

# JUDGMENT

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## AMSTERDAM DISTRICT COURT

Private Law Division, Provisional Relief Judge in civil cases

Case No / Cause-List No: C/13/600958/KG ZA 16-51 MV/MV

Judgment in provisional relief proceedings of 8 March 2016

in the matter of

**CONSUMENTENBOND** (the Dutch Consumers' Association),  
an association with full legal capacity,  
with its registered office in The Hague,  
the Claimant in the Summons of 22 January 2016,  
represented by M.S. Neervoort practising in Amsterdam,

v

**1. SAMSUNG ELECTRONICS BENELUX B.V.**,  
a private limited company,  
with its registered office in Delft, the Netherlands,  
**2. SAMSUNG ELECTRONICS CO. LTD.**,  
a company incorporated under foreign law,  
with its registered office in Suwon City, Kyungki-Do (South Korea),  
the Defendants,  
represented by F.W. Gerritzen, practising in Amsterdam.

The parties are hereinafter referred to as the DCA and Samsung.

### 1. The proceedings

At the hearing of 16 February, the Dutch Consumers' Association ("DCA") claimed and moved as stated in the Summons, a copy of which is appended to this judgment.

Samsung raised a defence, moving to deny the requested relief. Both parties have entered Exhibits and pleading notes into the proceedings.

The following persons attended the hearing (where relevant):  
on behalf of the DCA: M. Wesseling, I. Piek and Y. Verschoor with M.S. Neervoort;  
on behalf of Samsung: H. Lee, J. Duart and T. Conijn with F.W. Gerritzen and his colleagues C.E. Schillemans and Q.J. Tjeenk Willink.

Following further discussion, the parties asked the provisional relief judge to deliver judgment.

### 2. The facts

2.1. The DCA represents the interests of Dutch consumers.

2.2. Samsung is a global market leader in the field of smartphones. In the Netherlands, Samsung has a market share of 40.5%. In the Netherlands, Samsung sells its phones through its Dutch website. Samsung phones are also sold through a number of other webshops (e.g. studentmobiel.nl, wehkamp.nl, typhone.nl, GSMwijzer.nl, coolblue.nl and bol.com) and through the shops (including webshops) of telecom providers (such as

Vodafone, T-Mobile and KPN). In addition, second hand Samsung phones are sold on the Dutch market (e.g. through marktplaats.nl).

2.3. Android is installed on Samsung smartphones. Android is an open source operating system that is managed by Google. Samsung offers its Android smartphones with a Samsung "software shell". The buyer of a Samsung smartphone obtains a licence for the use of Android and the Samsung software shell.

2.4. Google frequently issues new Android updates and security updates. Google makes this software available online, so that a manufacturer such as Samsung can implement it.

2.5. On 27 July 2015, it became known that the 'Stagefright' bug had been found on Android smartphones (as of version 2.2). On 1 October 2015, it became known that a new variety had been found, i.e. Stagefright 2.0.

2.6. In a letter of 2 December 2015 from the DCA's lawyer, Samsung was told, inter alia, that as a result of the Stagefright, cybercriminals could gain access to and control of Android smartphones. According to the letter, Stagefright had also been found on several Samsung phones. Samsung had allegedly not properly informed and warned its customers about Stagefright. Added to that, Samsung had allegedly failed to inform its customers (or failed to inform them properly) of whether or not they would receive updates on buying a Samsung smartphone. The letter also stated that over 80% of the Samsung smartphones do not have the most recent Android version and that Samsung should have immediately provided an update to customers with a vulnerable smartphone. Samsung was ordered to inform consumers clearly about Stagefright, about future critical security bugs and about Samsung's update and upgrade policy. Samsung was also ordered to actually patch Stagefright and future critical security bugs by making updates and upgrades available, and to continue to make updates and upgrades regularly available for a period of two years following the purchase of a phone. Finally, Samsung was invited to meet with the DCA, having regard to Article 3:305a of the Dutch Civil Code ("DCC").

2.7. On 17 December 2015, a meeting was held with the parties. Further to this meeting, Samsung implemented adjustments to its websites.

### 3. The dispute

3.1. Put briefly, the DCA is claiming the following:

- I. an order against Samsung to post at various places on its website [www.samsung.com](http://www.samsung.com) and in printed Samsung information such as user manuals and advertising materials information per model that the Stagefright bug is present and when Samsung will make a security update available to fix the Stagefright bug, for all Samsung models that contain the Stagefright bug (models that were offered to consumers in the Netherlands in the period of two years prior to Stagefright becoming known and models that contained the Stagefright bug directly from when they were introduced);
- II. an order against Samsung, immediately after a security bug in the Android operating system that Google has classified as critical has become publicly known, to post at various places on its website [www.samsung.com](http://www.samsung.com) and in printed Samsung information such as user manuals and advertising materials information per model that this bug is present and when Samsung will make a security update available to fix this bug for all Samsung models that contain this critical security bug;
- III. an order against Samsung to post at various places on its website [www.samsung.com](http://www.samsung.com) and in printed Samsung information such as user manuals and advertising materials information per model the information regarding the period during which Samsung makes security updates and upgrades available and how often, for all smartphones that have been offered for sale in the Netherlands in the past two years and for new models directly upon their introduction in the Netherlands;
- IV. an order against Samsung to offer a security update that actually fixes Stagefright and Stagefright 2.0 for all smartphones that contain the Stagefright bug and that were

sold to consumers in the Netherlands in the two-year period before this bug became known and for all models that are still being sold and contain the Stagefright bug;

V. an order against Samsung to offer a security update that actually fixes this critical security bug for all smartphones that contain a security bug in the Android operating system that is classified as critical by Google and that were have been to consumers in the Netherlands in the two-year period before this bug became known and for models that are still being sold with a security bug in the Android operating system that is classified as critical by Google;

VI. an order against Samsung to make those upgrades available that are necessary for normal use for all smartphone models that have been sold to consumers in the Netherlands during the past two years and for all models that will be sold in the future, for two years following the sale;

VII. all this on pain of penalties;

VIII. with an order against Samsung to pay the extrajudicial costs; and

IX. with an order against Samsung to pay the costs of these proceedings plus the statutory interest.

3.2. The DCA submits, put briefly, in support of this that the Stagefright bug has been found in the Android operating software of various Samsung smartphone models, including the Samsung Galaxy S5 mini, the Samsung Galaxy S5 Neo and the Samsung Galaxy A7. At the time the Summons was drafted, only the Samsung Galaxy A7 had been patched. Samsung does not inform its consumers of the Stagefright bug, even though it is one of the most serious software security problems in history and consumers run considerable risks (e.g. internet banking). Although there is information about the Stagefright bug (after the demand letter of 2 December 2015, see 2.6 above) on Samsung's website, that information is presented in such an inconspicuous manner that the consumers are in effect not sufficiently informed. Nor does Samsung provide information (or clear information) about whether or not consumers will receive security updates after buying a smartphone, and if so, for what period, or about the period within which the critical security bugs will be fixed. The security updates that Samsung does offer are limited to the most expensive and latest models and are not offered soon enough. After the demand letter of 2 December 2015 (see 2.6 above), Samsung patched the Stagefright bug in some of its models, but at the time of the hearing of these provisional relief proceedings, it still had failed to patch one third of its devices.

Samsung and the DCA held several talks. Further to these, Samsung made some adjustments on its website, but on essential points it has still failed to meet the demands of the DCA. Accordingly, the DCA has no choice but to issue these provisional relief proceedings.

The DCA's claims in these provisional relief proceedings are based on unfair (misleading) commercial practice on Samsung's part. The fact is that Samsung is failing to supply essential information that the average consumer needs to take an informed decision about the purchase. Information about Stagefright and about implementing (and continuing to implement) security updates and upgrades is essential. The DCA is also relying on Article 7:17 DCC. Under this article, sold smartphones must contain properties that the consumer may expect based on the purchase contract. The provisions regarding conformity and performance also apply to the licence for Android. On these grounds, the Stagefright bug and future critical security bugs must be fixed and upgrades must actually be made available. Samsung is obliged to do so on the grounds of its own general duty of care (Article 6:162(1) DCC). Finally, the DCA submits that Samsung is in breach of its obligations under the Dutch Personal Data Protection Act (*Wet Bescherming Persoonsgegevens*, Wbp), and specifically Section 13 of that Act. Samsung is responsible for taking appropriate technical and organisational measures to protect personal data against loss or any kind of unlawful processing. This is another reason why Samsung must close all critical security leaks.

Samsung must also regularly make updates and upgrades available to consumers for a period of two years following the purchase of a smartphone. Research has shown that consumers expect a smartphone to last 2.26 years, while information on Samsung's website shows that Samsung only offers a few months of support for several of its

smartphone models that are currently being sold to consumers as new devices. For this reason also, the DCA has an urgent interest in its claims being awarded. Added to that, the DCA has an urgent interest because Samsung continues to sell smartphones with the critical security bugs Stagefright and Stagefright 2.0 and several of its smartphone models have to date not been protected against Stagefright. There is also an urgent interest in respect of the actual patching of future security bugs. In that regard, the DCA refers to another bug, i.e. Certifigate. This bug is not found in Android, but in applications of third parties that collaborate with Samsung. Moreover, it was announced on 19 January 2016 that there is a "Linux bug". Linux is key to Android and, according to researchers who discovered the bug, it is present in 66% of all Android smartphones.

3.3. Samsung has raised a defence against the claims. This defence will, where relevant, be discussed in more detail in what follows.

#### 4. Assessment

- 4.1. A provisional relief claim is only admissible if the claimant has an urgent interest in obtaining it. In addition, a claim filed in provisional relief proceedings must lend itself to being awarded by way of provisional relief. If that is impossible, for instance because a more detailed factual investigation is required into technical aspects of the case, or because it is impossible to balance up the interests of the parties in an adequate manner, then the more appropriate route will be proceedings on the merits.
- 4.2. It is for the DCA, as the claimant, to demonstrate to the Court's satisfaction that there is an urgent interest. According to the DCA, the urgent interest arises from the fact that there are real security bugs in the Android operating system that may entail significant risks to owners of Samsung smartphones. As the provisional relief judge understands the position (from the Summons), *Stagefright* and *Stagefright 2.0* were the most significant prompts behind the DCA raising these provisional relief proceedings. The DCA also mentioned *Certifigate* and the "Linux bug" (CVE 2016-9728) at the hearing.

##### *Stagefright and Stagefright 2.0*

The Court is not satisfied at this point that Stagefright and Stagefright 2.0 represent such an acute security risk as the DCA would assert. Based in part on statements made by two of its staff members, H. Lee and J. Duart (Exhibits 2 and 3), Samsung clarified that the issue is not a security bug in Android but a weak spot in the operating system, and that abusing this vulnerability is a particularly complex, expensive and time-consuming process. What is required for this is the development of an *exploit*. This is a computer program designed to create a leak at a vulnerable spot in the operating system in order to gain access to (or *hack*) sensitive information on a smartphone. Moreover, a single exploit cannot be used for multiple models of smartphones. Samsung argues that the chances of "successfully" using an exploit are minimal. The provisional relief judge considers that the DCA has not adequately refuted this assertion by Samsung.

On the contrary, the DCA filed, as Exhibit 24, a report from DPA B-Able, from which the Court can likewise infer at this stage that the danger from Stagefright is at the very least minimal and may no longer even exist. One of the findings of that report, dated 30 January 2016, actually states:

*There is no evidence that the Stagefright vulnerability can be actively exploited on Samsung devices ...*

It is also significant that the DCA has not satisfied the Court that any Samsung smartphone has been hacked beyond the confines of a test environment ("*in the wild*"), far less than this has caused any detriment to a Samsung smartphone user.

Finally, it is significant that the statement by Lee (Exhibit 2) and also the email from G.J. ter Haar (a Samsung staff member) dated 10 February 2016 (Samsung's Exhibit 13) confirm at this stage that all Samsung devices introduced to the market in the Netherlands since July 2013 are (now) secured against Stagefright (2.0). It may well be that there some

older models of smartphones have been sold since July 2013, for which no patch has yet been issued, namely the Ace 2, the S3 and the S3 Mini, but it has not been made clear that this involves substantial numbers of smartphones. All things considered, it is not clear that Stagefright and Stagefright 2.0 present such an acute risk to users of Samsung smartphones as to create an urgent interest that would allow provisional relief proceedings to be embarked upon.

#### Certifigate

In this context, Samsung entered an email from Duarte dated 11 February 2016 (Exhibit 16) into the proceedings. It follows from this that *certifigate* is a bug not in Android, but "*in the software offered by third party application providers and only they can fix it.*" It also follows from this email that the bug has already been rectified by the developers of those applications. The provisional relief judge is for now of the view that the DCA has not established to the Court's satisfaction, against that background, that *certifigate* is (still) an acute problem that Samsung can rectify. Admittedly, the DCA has filed the said report from DPA B-Able, and it may be inferred from page 47 of that report that *certifigate* does represent an acute problem (it shows a print of a screen containing a warning against *certifigate*), but this is also refuted by Duarte in his email of 11 February 2016, which states, inter alia, "*the warning does not say anything meaningful about the likelihood of a threat.*"

#### Linux (CVE-2016-9728)

Here, too, the DCA has not satisfied the Court that there is an acute problem or an acute threat. The DCA has referred in this context to Exhibit 52 (a blogpost by Google), but this is refuted by Samsung with a reference to its Exhibit 19, a statement from Collin R. Mulliner, who is a specialist in the field of computer system security. This statement confirms, among other matters, that in practice it is virtually impossible to make any use of this vulnerability.

- 4.3. The conclusion thus far is that the DCA has not adequately demonstrated an urgent interest, in so far as this might be based on the presence of the three vulnerabilities/bugs that have been discussed, bearing in mind the defences presented by Samsung.
- 4.4. Furthermore, there are other reasons why the claims by the DCA do not lend themselves to being awarded by way of provisional relief. It is firstly important in this context that the DCA adduced during the hearing that the provisional relief proceedings were not so much about the Android smartphones of Samsung but rather about something bigger, namely the security for consumers of products connected to the internet. In this context, the DCA initiated the "*Update!*" campaign in June 2015. The DCA is keen to denounce a widely occurring problem. This is, in itself, quite understandable, given the objectives of the DCA. It also appears that the campaign has enjoyed some degree of success. Whether prompted by the DCA or otherwise, Samsung has after all improved the way it provides information concerning updates and upgrades for its smartphones, as is discussed below in 4.6 below, and has now issued updates for many smartphone models. This does not however change the fact that provisional relief proceedings are not the appropriate way to have such a wide-ranging problem assessed if there is no urgent and concrete reason for doing so.

It is relevant here that the interests of the members of the DCA must be balanced against those of Samsung. It follows from the statements given by Lee and Duarte (Exhibits 2 and 3 filed by Samsung) that awarding the claims might have significant (technical) implications for Samsung and that the consequences of these could be huge. For instance, Lee's statement indicates that the process of updating smartphones is far from straightforward and that Samsung is dependent on Google for this. Furthermore, Samsung has to cope with a number of versions and models and must be able to set its own priorities for updates. Also, allowing the claims might result in enormous expense for Samsung, and this could not be controlled appropriately within the limited scope of these provisional relief

proceedings. Reference is made to points 3.16 - 3.12 of the pleading notes submitted by Samsung's counsel on this matter.

- 4.5. Likewise, claims "dealing with the future" and/or that are too indeterminate are inappropriate for being awarded in provisional relief proceedings. The award of claims II and V must fail for these reasons. After all, these claims deal with providing information about or sealing "a security bug in the Android operating system classified by Google as critical" which will (possibly in the future) become apparent. Leaving aside the fact that the parties cannot agree on the meaning of the word 'critical' in this context, it is impossible at this point to judge which possible bugs or vulnerabilities might face the Samsung user at some point in the future, or how (and by whom) these might have to be addressed.
- 4.6. As far as the (other) claims are concerned, dealing with the provision of information, the position is that Samsung has already placed extra information on the website [www.samsung.com](http://www.samsung.com), probably in part as a result of the demand letter sent by the DCA on 2 December 2015. Regarding this, Samsung has referred to its Exhibit 6, showing that it amended the text on its website on 24 December 2015. The DCA also acknowledges this, albeit commenting that this information is still inadequate. Here, too, the position is that deciding whether or not this is adequate (leaving aside the issue of what information Samsung is legally obliged to disclose) is a highly technical issue that would require a more detailed investigation of the facts. At this point, it is impossible to assume that the DCA is correct in its view that Samsung has breached its duty to provide information.
- 4.7. For the reasons considered above, the provisional relief judge has reached the finding that the claims by the DCA may not be awarded. That being the case, the provisional relief judge need not discuss the various legal bases for the claims or the defences raised by Samsung against them.
- 4.8. The DCA, as the party found to be in the wrong, will be ordered to pay the costs of the proceedings. The costs for Samsung are assessed at:
- |                 |   |               |
|-----------------|---|---------------|
| - Court fees    | € | 619.00        |
| - Lawyer's fees | € | <u>816.00</u> |
| - Total         | € | 1.435,00      |

## 5. The decision

The provisional relief judge

- 5.1. denies the relief sought;
- 5.2. orders the DCA to pay the costs of the proceedings, estimated at today's date to amount to €1,435.00 for Samsung;
- 5.3. declares this judgement to have immediate effect as regards the award of costs.

This judgment is issued by M.W van der Veen, Provisional Relief Judge, assisted by M. Veraart, Clerk of the Court, and is pronounced in open court on 8 March 2016.

[duly stamped and signed]