

Case C-774/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

22 October 2019

Referring court:

Vrhovno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer

5 September 2019

Applicant:

A.B.

B.B.

Defendant:

Personal Exchange International Limited

Subject matter of the main proceedings

At issue is whether the courts of the Republic of Slovenia or those of the Republic of Malta have jurisdiction. The decisive question of substantive law is whether the described circumstances to be taken into consideration fall within the scope of Article 15(1) of Regulation No 44/2001. It is necessary to establish whether the applicant in the main proceedings entered into a contract with the defendant as a consumer, outside his trade or profession. The assessment concerning jurisdiction turns on whether the applicant may be regarded as a consumer within the meaning of EU law.

Subject matter and legal basis of the reference

Interpretation of European Union law, Article 15 of Regulation No 44/2001; the legal basis of the reference is Article 267 TFEU.

Question referred

Must Article 15(1) of Regulation No 44/2001 be interpreted as meaning that an online poker playing contract, concluded remotely over the internet by an individual with a foreign operator of online games and subject to that operator's general terms and conditions, can also be classified as a contract concluded by a consumer for a purpose which can be regarded as being outside his trade or profession, where that individual has, for several years, lived on the income thus obtained or the winnings from playing poker, even though he has no formal registration for that type of activity and in any event does not offer that activity to third parties on the market as a paid service?

Provisions of EU law relied on

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in particular Article 15

Provisions of national law relied on

Zakon o pravdnem postopku (Code of Civil Procedure), in particular Articles 17 and 18

Zakon o varstvu potrošnikov (Law on consumer protection)

Succinct presentation of the facts and the main proceedings

- 1 The applicant is a poker player who is asking the defendant to pay an amount of EUR 226 850 which he won playing poker on its website www.mybet.com between 31 March 2010 to 10 May 2011. The defendant, the organiser of the online casino, seized the amounts won in the game and appropriated them as the applicant had infringed its gaming terms and conditions by having several user accounts.
- 2 The defendant is a legal person registered as a company providing online gaming services and has, to that end, a licence from the Republic of Malta, where it has its principal place of business. The defendant offered online gambling remotely to users via the website (www.mybet.com), by which it carried on its commercial activity also in relation to the Republic of Slovenia.
- 3 The applicant is a natural person resident in Slovenia who used the services provided by the defendant remotely via the website. The applicant himself stated that he intended to secure his financial future by playing poker and fell within the category of professional poker players. The applicant is not formally registered to perform or pursue such activity. He won EUR 227 226.44 from playing poker,

whilst his total turnover from the activity was higher. He won a net amount of EUR 110 per hour from the defendant.

- 4 By registering a user account on the defendant's website, every user, including the applicant, had to accept the specific and general terms and conditions drawn up unilaterally by the defendant. The user had no influence over the content of those terms and conditions. The general terms and conditions of the contract provided inter alia that the courts of the Republic of Malta would have jurisdiction over any disputes arising from the contractual relationship.
- 5 The law of the Republic of Malta and the general terms and conditions of the contract provide that each user can have only one account with one gambling operator. A user account permits only the person, in whose name the account is, to play. No new registration is authorised, nor is the use of another player's account. If the data are incorrect, the registration of the player concerned is not authorised and the registration made is cancelled immediately. The general terms and conditions of the contract provide that in such a case the defendant is entitled to seize the funds held in a casino account.
- 6 By opening an additional user account, the applicant infringed the condition relating to a single user account, which he thus sought deliberately to circumvent. On account of the infringement of the abovementioned conditions, on 10 May 2011 the defendant blocked the applicant's user account and seized the applicant's entire deposit in the amount of EUR 227 226.44.
- 7 However, despite the infringement of terms and conditions by the applicant, that seizure was not justified as the defendant did not act correctly in that regard. The defendant was aware of that action and allowed the applicant to play poker, agreed to it and approved it fully. Even though it had been aware of applicant's infringements for a long time, it did not block his account or prevent him from continuing to play. It earned a commission from his games and ultimately appropriated all the sums that the applicant had won up until then. In the light of the foregoing, the applicant is entitled to the sums won gambling and the defendant is required to pay them.
- 8 The court of first instance granted the application brought by the applicant in its entirety and ruled that the defendant had to pay him the sum of EUR 226 850.21, plus default interest.
- 9 The court of first instance considered that the applicant had acted as a consumer outside his trade or profession. In doing so, it accepted the jurisdiction of the Slovenian courts on the basis of his place of domicile, that is to say the Republic of Slovenia.
- 10 The defendant lodged an appeal against that decision, by which the court of first instance granted the application brought by the applicant, before the court of second instance, which dismissed its appeal as unfounded and accepted, in their entirety, all the findings and grounds set out by the court of first instance.

- 11 The defendant brought an appeal on a point of law (*revizija*) against the judgment delivered by the court of second instance before Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia). In its appeal it alleges substantial infringements of the rules of procedure and incorrect application of substantive law. It essentially contests the lower courts' finding that the applicant was a consumer acting outside his trade or profession. In his response the applicant disputed the defendant's claims and agreed with the view of the lower courts.

The essential arguments of the parties to the main proceedings

- 12 The applicant bases the defendant's liability to pay on the fact that he won that amount as a poker player in connection with online casino services which the defendant offered as the organiser of the website. Poker players register on its website and open a user account into which they pay a cash deposit that they can then use to play on the website or pay at any time. Since the defendant misappropriated the applicant's money, it is required to repay it to him.
- 13 The applicant bases the jurisdiction of the courts of the Republic of Slovenia on the fact that he used the defendant's online casino services as a consumer, as he acted outside his trade or profession. Therefore, he has the status of consumer and, under Articles 15 and 16 of Regulation No 44/2001, has the right to bring an action in the State in which he is domiciled.
- 14 The defendant requests that the application be dismissed as inadmissible on the ground that the Slovenian courts do not have jurisdiction over the matter and the courts of the Republic of Malta, where it has its principal place of business, instead have jurisdiction. The applicant did not have the status of a consumer since he is a professional player who is not entitled to consumer protection.
- 15 Therefore, the defendant lawfully seized the applicant's money as he had infringed its terms and conditions. Furthermore, in addition to his regular user account, the applicant also had an additional user account, which is prohibited.

Brief summary of the basis for the reference

- 16 The question referred is essential as the final decision turns on it. An examination of the case-law of the Court of Justice shows that it has not yet ruled on such a case. The application of EU law is not so obvious as to leave no scope for any doubt (*acte clair* doctrine). It follows from other cases before the Court of Justice [C-498/16 (*Schrems*, ECLI:EU:C:2018:37), C-297/14 (*Hobohom*, ECLI:EU:C:2015:844), C-441/13 (*Hejduk*, ECLI:EU:C:2015:28), C-375/13 (*Kolassa*, ECLI:EU:C:2015:37), C-508/12 (*Vapenik*, ECLI:EU:C:2013:790), C-218/12 (*Emrek*, ECLI:EU:C:2013:666), C-419/11 (*Česká spořitelna*, ECLI:EU:C:2013:165) C-190/11 (*Muhlleitner*, ECLI:EU:C:2012:542) and C-585/08 and C-144/09 (*Pammer and Hotel Alpenhof*, ECLI:EU:C:2010:740)],

which, moreover, concerned a different factual situation, that the concept of consumer must be interpreted independently and uniformly since it is an autonomous concept of EU law. Consumer protection applies only to the final, private consumer and contracts concluded for the sole purpose of satisfying an individual's own needs in terms of private consumption.

- 17 Account must also be taken of the concept of consumer in other relevant, complementary rules of EU law, such as Regulation No 805/2004, Directives 1999/44/CE and 93/13/CEE, and others. The same applies as regards the Court of Justice's interpretation for the purposes of applying the 1968 Brussels Convention [C-150/77 (*Bertrand*, ECLI:EU:C:1978:137), C-89/91 (*Shearson Lehman Hutton*, ECLI:EU:C:1993:15), C-464/01 (*Gruber*, ECLI:EU:C:2005:32), C-96/00 (*Gabriel*, ECLI:EU:C:2002:436), C-269/95 (*Benincasa*, ECLI:EU:C:1997:337), and others].
- 18 It is clear from the factual circumstances of the case that the circumstances which characterise private consumers and those which characterise the pursuit of an economic activity or a profession overlap. In this respect, there are several relevant but competing circumstances which must be ranked hierarchically and qualitatively under EU law. In the present case, both the interpretation of the concept of consumer proposed by the applicant and the contrary interpretation thereof proposed by the defendant are possible.
- 19 The two interpretations are also conceptually different. In terms of contents, in both alternatives there is a relationship between a traditional concept of consumer and a more modern one and the understanding of an individual's private or professional activity. The interpretation advocated by the applicant construes the professional activity of an individual in the formal sense, whilst the defendant's approach overlooks the manner in which that activity is carried out and emphasises its significance for the individual.
- 20 The different language versions of certain EU Member States,¹ which differ in terms of nuance, cause further confusion. Also, the scope of the comparable

¹ **Slovenian:** 'V zadevah v zvezi s pogodbami, ki jih sklene oseba — potrošnik — za namen, za katerega se šteje, da je izven njegove poklicne ali pridobitne dejavnosti ...' [... In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his professional activity ...].

– **English:** 'In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession ...'.

– **German:** 'Bilden ein Vertrag oder Ansprüche aus einem Vertrag, den eine Person, der Verbraucher, zu einem Zweck geschlossen hat, der nicht der beruflichen oder gewerblichen Tätigkeit dieser Person zugerechnet werden kann ...'.

– **French:** 'En matière de contrat conclu par une personne, le consommateur, pour un usage pouvant être considéré comme étranger à son activité professionnelle ...'.

– **Croatian:** 'Ustvarima koji se odnose na ugovor koji sklopa osoba — potrošač, u svrhe za koje se može smatrati da su izvan njezine profesionalne djelatnosti'.

definitions is not identical in all the languages. In all the language versions, the status of consumer is excluded in the case of the individual's profession.² Some language versions also contain additional word elements. In Slovenian that element states: 'professional activity', which refers to the technical and economic aspect of an inflow of money in the sense of the acquisition of material goods. This is understood in a slightly different way from the English word 'trade',³ which refers to trade as an exchange of goods or services in the sense of an economic and organised market. The German term 'gewerblich', which refers to the importance of the commercial character but more in the sense of individual market orientation, also has a broad meaning. In certain languages there are no additional word elements as described above, merely a link to 'profession' (in the Croatian definition, for example, there are no word elements in addition to 'profession'). The language difference described above shows that the concept set out is not unequivocal in terms of linguistic interpretation, which does not help provide a clearer understanding of Article 15(1) of Regulation No 44/2001.

- 21 This is an interesting issue which concerns a current situation in life which has a broader scope. The subsequent definition of comparable activities, which are already diverging theoretically from the conventional concept of consumption and becoming increasingly widespread, will also turn on the interpretation of the law provided by the Court of Justice. Earning through computer games or other virtual activities, which modern livelihoods and professions entail, could also be classified, by analogy, among such activities. Therefore, the interpretation provided will necessarily also call into question certain traditional associations that are (were) typical of the conventional concept of consumption.

² In Slovenian, 'poklic' (profession); in English, 'profession'; in German, 'beruflich'; in French: 'professionnelle'; in Croatian, 'profesionalne'

³ Online Cambridge dictionary: '*the activity of buying and selling, or exchanging goods and/or services between people*' ... '*business activity*'.