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Appellate Court of Cologne
19th. Senate for Civil Matters
Reichenspergerpl. 1
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In the preliminary injunction proceedings

Internet Corporation for Assigned Names and Numbers (ICANN)

- Applicant -

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versus

EPAG Domainservices GmbH

- Defendant -

Attorneys of record: Rickert Rechtsanwaltsgesellschaft mbH / Fieldfisher (Germany) LLP

Docket- No.: 19 W 32/18

the Defendant's brief of 30 August 2018 gives reason to shortly comment on the (undisputed) facts of the case.

The Defendant's brief does not contest the fact that the Applicant asserts a cease and desist claim only. The brief of the Defendant is therefore proof that the Senate has overlooked these facts even though the Applicant has raised the facts beforehand. This gives reason to continue proceedings.

The Senate has decided in its order:

"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."

(page 2/3 of the Senate's decision)

This is factually not true. The Senate was obviously misled by the arguments of the Defendant assuming that an order would lead to the obligation of a contractual performance.

Regarding this question the Defendant states on page 4 of its brief:

"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."

(Relevant parts emphasized by the Applicant)

Of course, on the one hand the Defendant still argues that the Applicant actual seeks for performance of the RAA. But, at the same time it implicitly confirms that the RAA does not contain an obligation to conduct domain name registrations Thus, the Defendant confirms **that the Defendant has no contractual obligation under the RAA to register domain name registrations.**

As a consequence, the Senate based its decision on the assumption of wrong facts.

The cease and desist claim asserted by the Applicant is in fact NOT a claim for performance.

Because the Defendant has no duty to register domain name registrations according to the RAA an order of the court would have the legal effect that the Defendant has to do nothing hereafter.

The case is therefore also not comparable to the case law raised by the Senate. Because in all these cases cited by the Senate, the Defendant would have had to perform contractual obligations in case an order was issued by the court. The Applicant therefore trusts that the Senate will continue proceedings taking into account the interests actually affected by a possible cease and desist order.

The Defendant now provides new facts why - in its view - a preliminary injunction would also harm its business. The Defendant argues that "cessation is not an option" because it invested considerable financial expenses and concluded third party agreements regarding the resale of domain name registrations.

These facts are firstly contested. The Defendant just had to pay a very low amount of money for accreditation as a registrar. And the Defendant has neither argued nor substantiated alleged third party obligations beforehand. Secondly, with a cease and desist order by the Senate any duty of performance with third parties would become legally impossible for the Defendant with consequence that such duty towards third parties does not apply anymore. The Defendant thus would be free from such obligation by law. And the Defendant would be protected by § 945 ZPO in case the Applicant's does not succeed in main proceedings.

The Applicant trusts that the Senate will evaluate these undisputed facts and that it will reconsider its position in a new decision. The Applicant also kindly asks the Senate to take into account that the Regional court considers the claim as well-founded with regard to the alternative claims. The Applicant takes from the decision of the Senate that the Senate does not question this view.

Furthermore, the Applicant suggests to continue these proceedings by way of an oral hearing in order to clarify any remaining uncertainties in this case.

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