Appellate Court of Cologne
- Clerk office -

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50670 Cologne

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August 31 2018

Page 1 of 1

Docket no
19 W 32/18
please specify when answering

Responsible
[redacted]
Direct call
[redacted]

Your Reference: 172210-690003 JG

Dear Sir or Madam,

In the proceedings
Internet Corporation for Assigned Names and Numbers vs EPAG Domainservices GmbH

Please find attached copy for your information.

Kind regards,

[redacted]

Judicial employee
-created automatically valid without signature-

[redacted]

RICKERT.NET

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In advance via facsimile to: [redacted] (9 pages)

Your reference:
Our reference: 18/178/01/AK

Attorney: Thomas Rickert
Email: [redacted]

Bonn, August 30, 2018

In the proceedings

ICANN ./. EPAG Domainservices GmbH
Docket no. 19 W 32/18

we comment on the Applicant's plea of remonstrance of August 17, 2018 as follows. We move

to dismiss the plea of remonstrance.

The plea of remonstrance is unfounded. The right to be heard of the Applicant was not violated by the challenged decision of the Appellate Court of Cologne of 1 August 2018. In particular, the Senate was not obliged to give legal notice. Moreover, the Applicant fails to recognize the function of the plea of remonstrance because she is trying to force a new review of the case.

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In detail:

1. No infringement of the duty of legal notification

The decision of the Appellate Court was made in a manner not objectionable under procedural law. A violation of the judicial duty to give legal notice according to sec. 139 para. 2 ZPO does not exist. The non-dismissing order was not based on an aspect that the Applicant could not have reckoned with. The opposite is the case: in view of the Respondent's repeated and detailed submissions, the Applicant could not be surprised that the application was interpreted as a request for benefit and that this entailed increased requirements with regard to the condition of urgency. The Applicant did not overlook this lecture either, because she reacted to it in her immediate complaint. There can therefore be no question that the Court's decision has not been based on a legal point of view which the Applicant had overlooked or considered to be irrelevant through no fault of her own.

1.1. Dispensability of a notice

According to the case-law of the Federal Constitutional Court, it is primarily the responsibility of the parties to consider all justifiable legal aspects on their own initiative and to adjust their own presentation accordingly:

> *"Even if the legal situation is controversial or problematic, a party to the proceedings must always take all* ***reasonable legal aspects*** *into consideration and adapt his presentation accordingly"* (cf. BVerfGE 86, 133 [144ff.]; BVerfGE 98, 218 [263] = NJW 1998. 2515)."

This applies all the more if the party's presentation alone provides an opportunity to deal with a legal question that has been raised. Therefore, according to the case-law of the Federal Court of Justice, a judicial reference is

> ***"dispensable if the party has received the necessary information from the other party"*** (BGH, Court order of 20 December 2007 – docket no. IX ZR 207/05

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= NJW-RR 2008, 581, margin 2 f.).

Exactly this is the case in these proceedings: In these proceedings the Respondent has elaborated in detail the legal classification of the application and the related legal requirements:

> *„The prohibition requested by the Applicant to offer domains without collecting the data in dispute is an order for performance: The Applicant demands compliance with the RAA, i.e. the collection of the data in dispute. The Applicant's astonishing view that the Respondent could temporarily suspend the sale of domains does not change this (immediate appeal, p. 35). Of course, almost any prohibition order can be complied with by completely discontinuing business operations. However, if this were the only way to comply with the required prohibition, the necessary balance (see below) would of course also be in favor of the Respondent.*
>
> *After all, an injunction ordering performance may only be issued under strict requirements that are not met here: Firstly, the claimant must urgently need the immediate fulfilment of the claim; secondly, it is necessary that the conduct of the main action is not reasonably possible because performance must be effected urgently in order not to lose its meaning; and thirdly, the disadvantages for the creditor must not only be severe but must be disproportionate to the disadvantages of the debtor. According to these principles, it is in any case necessary that when weighing the interests of the creditor against the interests of the debtor, the interests of the creditor clearly predominate because the enforcement of the claim is particularly urgent for the creditor because of the risk of further impairments of his claim and, on the other hand, the risk of the debtor being unjustly obliged in the injunction proceedings is relatively low (BGH, decision of 11 October 2017, docket no. I ZB 96/16, WM 2018, 332). […]“. (Brief of Respondent of 10 July 2018, pp. 30 ff.)*

The Applicant's incomplete reference to the decision of the Federal Supreme Court of 25 May 1993 does nothing to change this. Because in the reasons the court makes clear that the duty to give legal notice is only effective if the party presentation does not already give sufficient reason to deal with the legal question:

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> *"The Court of Appeal based its view that damage was not conclusive on arguments that none of the parties had put forward." (BGH, judgment of 25 May 1993, docket no. XI ZR 141/92, NJW-RR 1994, 566, 567).*

Completely out of line with the case is the Applicant's deliberate misinterpretation that the Respondent "admitted" that the injunction in question was an injunction (Gehörsrüge, p. 5). The opposite is the case: the Respondent pointed out that ICANN's argument that the Respondent could then stop selling domains is unhelpful to the question of qualification as an injunction (Respondent's brief of 10 July 2018, p. 30 f.). Moreover, an injunction, irrespective of its form, is also subject to increased requirements as to the reason for the injunction, when it amounts to an anticipation of the main issue and is not merely limited to a security (cf. OLG Frankfurt, Court order of 2 February 2004, BeckRS 2004, 02787; OLG Düsseldorf, judgment of 16 January 2008, docket no. VI U (Kart) 23/07, BeckRS 2008, 11167). This is the case here.

Moreover, the Applicant was also aware from the outset that the complete cessation of the registration of domain names is not an actual option for the Respondent. Thus, the Respondent also offers resellers the opportunity to register domain names through her and to maintain registrations. In this respect, the Respondent must be able to obtain domains from the Applicant because she is obliged to do so vis-à-vis third parties. In addition, obtaining accreditation as a registrar is also linked to considerable financial expenses, so that cessation of domain operations would lead to damage to the Respondent.

1.2 Knowledge of the Applicant

The Applicant has also taken note of the Respondent's comments. Because it writes in its plea of remonstrance:

> *However, the Applicant has made clear hereafter that it does not request collection of the data in dispute. The Applicant has expressly pointed out that it is not requesting the court to order the Respondent to offer and sell second level domain name registrations and to collect Admin-C and Tech-C data, instead the*

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> *Applicant has explained that the* ***"Respondent would only have to refrain temporarily from selling further domain name registrations*** *[…]" (see Immediate Appeal p. 33) (plea of remonstrance, p. 5).*

The fact that the Applicant was obviously and inaccurately of the opinion that she had dismissed the Respondent's objections with this statement does not constitute a violation of the right to be heard. It is up to the Applicant - represented by an experienced litigation lawyer of a large US law firm - to deal with the legal aspects that play a role in connection with the delimitation of injunctive relief and power disposition. The fact that this dispute was insufficient is not relevant to the question of the legal hearing. In any case, the legal aspect raised was not "surprising" - the only surprise for the Applicant was that the court did not follow the Applicant's legal opinion.

2. Lack of consideration of essential facts and legal aspects

The Senate's decision also does not violate the procedural rights of the Applicant from the aspect of a lack of consideration of essential facts and legal aspects. The Applicant attempts to construe a violation of her right to a fair hearing from the fact that the Senate, when classifying her application as a request for performance, takes a different legal view than she represents. This attempt has failed. It is not the purpose of the notification of a hearing to re-examine the correctness of the content of court decisions (cf. BVerfG, GRUR-RR 2009, p. 441, 442; BGH, GRUR 2009, p. 90; BAG, NJW 2012, p. 1164). The Senate was also not obliged to comment on any submission by the Applicant in the grounds for its decision (sec. 313 ZPO: "kurze Zusammenfassung der Erwägungen").

2.1 Correct interpretation of the proposal by the Senate

Contrary to the Applicant's view, the Senate did not misunderstand the Applicant's proposal, but interpreted it. In this context, the Higher Regional Court correctly pointed out that it is not the wording but the content that is decisive in the interpretation. It can also be assumed that the Applicant's actual request is the proper execution of the contract from her point of view and the provision of the services in accordance with the

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contract. This is evident not only from the application form, which focuses on the collection of data *("[...] ohne die folgenden Daten des Registrierenden, der einen Second Level Domainnamen über die Antragsgegnerin registrieren will, zu erheben [...]")* , but ultimately also from the Applicant's entire presentation, which focuses on the assertion that the failure to collect the data leads to supposedly irreparable (but nevertheless no longer plausible) damage. Any other interpretation of the Applicant's proposal contradicts the explicit aim pursued by the Applicant in the procedure. In her announcement of 30.05.2018, available at https://www.icann.org/news/announcement-4-2018-05-30-en, she declares the following:

> *"In particular, ICANN requested a clarification from the Court about whether EPAG should be obligated to continue to collect administrative and technical contact information for new domain name registrations, as it is required to do under its Registrar Accreditation Agreement with ICANN."*

The purpose of the Applicant was precisely to have the Respondent obliged by the court to further collect data, not to cease further registrations. ICANN could have suspended its business operations by imposing contractual sanctions and even terminating the contract. This was not desired, however, but rather the clarification of the question of whether the data for Admin-C and Tech-C must be collected further. Accordingly, the Applicant's General Counsel and Secretary, John Jeffrey, was disappointedly quoted in the same publication:

> *"While ICANN appreciates the prompt attention the Court paid to this matter, the Court's ruling today did not provide the clarity that ICANN was seeking when it initiated the injunction proceedings."*

The interpretation of the applications by the Senate is, apart from that, outside of the scope of review of a plea of remonstrance, because this would constitute a substantive review of the decision. There is neither an apparent reason to assume that the court unjustifiably exceeded the scope of interpretation, nor that the court did not consider the Applicant's pleadings.

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The substantive discussion by the Applicant of the judgments (Plea of Remonstrance, p. 7) cited by the Senate in its decision is immaterial. The judgments were cited by the Senate in order to substantiate the requirements of a performance injunction. The cited judgments are not relevant for the classification of the application as a performance injunction. There is no connection with the qualification as a performance claim.

Apart from that, the Applicant introduces its discussion of the cited judgments by stating, that "*the respective Applicant's cease and desist requests would have resulted in an obligation of the Respondent to a certain contractual performance*". However, the Applicant applies for nothing else in its main application: It wants to obligate the Respondent to collect the data envisaged in the RAA. We refer to our previous pleadings with respect to the inadmissibility of this obligation pursuant to data protection law.

2.2 No inaccurate facts

It is also not apparent to the Respondent, why the challenged statements by the Senate are supposed to be inaccurate (Plea of Remonstrance, p. 9). The Senate has correctly pointed out that the technical changes of the registration process at the Respondent can be reversed. The Senate likewise correctly assumes that the data can be collected later on in the case of a success of the Applicant in the main proceedings. While it is correct that to that end the registrants of the respective domains must be contacted, this does not make the collection later on impossible. The data are in no case "permanently lost" (Plea of Remonstrance, p. 9 et seq.) and the Applicant contradicts its own pleadings with this statement: Because it has continuously claimed that in particular larger companies have an compelling need to name an Admin-C and Tech-C. If one assumed, hypothetically, that this statement was true, then there would be no reason for the domain holder not to make use of this possibility, which would be (again) available after the end of the main proceedings. The other way around: Should the domain holders forego naming [an Admin-C and Tech-C] when they have the possibility to do so, then the need could not have been as great as the Applicant claims.

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It is unclear, what the pleading of the Applicant is supposed to have to do with a violation of the right to be heard. The Applicant does not have a claim that the Senate addresses every point raised by the Applicant.

To the extent the Applicant also challenges the determination of the Senate that only an abstract danger in cases of delays in contact in cases of abuse do not justify the sought preliminary injunction (Plea of Remonstrance, p. 10), this also does not constitute a violation of the right to be heard. The statement by the Senate constitutes a substantive analysis of the law and a connection to Section 321a ZPO is not apparent. The plea of remonstrance does not serve the purpose of a substantive review of the decision.

Apart from that, the Applicant interprets the Senate incorrectly: The Senate does not claim that the issuance of a preliminary injunction generally requires that the legal criterion "concrete danger" must be fulfilled. The Senate only states that in the concrete case at hand the abstract danger of possible delays do not justify the issuance of a preliminary injunction. The Applicant simply was unable (and this is also not possible) to demonstrate concrete negative consequences.

3. Lack of decisiveness

The lack of an urgency requirement was also not decisive. Because the Higher Regional Court in its decision expressly noted that the Applicant's claims are also substantively unjustified:

"Regardless of the fact that already in view of the convincing remarks of the Regional Court in its orders of 29 May 2018 and 16 July 2018 the existence of a claim for a preliminary injunction (Verfügungsanspruch) is doubtful, at least with regard to the main application, the granting the sought interim injunction fails in any case because the Applicant has not sufficiently explained and made credible a reason for a preliminary injunction (Verfügungsgrund)." (Higher Regional Court, Decision of 1 August 2018)

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With regard to the lack of the requirements of the claim we also refer to our previous pleadings.

We ask for a decision as applied for.

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