19 W 32/18
10 O 171/18
Regional
Court Bonn

Appellate Court of Cologne

Order

In the proceedings

of Internet Corporation for Assigned Names and Numbers, 12025 Waterfront Drive // Suite 300, Los Angeles, CA 90094-2536, United States,

Applicant,

- Attorneys of record: Jones Day in Dusseldorf -

versus

EPAG Domainservices GmbH, represented by the managing directors,

Defendant,

- Attorneys of record: Attorney Rickert in Bonn/fieldfisher in Hamburg –

the 19th Civil Senate of the Appellate Court of Cologne through the presiding judge at the Appellate Court ████████, the judge at the Appellate Court Court ██████ and the judge at the Local Court ██████ on September 3, 2018

o r d e r e d:

The plea of remonstrance of 17 August 2018 filed by the Applicant concerning the order of the Senate of 1 August 2018 (19 W 32/18) is rejected with costs.

Reasons:

The plea of remonstrance, which is permissible under § 321 a para. 1 of the Code of Civil Procedure and is also raised in due time and which is to be decided by the Senate in the present composition, has no success on the merits. Whether the grounds for the plea of remonstrance satisfy the admissibility requirements of Sections 321 a para. 2 sentence 5, second half sentence, para. 1 sentence 1 no. 2 of the Code of Civil Procedure and whether a case of a material breach of the right to be heard has been adequately substantiated can remain open. Because the Applicant's right to be heard was not violated.

The Senate took note of all the Applicant's arguments and took them into account in the decision-making process. Contrary to the Applicant's position there is no – and certainly no material – violation of its right to be heard because the decision of 1 August 2018 was in particular not an inadmissible surprise decision, which the Applicant did not have to reckon with without prior notice and/or the opportunity to comment. This applies in particular insofar the Applicant asserts that the Senate has interpreted its request for legal protection as aimed at the issuance of a so-called performance order and has not regarded the relevant (strict) conditions for this as fulfilled. A judicial notice to this legal aspect leading to the unsuccessful application for an interim injunction and thus to the immediate appeal against the rejection decision of the Regional Court was in any case not necessary because the Defendant had already dealt with it in detail (pages 8 et seq. of the pleading of 10 July 2018 = pp. 195 ff. of the file), to which it rightly refers in its submission on the plea of remonstrance. For the reasons also correctly stated there, no notice from the Senate was required, even if it based the rejection of the immediate appeal on a reasoning that differs from that of the Regional Court. On the basis of the Defendant's objection alone, the Applicant had sufficient reason and opportunity to state its divergent position, which has now been asserted.

In the absence of a violation of the right to be heard, contrary to the statement of 3 September 2018 (received after expiry of the deadline for lodging the plea of

remonstrance), there is no possibility for a "new decision", weighing of interests or holding an oral hearing, "in order to clarify any ambiguities in this case".

Notwithstanding this, the Senate, in the present composition and taking into account the statements in the submissions of the applicant of August 17, 2018 and September 3, 2018, maintains the decision taken in the order of August 1, 2018 both in the result and in the reasoning. Notwithstanding the Applicant's objection, there is no reason for an assessment with regard to the (non-existence of a) reason for a preliminary injunction that deviates from the Senate's order of August 1, 2018. The legal classification of the Applicant's request as an performance order is not even decisive, which the Senate, however, maintains unchanged and contrary to the assertion in the Applicant's submission of September 3, 2018 was not – in particular not in a way that would bind the Senate – conceded by Defendant because comparable – strict – requirements are applicable also under the aspect of anticipation of the main action and also the required urgency for a preliminary injunction is called into question by the fact that the Applicant itself considers a referral to the ECJ as possible (see pages 36 et seq. of the submission of June 13, 2018), in which case a timely decision could not be expected. Finally, the Applicant's objections are also unsuitable to dispel the detailed concerns set out in the order of August 1, 2018 with regard to the (further) requirements for a reason for an injunction, because in particular it is not apparent that it is facing irreparable damage in case it is (only) successful in the main proceedings. Even on the basis of the Applicant's submissions, there are no reliable indications for its assumption that a temporary non-collection of data on the so-called Admin-C and Tech-C could not be rectified or that in such case such damage was caused to the Applicant that the disadvantages associated with the requested injunction caused to the Defendant and third parties are outweighed by the interests of the Applicant, especially as the provision of the information, the collection of which the Defendant now refuses, was also not previously obligatory and the GDPR applicable as of 25 May 2018 reaffirms the principle already in force that (personal) data should be handled with as much restraint as possible. Ultimately, the decision as to whether a legal obligation of the opposing party to collect these data elements exists depends on an interpretation of the contractual agreements between the parties against the

background of the applicable law, for which a preliminary injunction procedure does not provide the appropriate framework. In light of all of this, there is no reason for an assessment of the factual and legal situation that deviates from the resolution of August 1, 2018. This also applies to the auxiliary requests.

The decision on the costs of the plea of remonstrance is based on §§ 91 para. 1, 97 para. 1 Code of Civil Procedure.

executed

Urkundsbeamtin der Geschäftsstelle