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**JUDICIAL BRANCH
COURT OF JUSTICE OF SERGIPE**

ORDER

Writ of Mandamus nº 201600110899

Origin: Aracaju

Petitioner: WHATSAPP INC.

Attorney: Davi de Paiva Costa Tangerino

Defendant: Judge Of The Lower Criminal Court Of Lagarto

Rapporteur: Judge Ricardo Múcio Santana de Abreu Lima

Reconsideration

Preliminary Injunction Grant Decision

**WRIT OF MANDAMUS - Whatsapp -
Block - Maintenance -Reconsideration -
Deferred - Deferred injunction.**

Case record examined, etc.

Writ of Mandamus nº 201600110899, in which the petitioner is **WHATSAPP INC** against the act of the **LAW JUDGE OF THE LOWER CRIMINAL COURT OF LAGARTO**.

The Law Judge of the Lagarto District has determined, in the court records nº 201655090027, the block for 72 (seventy two) hours of the *Whatsapp* application, having in sight the former process nº 201555000783 that runs UNDER LEGAL SECRECY, in the District of Lagarto, which had a Request for Breach Of Data and/or Telecommunications (process nº 201555000783).

The process nº 201555000783 is an injunction for the interception and breach of communication data requested by Federal Police Authority in the investigation of a criminal organization devoted for the illegal commerce and interstate drug trafficking.

On that doing, the district magistrate deferred a measure so that it was officiated to the plaintiff to implement the interception of the WHATSAPP application and provide the unrestricted access to the text conversations, photographs, videos, voice conversations, contact list, as well as content of the groups in which the involved parties took part, of the targets/devices that were related, as well as to provide, via e-mail, text conversations, photographs, videos, voice conversations and contact list, being stipulated a fine of R\$500.000,00 per day, that can be increased to up to 10% of the economic group's income, that generated the writ of mandamus nº201600110899.

Now, in the process nº201655090027, the imprisonment of XXXXX XXXXX XXXXXX was declared and revoked.

The petitioner clarifies that, during the investigation above, in which it is not investigated, there was the judicial determination for the breach of telephonic and telematic seal of 36 (thirty-six) users, owners of devices with the *Whatsapp* application, discriminating one by one.

The petitioner adds that the breach of seal was conditioned to the unrestricted provision of text conversations, photographs, videos, voice conversations, contact list, as well as content of the groups in which the involved took part, and it was directed to Facebook Brasil LTDA (hereinafter Facebook Brasil), under the equivocal argument that it would be the subsidiary of the stakeholder of Whatsapp Inc, without representation in Brazil.

The Magistrate of the Civil Court determined the suspension for 72 (seventy-two) hours of the *Whatsapp* application, in the terms of the article 12, item III of the 12.965/2014 Law.

The company, then, petitions this writ, pleading that the measure is unproportionate and that there's juridical impossibility of ordering the suspension of legal applications in Brazil, juridical impossibility of determining the interception of content and the inexistence of deceit for the noncompliance of judicial order.

It makes considerations about cryptography and the technical impossibility of intercepting private messages through *Whatsapp*.

It made a preliminary injunction request for the suspension of the impugned decision and the security grant.

The injunction was rejected on duty regimen by Judge Cezário Siqueira Neto and WHATSAPP made a request for **RECONSIDERATION** affirming that the decision of the on duty judge counteracts the Brazilian legal framework and that there are other investigative measures.

It affirms that the data breach of data is the one punished with suspension of activities according to the article 12 of Brazil's Internet Bill of Rights and that the interruption of Internet services is sealed by article 7 and article 9, item 3, of the same law.

It assures it has no obligations of retaining content and that, even if the content was retained, it would be encrypted.

I decide.

There is no doubt that today, globally speaking, there is a clash of principles about seal in the use of Internet.

In Brazil, the Internet Bill of Rights (Law nº12.965/2014) was published.

Such law stipulates cases in which the service can be interrupted. There it is described that the provider responsible for the guard of the connection records and access to Internet applications is only forced to release such records, in an autonomous

manner or associated to personal data or to other information that can contribute to the identification of the user or the device, by judicial order.

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 seth for 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.

§2º The content of private communications may only be made available by court order, in the cases and in the manner established by law, and in compliance with items II and III of art. 7º.

§3º. The provision of the caput of art. 10 does not prevent administrative authorities to have access to recorded data that informs personal qualification, affiliation and address, as provided by law.

§4º The security and confidentiality measures and procedures shall be informed in a clear manner by the responsible for the provision of the services, and meet the standards set in regulation, in compliance with rights of confidentiality of business secrets.

Art. 11. In any operation of collection, storage, retention and treating 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.

§1º. The established in Art. 11 applies to the data collected in the national territory and to the content of the communications in which at least 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 placed 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 treating of data, as well as, in regard to the respect of privacy and of confidentiality of communications.

§4°. A Decree shall govern the procedures to determine the infringements to what is established in this article.

Art. 12. Without prejudice to any other civil, criminal or administrative sanctions, the infringement of the rules set forth in the Articles 10 and 11 above are subject, in a case basis, to the following sanctions applied individually or cumulatively:

I – a warning, which shall establishing a deadline for the adoption of corrective measures;

II --- fine of up to 10% (ten percent) of the gross income of the economic group in Brazil in the last fiscal year, taxes excluded, considering the economic condition of the infractor, the principle of proportionality between the gravity of the breach and the size of the penalty;

III – the temporary suspension of the activities that entail the events set forth in Article 11; or

IV – prohibition to execute the activities that entail the activities set forth in Article 11.

Sole paragraph. In case of a foreign company, the subsidiary, branch, office or establishment located in the Country will be held jointly liable for the payment of the fine set forth in Art. 11.

Without entering the discussion about the need for a regulatory decree on the imposition of the penalties (article 11, item 4), the fact is that the social chaos generated by the interruption of Whatsapp services adds another constitutional principle to the principled dispute already referenced (seal x common good x access to information).

It is certain that Justice, when determining the interruption of Whatsapp services, is doing it as a punishment to secure the common good. This same common good should be guarded with disembarassment in the use of Internet and communications.

In the first case the common good is consequence, whilst in the second it is immediate.

Certainly the message was sent up to here.

The suspension of the Whatsapp services has already lasted 24 hours and it is also certain that it generated social chaos in all national territory, with difficulties of developing work, leisure, family activities, etc.

This is a case in which we see the need for a supreme decision in general repercussion by the Supreme Court, for it would normalize the services of social networks in all territory.

The fact is that there are no conditions to affirm, at least for now, that the information could be supplied by Whatsapp or that it can be decrypted to serve Justice.

I acknowledge the reasons brought by the Judge Cezário Siqueira Neto when revoking the injunction, but I consider it strongly entered the merit and that, being an injunction, the doubt about the efficiency of the measure and the guard of the common good, result in the *periculum in mora* necessary for the granting of the measure, keeping in sight that there is a clash of principles in the articulated right.

Therefore, **I GRANT** the request of reconsideration and the pleaded injunction to suspend the block of *Whatsapp* determined by the Law Judge of the Lower Criminal Court of Lagarto in the records nº 201655090143.

The defendant is to be notified for, if it is their wish, account for information under the period consigned in article 7, item I, of Law n. 12.016/2009.

Notify the execution to the judicial representative body of the interested legal entity, being of responsibility of the leading registrar to subscribe for the effective execution of the decision.

Dispatch the counter-letter to the telecommunications companies, acts, official letters and warrants, authorizing the registrars to sign them in the faithful execution of the decision.

This decision, when made available in the informatic system and the Internet will make notice to the parties and the authorities.

Aracaju/Se., in May 3rd 2016.

Judge Ricardo Múcio Santana de Abreu Lima
Rapporteur