

**JUDICIAL BRANCH
RIO DE JANEIRO STATE
2nd CRIMINAL DIVISION
DUQUE DE CAXIAS COUNTY**

IP 062-00164 / 2016

DECISION

This case is about the representation filed by the police authority of the 62nd DP, ratified by the Prosecutor's Office (MP), reporting that the wiretap order issued by this Court demanding the live interception of messages shared on the application WhatsApp, owned by Facebook Serviços Online do Brasil, has not been executed, and petitioning, therefore, the appropriate legal action for the effective enforcement of the order.

Given that the criminal procedure at stake is confidential and that the recent decisions concerning WhatsApp caused public outcry, in order to ensure the right of information to everyone who will be affected by this decision, I will analyze and decide this matter separately from the other requests. This way this decision can be made publicly available and the secrecy of the investigation will remain intact.

This Court, within this criminal investigation procedure, issued wiretap orders commanding breach of communications secrecy and compelling the live interception of messages shared on WhatsApp regarding targets indicated in the letter forwarded by d. police authority to Facebook in Brazil, under penalty of daily fine of R\$ 50,000.00, in addition to any charges for obstruction of justice and suspension of services until the court order is executed.

According to the police authority, after the first communication, the company sent an email - from the sender Shannon Kontinos, Shannon@zwillgen.com. The content was written in English and, in short, explains that WhatsApp does not copy or store messages shared among users. While failing to comply with the court order, the email asked questions about the investigation. [The email also points out that] previously, [the company] informed in an interview with the creator of the cryptographic system used to encode the messages that the interception of the messages' content is impossible.

WhatsApp replied to this court's wiretap orders with an email written in English, as if this was the official language of this country, in complete disregard of national laws. Since the company has an establishment in Brazil, it must therefore respect the laws and the language, other than treat the country as a "Banana Republic". I doubt that in their country of origin a judicial authority or any other authority are treated with such

disregard.

As if this was not enough, in the email in English the company further asked that the next order be communicated in English and also formulated totally unfounded and impertinent questions, since the procedure is confidential and none of the information asked is necessary to fulfill the order.

“If possible, please provide responses in English as that will significantly improve our ability to analyze and process your request in a timely manner.

- 1. Is this a criminal matter?**
- 2. What organization is conducting the investigation (Federal Police, Civil Police, Prosecutor’s Office)?**
- 3. What is the nature of the crime being investigated (corruption, drug trafficking, gun violence/homicide, child exploitation, terrorism, etc.)?**
- 4. What are the specific WhatsApp accounts that are the target of this legal process (including all applicable country codes)?**
- 5. What data are you requesting for each of the targets listed above?”**

It is curious that WhatsApp works perfectly fine in BRAZIL with a large number of users, and, that, obviously, it is used in Portuguese, and includes even a spell checker in Portuguese.

The company claims, always, that it does not comply with court orders due to technical impossibilities, but it wants to have access to the judicial files and the court decision, becoming aware of the alleged crimes investigated, the person of the accused and other details of the investigation.

The court is curious to know how this information would help representatives of WhatsApp to execute the wiretap order since, according to them, the reasons of repeated non-compliance are purely technical.

Granting WhatsApp’s request would implicate the admission that all operators and providers that receive subpoenas, warrants and wiretap orders are entitled to the same right of access to the judicial files, gaining knowledge of the investigation and the facts being investigated. In sensitive cases, this would certainly compromise the success of all investigations.

In this regard, representatives of the WhatsApp do nothing to effectuate the wiretap order. Similar orders have already been determined by judges from different states of this country, however, those [representatives] have come to court and police headquarters aiming to have access to the file and the court decision (in certificated form), in total disregard to Justice, once they were aware that it is confidential and not even the legal clerks have access!!

It should be noted that the Court has not requested stored communications nor the retention of data, which are measures that WhatsApp claims that cannot be executed.

In fact, the court merely requires the disablement of the encryption key, with the interception of data traffic, with real-time deviation [of information] in one of the ways suggested by the Prosecutor's Office, in addition to the routing of messages already received by the user and not yet encrypted, that is, the exchanged messages shall be forwarded in real time (as in the case of wiretaps of telephone conversations), before encryption is implemented.

This Court also subpoenaed Facebook's representative based in São Paulo. The subpoena was received by an employee, who signed the receipt adding name and position. Even though WhatsApp Inc. and Facebook Brazil, upon receipt of the court order, manifested themselves in the process through their legal departments, although, the order was not executed. Even after a third demand - also delivered to the company's office -, the company did not comply with the order.

According to the process, the judicial order was not executed, even after the company was notified three times, which leads to the adoption of coercive measures by this court.

After replying by email in English, WhatsApp Inc. (based in the U.S.) sent a petition to the court, in which they presented the curriculum vitae of an expert that could attest the technical impossibility to comply with the court decision. Facebook Brazil claims that "there are no ties between the two companies" and that Facebook employees do not have "powers over the app [WhatsApp]."

According to this reasoning, both companies would remain untouchable and immune to Brazilian law. While the one [WhatsApp] is not based in Brazil, the other which is [Facebook] does not have "powers" over a company of its own conglomerate.

Both offer their services in Brazil and pursue profitable activities without being held accountable for their actions. The billion-dollar acquisition of WhatsApp Inc. by Facebook company, as widely reported in the news, is remarkable:

"Facebook has finalized the acquisition of WhatsApp this Monday (6), with the final price going up from US \$ 3 billion to about \$ 22 billion, due to the rise of Facebook's stock's value in recent months"

...

The purchase, which was announced by Facebook in February and recently received regulatory approval in Europe, strengthens the stratospheric values of fast-growing startups and the willingness of players

already established, such as Facebook and Google, to pay for them" (G1).

As expected, Brazilian case law has adopted the opposite view [with regards to Facebook's allegation] and recognized the responsibility of Facebook Brazil:

"Considering that it is a public and notorious fact that Facebook acquired the mobile messaging service "WhatsApp" in 2014 and that only Facebook has representation in Brazil, the latter [Facebook] is legitimate to answer requests originally addressed to "WhatsApp" (70,064,361,157 RS - DES REL RICARDO MOREIRA LINS PASTI - 8th Civil Chamber - TJ RS).

*"With the present motion, the Plaintiff aims to obtain the IP addresses corresponding to the profiles indicated in the opening brief and the IP addresses corresponding to message exchanges in the indicated WhatsApp's groups. Granted. Those conversations also feature defamatory content affecting the plaintiff (including pornographic photomontages). Facebook, who appealed the decision, argued that it does not directly control/manage WhatsApp (which, in turn, has headquarters in the USA). Inappropriateness. Acquisition of WhatsApp by FACEBOOK is notorious (App has more than 30 million users in Brazil). **The claim that WhatsApp has no representation in Brazilian territory does not prevent Facebook from receiving judicial requests in Brazil (legal entity that has representation in the country, is registered in JUCESP and, as already mentioned, has acquired WhatsApp). WhatsApp Service is widespread in Brazil.** Furthermore, this measure is limited to the provision of IP addresses of the profiles indicated by the plaintiff and the provision of the content of the messages exchanged in two WhatsApp groups ("ATLÉTICA CHORUME" and "LIXO MACKENZISTA"), during the period indicated in the opening brief and related to news involving the plaintiff. **This judicial measure is executable. Legal obligation to store this information, in accordance with article 13, Law n. 12.965/2014. Decision upheld. Appeal dismissed** (Here in this paragraph, the judge selects some excerpts of an Appeal made by Facebook).*

"Appeal. Application Provider. Allegation: dissemination of pornographic photomontages with the image of the plaintiff in electronic messaging groups; exposure by disseminating the plaintiff's phone number, workplace, followed by the false insinuation that the plaintiff was a sex worker. Injunction granted in order to compel the defendant to provide access to connection logs of those responsible for the dissemination of the content mentioned above and to take it down. Alleged distinction between the defendant ("Facebook Brazil") and who the defendant indicated as

responsible for the application ('Whatsapp Inc.') does not prevent the concession of the injunction, since there has been apparently a merger between the latter [Whatsapp Inc.] and the former [Facebook], and, for now, it is possible that Facebook Brazil is integrated to the litigation as a national legal entity. Precedent ... "(AI 20958433620158260000 - 1st Civil Chamber - TJ SP).

Hence, it is important to highlight that the company Facebook Serviços do Brasil, owner of the application WhatsApp, failed to comply with an order given by a judge and this act impaired the criminal investigation about several serious crimes.

Regarding the jurisdiction of the Brazilian judicial authority, the new Code of Civil Procedure establishes in its article 21 that the foreign legal entity who has agency, subsidiary or branch in our territory is considered domiciled in Brazil and, therefore, the company installed in national territory shall obey the Brazilian laws and communicate using the country's official language.

Article 1126 of the Civil Code establishes that "a company incorporated according to Brazilian law and headquartered in the country is national."

The Marco Civil da Internet also regulates this subject:

Art. 11. In any operation of collection, storage, retention and treatment of personal data or communications data by connection providers and internet applications providers where, at least, one of these acts takes place in the national territory, the Brazilian law must be mandatorily respected, including in regard the rights to privacy, to protection of personal data, and to secrecy of private communications and of logs.

§1°. The established in Art. 11 applies to the data collected in the national territory and to the content of the communications, as long as one of the terminals is placed in Brazil.

§2°. The established in Art. 11 applies even if the activities are carried out by a legal entity headquartered abroad, provided that it offers services to the Brazilian public or at least one member of the same economic group is established in Brazil.

§3°. The connection providers and the internet application providers must provide, as set forth by regulation, information that allows verification concerning its compliance with Brazilian legislation regarding the collection, storage, retention and treatment of data, as well as, in regard to the respect of privacy and of secrecy of communications.

It is important to mention the opinion on the MS [writ of mandamus] No. 2009.04.00.011335-1/PR, C. 7th Panel of the TRF-4th Region, issued by the Federal Judge Salise Monteiro, who examined masterfully the application of Brazilian law in a similar case:

First of all, it must be noted that Article 5 of the Brazilian Penal Code is clear in stating that Brazilian law applies to a 'crime committed in national territory'. [The Code] even provides for the application of Brazilian Law when the crime is abroad (Article 7 of the Penal Code -. Extraterritoriality) under certain circumstances. In the case at issue, the judicial request refers to messages received or sent by a Brazilian individual, in national territory. Thus, the investigation is restricted to acts committed by a Brazilian domiciled in the country, and not by people residing in another location, which is the reason why Brazilian Law is to be adopted instead of other foreign State legislation or standard.

The Special Court of the Superior Court of Justice has also decided similarly, as can be seen in the vote of judge Laurita Vaz:

"We cannot accept that a company established in the country that explores the lucrative messaging service via the Internet (which is absolutely lawful) but shies away from complying with local law.

It is not possible to tolerate that judicial authorities, who are often in charge of investigating important crimes, are subject to such neglect. It is an affront to the national judicial system, and more, it is also an affront to the Brazilian government.

There is no doubt that Facebook Brasil is subject to Brazilian laws, which makes the company's evasion regarding the enforcement of court orders issued by Brazilian authorities unjustifiable.

Well, if the wiretap orders cannot be executed – allegation that is constantly challenged by experts among the police authorities –, as it been possible for Google – which in the past used the same argument – to comply with judicial orders, we have to conclude that WhatsApp's messaging service can no longer be provided [in Brazil]. Otherwise this would favor countless individuals that use the service to commit crimes, to orchestrate criminal ploys and plotting all kinds of illicit activities. Those criminals would be covered up by legal representatives of the company, who insist on disobeying court decisions, making it impossible for the legal system to investigate crimes and punish criminals.

WhatsApp has more than 1 (one) billion users worldwide and **"BRAZIL is the second country with the highest number of users, only behind South Africa. According to a report published by the company, 76% of mobile subscribers in Brazil make regular use of WhatsApp, which is the most popular instant**

messaging service in the country.”

Thus, a telecommunication service of such range cannot be offered to more than one hundred million Brazilian users without complying with the laws of the country. It cannot disregard judicial decisions and obstruct criminal investigations undergoing in several Brazilian states.

Any company operating in Brazil and providing a particular service must be able to comply with judicial decisions, under penalty of banishment of the service. Especially when the service involves sizeable profits, it is difficult to believe that the company's legal representatives are not able to take the necessary measures in order to comply with judicial decisions.

Judge Cezário Siqueira Neto, from the appeals court of Sergipe, when rejecting the preliminary injunction requested by Facebook to restore WhatsApp after the suspension ordered by the judge Marcel Maia Montalvão (amid process no. 201655000183), stressed the inertia of the company in meeting court orders:

“It should be emphasized that the app never bothered to send experts to discuss the feasibility of compliance with the order with the magistrate judge and the concerned police authorities, even after acknowledging a problem of such magnitude – which has been going on since 2015 – and that could have an impact on millions of users. The application opted for the inactivity, perhaps to cause chaos, and thereby press the judiciary to agree with their unwillingness to abide by Brazilian law.”

Regarding the encryption, first of all it is important to note that the encryption system used by the application aims to guarantee the confidentiality of conversations between users, which makes the company reliable. There is no questioning regarding Facebook's protection of its users, preserving their intimacy and privacy from hackers who infest the virtual world.

One has to consider, however, that the encryption of online conversations over WhatsApp cannot serve as a protective shield for criminal practices, which extremely often develop by means of conversations, shared pictures and videos exchanges over the app.

The suspension of secrecy and the interception of communications cannot be understood as threats to the security of the system, since wiretap orders are always legally justified and specific - it only affects users that are practicing crimes in national territory. **If that was not the case, the breach of secrecy of mail, telephone calls or even electronic mail (Gmail, Yahoo, Hotmail) would be unfeasible. Instead, these aforementioned services have never ceased to be reliable due to the possibility of breaching the secrecy.**

To support this argument, there is another excerpt from the decision by Judge Cezário Siqueira Neto, from the appeals court of Sergipe, when rejecting the preliminary injunction requested by Facebook to restore WhatsApp in the process n. 201655000183, said:

“Truthfully, the users' right to privacy is clearly at odds with the right to public security and the right of the Federal Policy and the Judicial Branch to freely conduct investigations to the benefit of the society. At this first moment, this court realizes that the appellant minimizes the relevance of the criminal investigation regarding members of a criminal organization that uses the app, downplaying the severity of the investigated crimes (interstate drug traffic) only to guarantee the right to privacy of its users. The use of this app, for whomever it is and for whatever ends cannot be tolerated restriction-less. When other constitutionally guaranteed rights are at stake [the use] should be restricted”

There is a similar decision issued in the MS [writ of mandamus] n° 2009.04.00.011335-1/PR, of C. 7ª Turma do TRF-4ª Região, by the federal Judge Salise Monteiro:

Accordingly, it does not seem reasonable that GOOGLE BRAZIL would benefit economically in a large scale, encouraging the use of its products (including GMAIL) among the Brazilian population and remain without the responsibility to counter illicit activities that are perpetrated through the misuse of its virtual tools by users in Brazil. (...) Thus, it is not conceivable that the Brazilian company to use US law provisions regarding the secrecy of communications as excuse to indirectly support crimes against which this government is obliged fight. ”

The Marco Civil da Internet, the Brazil's Internet Bill of Rights, states as user's rights:

Art. 7o The access to the internet is essential to the exercise of citizenry, and the following rights are guaranteed to the users:

III – inviolability and secrecy of user's stored private communications, except upon a court order;

The article 10 of said law regulates the protection of connection logs regarding private communication:

Art. 10. The retention and the making available of connection logs and access to internet applications logs to which this law refers to, as well as, of personal data and of the content of private communications, must comply with the protection of privacy, of the private life, of the honor and of the image of the parties that are directly or indirectly involved.

§1º The provider responsible for the retention of the records as set forth in art. 10o shall only be obliged to provide them, whether separately or associated with personal data or other information that allows the identification of the user or of the terminal, upon a judicial order, as provided in Section IV of this Chapter, in compliance with what is set forth in art. 7º.

Nowadays, criminal organizations are aware of the difficulties imposed to law enforcement agents to access the content of communications. As a consequence, they engage in intensive communication over the app in order to practice crimes, plot future crimes, frustrating law enforcement agents that relentlessly seek information to solve crimes.

In this sense, the member of the Prosecutor's Office affirmed that:

"The justification of technical impossibility is inadmissible. WhatsApp Inc. is a multinational company that needs to accommodate itself to the public interest, as the individuals under investigation are no longer talking on the phone to talk about their activities, they are rather using the app."

To support this point, it is possible to read in the investigation process about some wiretapped conversations on the phone: ***"interlocutors mentioned messages they had sent over Whatsapp, actively avoiding to talk about the specific content of those messages."***

This reference to WhatsApp shows that criminals who are under surveillance refrain from talking on the phone, preferring to communicate via the application. This is mentioned in several investigations and the legal system has its hands tied!

In this sense, the public purpose of criminal prosecution shall always prevail over the private interest of the company in preserving the intimacy and privacy of its users. The public interest shall also prevail over the interest of the users, especially when they are being investigated for practicing crimes, since there is no absolute right or constitutional guarantee in our legal system.

About this subject, Justice Gilmar Mendes, of the Supreme Court has affirmed:

"Life in community, with its different interactions between people, makes it impossible to assign radical value to privacy."

The Superior Court of Justice has also issued a relevant decision regarding this subject:

*CONSTITUTIONAL LAW. CRIMINAL PROCEDURE. HABEAS CORPUS. CONVICTION. EVIDENCE. BREACH OF TELECOMUNICATIONS SECRECY. JUDICIAL ORDER. **The inviolability of communications, albeit a constitutional guarantee (CF, art. 5, XII), backs down when there is an overriding public interest, such as during a criminal investigation as long as the breach of secrecy is authorized by a court order. Habeas corpus denied. (HC 14569 / SP, Rel. Min. Vicente Leal, 04.23.2001, 6th Panel STJ).***

Thus, even if it is often said in a general context that the suspension of WhatsApp causes inconvenience to its millions of users, it is necessary to see the issue from the opposite perspective. Criminal investigations conducted by the Police, the Prosecutor's Office and the Judiciary aim to fulfill the interests of the population as a whole, which suffers from lack of improvement of their quality of life and also from high levels of social insecurity. Criminal rates are increasing in an alarming way and impunity is a serious issue. Thus, [the efficacy of investigations] meets with the population's demands for security and justice.

The lack of information or the mere refusal to cooperate, failing to abide by a court order, prevents law enforcement from investigating illegal conducts and prosecuting the perpetrators of crimes. The refusal to turn over the sought-after data constitutes a mere business strategy to procrastinate and to violate the court order, under the canopy of technical impossibilities.

The society to bears the severest harm, when Facebook Brazil violates a court order, since the refusal to give this kind of information (which is essential to the investigation and to obtaining proof to be used in court) contributes to the rise of impunity.

Those in society that complain about the mere absence of an application – as if it was not possible to live without it anymore, or if another similar options were not available or if other means of communications did not exist – must be reminded that the greatest victim of the crimes being investigated is the Society. It is certain that new victims are constantly made and new crimes are committed and the legal system is unable to prevent those facts and punish those responsible.

Given the above, the sanctions related to lack of compliance with the court order must be imposed to Facebook's legal representative, so that the judicial order will be executed.

Since the case at issue is that of a police investigation of a criminal organization, the conduct of Mr. legal representative of Facebook Brazil can be considered a crime, according to the Article 2, 1st paragraph of Law no. 12850/2013.

After all those considerations, this court decides that:

1. The Police Authority is to be notified in order to initiate the proceedings/prosecution against Facebook Serviços Online do Brasil Ltda, for having allegedly committed a crime under Article 2, 1st paragraph of Law no. 12850/2013;
2. The imposition of a daily fine of R\$ 50,000.00 (fifty thousand reais) until the wiretap order is executed by WhatsApp on behalf of the government (in the form explained in a separate decision), according to the Article 139, IV of the Code of Civil Procedure c/c Article 3 of the Code of Criminal Procedure. Facebook legal representative is to be notified about the fine;
3. EMBRATEL, ANATEL and all the mobile carriers are to be notified so that they can immediately suspend WhatsApp's service, until the court order is effectively fulfilled by the company, under penalty of law;
4. The measures listed here should be executed by the police of the 62nd DP or agents specially designated by this DP by the Head of the Civil Police of Rio de Janeiro.

Forwarded to the police authority of the 62nd DP for immediate execution.

Duque de Caxias, July 19th 2016

DANIELA BARBOSA ASSUMPTÃO DE SOUZA

Magistrate judge