

A.G. Opinion on Pammer and Hotel Alpenhof

The Opinion of Advocate General Ms Verica Trstenjak in Case C-585 / 08 (Pammer) and Case C-144 / 09 (Hotel Alpenhof) was presented on May 18, 2010. Both cases involve the interpretation of Regulation (EC) No 44/2001. The national court asks if, in order to imply that a business or professional activity is addressed to the Member State where the consumer is domiciled within the meaning of Article 15, paragraph 1,c) of Regulation No 44/2001, access to the website in the Member State of domicile of the consumer is enough. The essential question raised is therefore how to interpret Article 15 paragraph 1 c), and specifically how to interpret the notion that a person engaged in a commercial or professional activity “directs” this activity to the Member State of domicile of the consumer, or to several Member States including that Member State. This is the first time that the ECJ will interpret the concept of “directing” trade or business to the Member State of domicile of the consumer.

As noted by the AG, interpretation of this concept is particularly important when the direction of activity to the Member State of the consumer occurs through the Internet, since this activity has some specific characteristics which should be taken into account in the interpretation of Article 15, paragraph 1 c) of Regulation n° 44/2001. The specificity of the Internet is that consumers can generally access the website of a dealer anywhere in the world; a very narrow interpretation of the concept of “direction of activity” would mean that the creation of a website could already mean that the trader directs its business to the state of domicile of the consumer. Therefore, in interpreting the concept of “directing activity”, a balance must be sought between the protection of consumers entitled to special rules of jurisdiction under Regulation n° 44/2001, and the consequences for the professional, to whom these special rules of jurisdiction should only apply if he knowingly chose to direct its activity to the Member State of the consumer.

The A. G. interpretation relies initially on four pillars: the usual sense of the concept of “directing an activity”; the teleological interpretation; the historical interpretation; and the systematic interpretation of the concept. She concludes that the notion is not broad enough to cover the mere accessibility of a website. She also notes that -leaving aside the historical interpretation - in assessing the

meaning of the direction of business within art. 15, the fact that the website is interactive or passive can not be an important point. On the other hand, she argues that several criteria will be relevant in assessing whether a person who pursues commercial or professional activities directs them towards the Member State of domicile of the consumer – ie, whether he invites and encourages the consumer to pass a distance contract. Among these criteria we find:

.- The information published on the site: indication of the international code before the telephone or fax number, or indication of a special telephone number for help and information of consumers abroad; information indicating the route to get from other Member States to the place where the professional operates (eg international connections by train, the names of closest airports); information on the possibility to check the availability of the stock of a commodity, or on the possibility to provide a particular service. Conversely, the only indication of an email address on the website is not enough to conclude that the merchant “directs its activity” within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001.

.- The business done in the past with consumers of other Member States: if the professional concludes traditionally distance contracts with consumers of a given Member State, there is no doubt that he directs its activities towards that Member State. On the contrary, the conclusion of one contract with one consumer of a particular Member State will not suffice for the direction of the activity to that Member State.

.- The language used on the website – although in the twenty-fourth recital Rome I Regulation this criterion is considered not important, Ms Trstenjak nevertheless argues that the language may in some borderline cases be an index of the direction of activity towards a particular Member State or to several Member States: for example, if a website is presented in a given language, but this language can be changed. This is relevant because it is an indication that the merchant directs its activity also to other Member States. Through the possibility to change languages, the merchant shows knowingly his wish that consumers from other Member States also conclude contracts with him.

.- The using of a top level domain of a given country, primarily in cases where a trader based in a given Member State uses the domain of another Member State in which he has no seat.

- If the merchant, using the various technical possibilities offered by the Internet (eg, the email), has sought to ensure that consumers of concrete Member States are informed of the offer.

.- If a trader who has a website also directs its activities towards the Member State of domicile of the consumer through other means of publicity.

.- If the merchant explicitly includes/excludes the direction of his activity to some Member States (and actually behaves in accordance with this inclusion/exclusion).

Finally, the AG suggests the ECJ to answer that the “direction of an activity” requirement within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001, is not met merely because the website of the person who carries the activity is accessible in the State where the consumer is domiciled. The national court must, on the basis of all the circumstances of the case, judge whether the person who carries on business and professional conducts his activities to the Member State where the consumer is domiciled. The important factors for this assessment include the contents of the website, the former activity of the person conducting the trade or professional activity, the type of Internet domain used, and the using of the possibilities of advertising offered by Internet and other media.

(The Parmer case also raises the question whether a tourist trip on board of a cargo ship can be considered as part of a contract for a fixed price combining travel and accommodation within the meaning of section 15, paragraph 3 of Regulation n° 44/2001. According to Ms Trstenjak, the ECJ must answer affirmatively. She adds that in her view, the concept of a “contract which, for an inclusive price, provides for a combination of travel and accommodation” in Article 15, paragraph 3 of Regulation n° 44/2001 must be interpreted in the same way as the concept of “package” of Article 2, paragraph 1 of Directive 90/314 of 13 June 1990 on package travel, package holidays and package tours).