concerns Belgian communication;
- the obligation to cooperate can indeed be located in Belgium, and this also applies to an individual obliged to cooperate who is located abroad;
- it is not *"from where one he can get this data and from where it can be manipulated"* that is decisive for the location of the crime of failure to cooperate, but rather the place where the requested data is received, which is Belgium;

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FOD Justitie ID nummer : 30366 - Angelo Antinoro, beëdigd vertaler



- the obligation to make the requested information, data or technical support available to the investigators in Belgium does not in any way entail an obligation for the service provider to have a registered office, infrastructure or physical presence in Belgium;
- the order is sent from Belgium to the plaintiff's registered office and this order must be fulfilled by the recipient entity in Belgium, where the requested information or technical cooperation must be provided;
- the fact that technical support must be made available on Belgian territory means that the service provider must organise itself in such a way that the monitored conversations are delivered to the investigators in Belgium, as necessary by digital means;
- every service provider who enters the Belgian market must be technically organised in such a way that they can promptly respond to any orders under Articles 46bis, 88bis and 90quater of the Code of Criminal Procedure.

Thus, the conclusion of the judgment that the requested technical information must be provided in Belgium does not imply that the plaintiff should have a branch or any infrastructure or physical presence in Belgium if it had the intention to offer its electronic communications services in this country.

In this sense, the part is based on an incorrect interpretation of the judgment and therefore lacks a factual basis.

3. Furthermore, the judgment rules that the plaintiff is being prosecuted for failure to provide the requested information in accordance with Article 88bis of the Code of Criminal Procedure and failure to provide technical assistance with the wiretapping measure pursuant to Article 90quater of the Code of Criminal Procedure, but not for failing to have a technical infrastructure on Belgian territory. Thus, the judgment does not support the conviction of the plaintiff on the grounds of the Royal Decree of 9 January 2003.

In so far as it is claimed in this part that Article 2, § 1 and § 2 of that Royal Decree infringes Article 56 TFEU, it cannot lead to cassation and is inadmissible due to lack of relevance.

4. Since the part is based on one hand on an incorrect interpretation of the judgment and, on the other hand, is inadmissible for reasons not based on standards that are the subject of the proposed preliminary question, there is no reason to ask the Court of Justice this question.

First part

5. The part alleges infringement of Article 149 of the Constitution: it is contradictory for the examining magistrate to demand, after finding that the plaintiff has no infrastructure or establishment in Belgium, on the one hand, that the plaintiff's cooperation and technical support had to be provided in Belgium, and on the other hand, that the obligation to provide the requested information and technical support in Belgium does not require the service provider to have a registered office, an infrastructure or a physical presence in Belgium.

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Gedaan te Buggenhout, op 27 maart 2019
FOD Justitie ID nummer : 30366 - Angelo Antinoro, beëdigd vertaler



6. The alleged contradiction is entirely derived from the erroneously invoked illegality in the second part.

This part is inadmissible.

Third part

7. The component alleges infringement of Article 2.2 of the UN Charter, Article 4 TEU, Article 18 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between Member States of the European Union, Article 3, § 1, of the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, Article 24 of the Convention of 27 June 1962 on the Extradition and Legal Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, Article 4 of the Luxembourg amended Law of 30 May 2005 laying down specific provisions for the protection of persons in relation to the processing of personal data in the electronic communications sector and amending articles 88.2 and 88.4 of the Luxembourg Code of Criminal Procedure, as applicable here, and articles 88bis and 90quater of the Code of Criminal Procedure, as applicable here: to the extent that the judgment should be understood as implying that the measure ordered by the examining magistrate must be implemented in Luxembourg when the plaintiff does not have any infrastructure or physical presence in Belgium, without a request for legal assistance having to be made in accordance with Article 18, § 1 and § 2 of the aforementioned Agreement of 29 May 2000 and without taking Luxembourg law into account, in particular the provision mentioned in this part, it violates the aforementioned provisions, especially now that, for the cooperation in the context of articles 88bis and 90quater of the Code of Criminal Procedure far more substantive action must be taken abroad than when it is merely a matter of identification data.

8. Article 88bis of the Code of Criminal Procedure, as applicable here, provides:

"§ 1. When the examining magistrate considers that there are circumstances that necessitate the tracing of telecommunications or the locating of the origin or destination of telecommunications in order to reveal the truth, he may, if necessary, by ordering the cooperation of the operator of a telecommunications network or the provider of a telecommunications service:

1° cause the call data to be traced from means of telecommunication from which or to which calls are or were made;

2° have the origin or destination of telecommunication localised.

In the cases determined in the first paragraph, for each telecommunication device whose call data was traced or for which the origin or destination of the telecommunication is localised, the date, the time, the duration and, if necessary, the location of the call is determined and recorded in an official report.

The examining magistrate mentions the factual circumstances of the case that justify the measure in a reasoned order that he communicates to the Public Prosecutor.

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FOD Justitie ID nummer : 30366 - Angelo Antinoro, beëdigd vertaler



He must also mention the duration of the measure, which cannot be longer than two months from the order, except in the case of renewal.

[...]

§ 2. Every operator of a telecommunications network and every provider of a telecommunications service must communicate the information that has been requested within a period to be determined by the King, on the proposal of the Minister of Justice and the Minister responsible for Telecommunications.

Any person who becomes aware of the measure or who cooperates in it by virtue of his professional operation is bound to confidentiality. Any violation of the confidentiality will be punished in accordance with Article 458 of the Criminal Code.

Any person who refuses his technical cooperation with the orders referred to in this article, the terms of which are determined by the King, on the proposal of the Minister of Justice and the Minister responsible for Telecommunications, will be punished with a fine of from twenty-six euros to ten thousand euros ".

Article 90quater, § 2, Code of Criminal Procedure, as applicable here, provides:

"§ 2. If the measure involves an operation on a communication network, the network operator or the provider of the telecommunications service is obliged to lend its technical cooperation if the examining magistrate so requests.

Any person who becomes aware of the measure or who cooperates in it by virtue of his professional operation is bound to confidentiality. Any violation of the confidentiality will be punished in accordance with Article 458 of the Criminal Code.

Any person who refuses his technical cooperation with the orders referred to in this article, the terms of which are determined by the King, on the proposal of the Minister of Justice and the Minister responsible for Telecommunications, will be punished with a fine of from twenty-six euros to ten thousand euros ".

9. Those provisions allow the Belgian examining magistrate, in the context of his judicial investigation, to order the disclosure of the information or technical information referred to here by any operator of an electronic communications network and provider of an electronic communications service that actively directs its economic activity to consumers in Belgium, to request assistance with regard to electronic communications conducted in Belgium, regardless of where that operator or provider is located or where the infrastructure is that is required to respond to the order of the examining magistrate.

After all, such an operator or provider is sometimes subject to Belgian legislation because of the mere fact of its active participation in economic life in Belgium. On the other hand, the cooperation obligation referred to here does not require intervention by the Belgian judicial authorities abroad. Consequently, the examining magistrate is not obliged to make a request for mutual assistance to

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FOD Justitie ID nummer : 30366 - Angelo Antinoro, beëdigd vertaler



the State where that operator or provider has its establishment or infrastructure: and he is not bound by the legislation of that country.

To the extent that this part is based on a different legal concept, it is not legally sound.

10. The judgment rules as stated in the reply to the second part of this plea and, moreover:

- an alleged conflict with Luxembourg law is not relevant as the plaintiff's duty of cooperation on the basis of Articles 88bis and 90quater of the Code of Criminal Procedure relates to communication in Belgium and not to communication in Luxembourg;
- the services provided by the plaintiff on Belgian territory to residents of Belgium are governed by the applicable Belgian law and not by Luxembourg law;
- the aim of the order of the examining magistrate was for the plaintiff to provide information to the Belgian investigators, as well as technical cooperation in a wiretapping measure on Belgian territory. There is no question of investigative acts being carried out by the authorities of the Belgian State in the territory of the Grand Duchy of Luxembourg, so that the mutual legal assistance procedure in criminal matters did not have to be followed;
- the alleged infringement of Luxembourg law cannot therefore constitute force majeure on the part of the plaintiff under the circumstances;
- there is no conflict between Articles 88bis and 90quater of the Code of Criminal Procedure with Article 2 of the UN Charter, which provides for the sovereign equality of the contracting Member States.

The decision is therefore justified according to law.

In that respect the part cannot be accepted.

Fourth part

11. The part alleges infringement of Article 8 of the ECHR and Article 2 of the Luxembourg Law of 11 August 1982 on the protection of privacy: the judgment wrongly finds that the cooperation to be provided by the plaintiff falls under Belgian law and not under Luxembourg law and the plaintiff was obliged to lend this cooperation on the basis of an order from the Belgian examining magistrate, while the plaintiff, as a legal entity established in Luxembourg without infrastructure in Belgium was required to comply with Luxembourg law; if the plaintiff is obliged to submit usage data to the Belgian examining magistrate in violation of Luxembourg law, she is forced to disregard the privacy of the persons who use her services.

12. In so far as the part alleges infringement of Article 2 of the Luxembourg Law of 11 August 1982 on the protection of privacy, it has the same effect as the unsuccessfully alleged infringement of the Luxembourg Law of 30 May 2005 in the third part of this plea and is rejected for the same reasons.

13. In so far as the part alleges infringement of Article 8 of the ECHR, it is based on the unsuccessfully alleged infringement of Article 2 of the Luxembourg Law of 11 August 1982 and is inadmissible.

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Gedaan te Buggenhout, op 27 maart 2019
FOD Justitie ID nummer : 30366 - Angelo Antinoro, beëdigd vertaler



Second plea

First part

14. The part alleges infringement of Articles 88bis and 90quater of the Code of Criminal Procedure and Article 126 of the Act of 13 June 2005 on electronic communications, each time as applicable as here: the judgment ruled that the plaintiff should have taken the necessary measures so that it would be able to comply with the orders of the examining magistrate on the basis of Article 88bis of the Code of Criminal Procedure and that it is criminally responsible if it knowingly and intentionally fails to comply with these orders; however, the plaintiff is only criminally responsible for non-compliance with said obligation to cooperate if the law also imposes an obligation on it to retain this information; such an obligation did not exist in the period of the charge.

15. The judgment supports the conviction of the plaintiff not only for the reason stated in the part, but also for the reason that the plaintiff had not even intended to comply with what was requested, while the plaintiff's letter nevertheless confirmed that they could release the basic subscriber data is, as well as other information such as overviews of online communications via the plaintiff. With that independent reason, the decision is justified according to law.

The part that does not address that reason cannot lead to cassation and is therefore inadmissible due to a lack of relevance.

Second part

16. The part alleges infringement of Article 56 TFEU and Article 2 Royal Decree of 9 January 2003: the judgment violates Article 2 Royal Decree of 9 January 2003 by ruling that this article does not oblige plaintiffs to have an infrastructure in Belgium from which cooperation must be provided; it follows from that article that the plaintiff is obliged to establish a "Justice Coordination Unit " on Belgian territory, which should be regarded as an infrastructure or at least a physical presence for the purposes of providing technical cooperation; a provision of national law that requires a business established in another Member State to set up a permanent establishment in the Member State where it intends to provide electronic communications services is contrary to the prohibition laid down in Article 56 TFEU to restrict the freedom to provide services.

The plaintiff asks the Court of Justice of the European Union to refer the following question to the Court of Justice for a preliminary ruling: *"Does Article 56 of the Treaty on the Functioning of the European Union prevent a Member State from imposing on a provider of telecommunications or electronic communications services within the meaning of the Articles 88bis and 90quater of the Code of Criminal Procedure, which is established in another Member State and does not have any establishment or physical presence in the aforementioned Member State that would allow it to intercept communication in the territory of that Member State, on the grounds of national legal provisions (i.e. a legal provision or an implementation decision taken on the basis of this legal provision) the obligation to provide a so-called "Justice Coordination Unit" and/or any other infrastructure and/or physical presence (in the form of a branch, servers, communication networks) in the territory of the latter state for the sole purpose of being able to intercept communications in the territory of that Member State on the direct order of the competent authorities there, provided that*

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the interception of communications may take place outside the territory of that Member State and in a way that forms a lesser burden on the service provider, in particular if the order for interception of communication is addressed to the service provider through the procedures explicitly provided for this purpose in the applicable European conventions and instruments on mutual legal assistance in criminal matters?"

17. In so far as the part alleges infringement of Article 2 of the Royal Decree of 9 January 2003, for the reasons mentioned in the answer to the second part of the first plea, it is deemed, inadmissible.

18. For the rest, the judgment finds that:

- the obligation to make the requested information, data or technical support available to the investigators in Belgium does not in any way entail an obligation for the service provider to have a registered office, infrastructure or physical presence in Belgium;

- it is by no means the case that the Royal Decree of 9 January 2003 would oblige the operators or service providers to have infrastructure in Belgium, from which cooperation should be provided; this is too narrow a reading of that Royal Decree;

- the plaintiff is prosecuted for failure to communicate the required information in accordance with Article 88bis of the Code of Criminal Procedure and for failure to provide technical assistance with the wiretapping measure of Article 90quater of that Code, but not for not having a technical infrastructure on Belgian territory.

Contrary to the assumption of the part in alleging infringement of Articles 80bis and 90quater of the Code of Criminal Procedure and of Article 56 TFEU, the judgment does not support the decision to declare the plaintiff guilty of the charges and thus of failure to fulfil the obligation imposed by the Royal Decree of 9 January 2003 to set up a "Justice Coordination Unit" on Belgian territory.

In that regard, the part is based on an incorrect reading of the judgment and therefore has no factual basis.

19. There is no reason to refer the question submitted by the plaintiff for a preliminary ruling, which is based on an incorrect reading of the judgment, to the Court of Justice.

Official investigation

20. The substantive legal forms or those prescribed on pain of nullity have been observed and the decision has been rendered in accordance with the law.

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Dictum

The Court,

Rejects the cassation appeal.

Orders the plaintiff to pay the costs.

Sets the costs at 143.61 euros.

This judgment was issued in Brussels by the Court of Cassation, second chamber, composed of president Paul Maffei, as president, counsellors Peter Hoet, Antoine Lieven, Erwin Francis and Ilse Couwenberg, and at the public hearing of 19 February 2019 pronounced by President Paul Maffei, in the presence of the Advocate General Luc Decreus, with the assistance of the court clerk Kristel Vanden Bossche.

[Signatures]

K. Vanden Bossche

L. Couwenberg

E. Francis

A. Lievens

P. Hoet

P. Maffei

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