Translation of Court Order of the Appellate Court of Cologne of 1 August 2018

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19 W 32/18
10 0 171/18
Regional Court of Bonn

Appellate Court of Cologne

Order

In the proceedings

of Internet Corporation for Assigned Names and Numbers (ICANN), represented by its president, Göran Marby, 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA,

Applicant,

Attorneys of record: JONES DAY Rechtsanwälte, Breite Straße 69, 40213 Düsseldorf

versus

EPAG Domainservices GmbH, represented by its managing director, [redacted]

Defendant,

Attorneys of record: Attorneys Rickert Rechtsanwaltsgesellschaft mbH, Kaiserplatz 7-9, 53113 Bonn,
Attorney Fieldfisher (Germany) LLP, [redacted]

The Applicant's immediate appeal of 13 June 2018 against the order of the Regional Court of Bonn of 29 May 2018 (10 O 171/18), in the version of the non-remedy order of 16 July 2018, is rejected.

The costs of the appeal procedure shall be borne by the Applicant.

The amount in dispute for the appeal proceedings is set at 50,000.00 euros.

Reasoning:

I.

The admissible immediate appeal of the Applicant is not successful on the merits.

The Applicant may not require the Defendant by way of preliminary injunction to refrain from offering and/or registering second level domain names under any generic top level domain listed in Annex AS 1 as an registrar accredited by the Applicant without additionally collecting the data of a technical and administrative contact, nor with the restrictions formulated in the alternative application.

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*).

A reason for a preliminary injunction exists according to § 935 ZPO if it is to be ensured that a change in the existing situation could frustrate or substantially impede the realization of a party's right (so-called injunction of protective measure) or according to § 940 ZPO if, with regard to a disputed legal relationship, the injunction appears necessary to avert substantial disadvantages or to prevent imminent violence or for other reasons (so-called regulating injunction). Beyond the wording of §§ 935, 940 of the Code of Civil Procedure, case-law also exceptionally permits a so-called performance or satisfaction injunction, the content of which is directed towards the (complete or partial) satisfaction of the right of disposal (see Zöller/Vollkommer, ZPO, 31st edition, § 940 marginal 1).

The Applicant aims for a regulating injunction. Like the alternative claim, the main claim asserted by the Applicant only on the basis of its wording, but not on the basis of its content, is directed at ceasing and desisting. With its main application, the Applicant aims to ensure that the Defendant collects the data of the technical and administrative contact and thus ultimately provides the services required in its view for the proper and complete performance of the contract. The same applies to the alternative claim, since it has the same direction, albeit with limitations.

Such regulating injunction aimed at satisfaction is subject to special conditions. The Applicant must demonstrate that he is urgently dependent on immediate compliance and that the issuing of the order to avert major disadvantages is inevitable (cf. OLG Düsseldorf, judgment of 24 March 2004, VI - U (Kart) 35/03); OLG München, judgment of 14 September 1995, 29 U 3707/95). A cease and desist order to satisfy the main claim is only admissible if the reason for the order is based on an otherwise occurring irreparable damage causing an emergency situation, which does not correspond to a comparable damage to the Applicant and which in particular cannot adequately compensate a later claim for damages (cf. OLG Frankfurt, decision of 02.02.2004, 19 U 240/03).

As the Defendant repeatedly pointed out, these conditions are not met in the present case. The Applicant has already not demonstrated that a preliminary injunction is required in order to avoid substantial disadvantages. To the extent the Applicant submitted in its application that interim relief was necessary in order to avert irreparable harm by arguing that the data to be collected would otherwise be irretrievably lost, this is not convincing. The Defendant could at a later point collect this data from the respective domain holder by a simple inquiry, provided that an obligation in this regard should be established. The fact that the Defendant is currently changing its technical systems in a way that the domain holders will no longer be able to provide the Admin-C and Tech-C data at all in the future does not change this assessment. For it is not apparent, nor is it claimed by the Applicant, that this technical change is irreversible. Furthermore, however, no imminent emergency on part of the Applicant is apparent that results from the failure to collect the data. In that regard, it is already not clear to what extent the storage of the data of the so-called Tech-C and the so-called Admin-C is absolutely necessary for the Applicant's purposes and, consequently, why failure to collect the data would result in substantial disadvantages. As correctly explained by the Regional Court, the fact that the collection of contact data for the categories Tech-C and Admin-C in the past has always been on a voluntary basis, since the Registrant could, but did not have to, provide such data, demonstrates that the collection was not absolutely necessary for the purposes of the Applicant. To the extent the Applicant argues that in the case of abusive practices (e.g. online fraud) there may be - if the data of the Tech-C and the Admin-C were not available – delays in establishing contact and that this would therefore impede the effective combatting of abusive practices, this does not justify another assessment. Irrespective of the fact that only the abstract danger of delays in a case of abusive practices cannot justify the sought preliminary injunction, the Defendant also stated, undisputed by the Applicant, that previous practical experiences do not confirm this. Accordingly, since no substantial disadvantages for the Applicant can be recognized

arising from the lack of a preliminary injunction, the Applicant must be referred to the main proceedings in order to enforce the rights it asserts.

II.

The Senate was under no obligation to refer the case to the ECJ pursuant to Art. 267 TFEU, because the interpretation of provisions of the GDPR was not material to the decision.

III.

The cost decision is based on § 97 Section 1 ZPO.

IV.

The amount in dispute for the appeals proceedings is set at 50,000.00 euros. As correctly stated by the Regional Court, the Applicant did not present an economic impairment which would justify the determination of a higher amount in dispute.

Cologne, 1 August 2018
19th Civil Senate