

## Anonymised version

Translation

C-800/19 — 1

Case C-800/19

### Request for a preliminary ruling

**Date lodged:**

30 October 2019

**Referring court:**

Sąd Apelacyjny w Warszawie (Poland)

**Date of the decision to refer:**

30 October 2019

**Applicant:**

SM

**Defendant:**

Mittelbayerischer Verlag KG

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[...]

### DECISION

On 30 October 2019

the Sąd Apelacyjny w Warszawie I Wydział Cywilny (Court of Appeal, Warsaw, First Civil Division)

[...] [composition]

having examined on 30 October 2019 in Warsaw

during an *in camera* hearing

the case brought by SM

against Mittelbayerischer Verlag KG, having its seat in Regensburg,

for the protection of personality rights

following an objection lodged by the defendant

against the decision of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) of 5 April 2019

[...]

refusing to dismiss the action

decides:

I. to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Should Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) be interpreted as meaning that jurisdiction based on the centre-of-interests connecting factor is applicable to an action brought by a natural person for the protection of his personality rights in a case where the online publication cited as infringing those rights does not **[Or. 2]** contain information relating directly or indirectly to that particular natural person, but contains, rather, information or statements suggesting reprehensible actions by the community to which the applicant belongs (in the circumstances of the case at hand: his nation), which the applicant regards as amounting to an infringement of his personality rights?

2. In a case concerning the protection of material and non-material personality rights against online infringement, is it necessary, when assessing the grounds of jurisdiction set out in Article 7(2) of Regulation [[...] No 1215/2012 [...]], that is to say, when assessing whether a national court is the court for the place where the harmful event occurred or may occur, to take account of circumstances such as:

- the public to whom the website on which the infringement occurred is principally addressed;
- the language of the website and in which the publication in question is written;
- the period during which the online information in question remained accessible to the public;
- the individual circumstances of the applicant, such as the applicant's wartime experiences and his current social activism, which are invoked in the present case as justification for the applicant's special right to oppose, by way of judicial proceedings, the dissemination of allegations made against the community to which the applicant belongs?

[...] [procedural information]

[...] [composition]

**[Or. 3]**

[...]

### **Grounds for the decision of 28 October 2019**

[...] [details relating to the parties to the proceedings]

[...] [repetition]

### **Subject matter of the dispute**

1. The subject matter of the dispute relates to the following claims[:] that the defendant be ordered to make a statement apologising to the applicant for infringement of his personality rights through use of the term ‘Polish extermination camp’ online; that it be prohibited from engaging in any further dissemination of the terms ‘Polish extermination camp’ or ‘Polish concentration camp’ in any language; and that it be ordered to pay PLN 50 000 to the Polski Związek Byłych Więźniów Politycznych Hitlerowskich Więzień i Obozów Koncentracyjnych (Polish Association of Former Political Prisoners of Nazi Prisons and Concentration Camps).

### **Facts and positions of the parties**

2. The applicant, SM, a Polish national living in Warsaw, was a prisoner in Auschwitz during the Second World War. The applicant is involved in activities aimed at preserving, in the public consciousness, the memory of the victims of crimes committed by Nazi Germany against Poles during the Second World War. These activities include, for instance, participation in meetings with an educational purpose.
3. The defendant company has its seat in Germany and publishes an online daily newspaper in German on the [www.mittelbayerische.de](http://www.mittelbayerische.de) website, which is regional in nature and is also accessible online from other countries, including Poland.
4. On 15 April 2017, an article entitled ‘Ein Kämpfer und sein zweites Leben’ was published on the [www.mittelbayerische.de](http://www.mittelbayerische.de) website. This article **[Or. 4]** presented the wartime and post-war fate of Israel Offman, a Jewish Holocaust survivor who was born in Częstochowa (Poland), was deported to the ghetto in 1941, was later incarcerated in camps in Bliżyn, Auschwitz-Birkenau, Sachsenhausen and Dachau, worked as a forced labourer in Leonberg and Plattling, and finally settled permanently in Germany after the war. The article starts with a story about how, in 1961, after the birth of Israel Offman’s third child, a registrar in Niederbayern

(Lower Bavaria) refused to register the name that the parents had chosen for the girl, claiming that it sounded too foreign and could not be pronounced in German. The article then explains that the parents wanted to name their daughter Faya because that was the name of Israel Offman's sister, who, as was stated in the original text of the article: 'was murdered in the Polish extermination camp of Treblinka'.

5. It is an undeniable historical fact that the camp in Treblinka was a German Nazi extermination camp established during the Second World War within the territory of occupied Poland.
6. According to the defendant's statements, which the applicant did not deny, the original phrase 'Polish extermination camp of Treblinka' remained on the website for only a few hours on 15 April 2017, from 5.00 a.m., when the entire article was published online, until around 1.40 p.m., when, after an e-mail intervention by the Polish consulate in Munich, the phrase in question was replaced with the following: 'was murdered by the Nazis in the German Nazi extermination camp of Treblinka in occupied Poland'. A footnote under the article contains a short explanation that the phrase 'Polish extermination camp of Treblinka' was originally used in the text and was subsequently corrected.
7. Enclosed with the application, the applicant submitted a printout of the disputed publication in its corrected version. In his application, the applicant did not specify the circumstances in which he became aware of the publication. The order of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw), which called on the applicant's counsel to describe the factual circumstances of the claim more precisely by stating whether the applicant has a command of the German language, when (before or after the correction of the disputed phrase) and how (whether directly online or through third parties) he became aware of the publication, remained unanswered.

#### **Claims and position of parties**

8. In the circumstances presented above, the applicant lodged an application with the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) on 27 November 2017. The applicant requests that his personality rights, in particular national identity and national dignity, be protected by:

#### **[Or. 5]**

- prohibiting the defendant from disseminating in any way the terms 'Polish extermination camp' or 'Polish concentration camp' in German or any other language in relation to German concentration camps located within the territory of occupied Poland during the Second World War;
- ordering the defendant to publish on its website a statement with the content specified in the application, apologising to the applicant for the infringement of

his personality rights caused by the online publication of 15 April 2017, which suggested that the extermination camp in Treblinka was built and operated by Poles;

- ordering the defendant to pay the amount of PLN 50 000 to the Polski Związek Byłych Więźniów Politycznych Hitlerowskich Więzień i Obozów Koncentracyjnych (Polish Association of Former Political Prisoners of Nazi Prisons and Concentration Camps).

9. To justify the jurisdiction of the Polish court, the applicant relied on the judgment of the Court of Justice in *eDate Advertising v Martinez* (Joined Cases C-509/09 and C-161/10).
10. The defendant company, before entering into a dispute on the merits of the case, filed a motion for dismissal of the action on the ground that Polish courts lack jurisdiction. The defendant stresses that, unlike the situation in Joined Cases C-509/09 and C-161/10, the online article which became the basis for SM's action did not directly concern the applicant. The defendant also emphasises its regional profile and readership range, as its reporting covers the Oberpfalz (Upper Palatinate, Bavaria) and focuses primarily on regional news, while the heading 'Germany and the World' is only in fourth place on the page menu. The defendant also points out that the website exists solely in a German-language version.
11. The defendant relies on recitals 15 and 16 of Regulation No 1215/2012, pointing to the requirement that jurisdiction must be predictable. The defendant claims that, operating on a local scale and addressing its message to recipients who do not include the applicant, the defendant could not have objectively foreseen the jurisdiction of Polish courts. In its view, Article 7(2) of Regulation No 1215/2012 does not apply to this case and therefore Article 4(1) of the regulation must apply, which leads to the conclusion that German courts have jurisdiction over the case. The defendant further submits that the national court must request the Court of Justice to interpret Article 7(2) of Regulation No 1215/2012.

### **Progress of the civil case to date**

12. By its order of 5 April 2019, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) rejected the defendant's motion for dismissal of the action because it considered that the conditions laid down in Article 7(2) of Regulation [No] 1215/2012 [**Or. 6**] were met in the case in question. That court pointed out that, over the period from 15 April 2017 to 29 November 2018, there had been more than 32 000 visits from Poland to the defendant's website and as a result Poland was ranked 14<sup>th</sup> out of 25 countries of origin. The defendant, that court found, could have foreseen that the publication might reach readers in other countries, including Poland, and be considered to infringe their personality rights. It could also have foreseen that the online publication of an article containing the phrase 'Polish extermination camps' ('*Polnische Vernichtungslager*') might be noticed by Polish readers. Owing to the online availability of the publication in Poland

and also in view of its content, Poland may be regarded as the place where personality rights are infringed and the defendant could have foreseen that an action against it might be brought before a Polish court.

13. On 25 April 2019, the defendant lodged an objection against the decision of the Sąd Okręgowy (Regional Court) referred to in point 12. The defendant does not agree with the decision which recognises the jurisdiction of Polish courts. It alleges an infringement of Article 7(2) of Regulation No 1215/2012 as a result of the latter's application, despite the fact that it was not reasonably possible to foresee court proceedings in Poland. The defendant submits that, if the content of an article concerns a person other than the applicant or does not concern any particular person, the defendant is objectively unable to predict the court before which it may be sued. The defendant points out that the content of the article in question is so 'distant' from Poland and devoid of any connection to Poland that this objectively excludes any reasonable foreseeability of court proceedings in Poland.

### **Applicable legislation**

#### National law

14. Article 1099(1) of the Kodeks Postępowania Cywilnego (Code of Civil Procedure) stipulates:

'The court shall in each case, of its own motion, take into consideration a lack of domestic jurisdiction. If the court finds that there is no domestic jurisdiction, it shall dismiss the application or motion subject to Article 1104(2) or Article 1105(6)'.

#### EU law

15. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable to this case. In particular, Articles 4(1), 5(1) and 7(2) of the regulation need to be analysed, taking into account its recitals 15 and 16.

[Or. 7]

### **Grounds for the request for a preliminary ruling**

16. At the present stage of the main proceedings, no consideration may be given to the substantive law applicable to the assessment of the claims submitted and the Sąd Apelacyjny (Court of Appeal) is even less able to consider whether those claims have merit under the substantive law and whether the applicant is entitled to make them. The Sąd Apelacyjny (Court of Appeal) must first decide whether the

jurisdiction of the Polish court under Article 7(2) of Regulation No 1215/2012 is justified on the basis of the parties' statements as to the facts of the case and the reasons for lodging the application with a Polish court. The Sąd Apelacyjny (Court of Appeal) is examining the question of jurisdiction as a preliminary procedural issue. All references to the claims and facts of the case are intended solely to assess whether or not the Polish courts have jurisdiction and do not express the court's opinion on the merits of the case. A substantive assessment of the claims will be possible only if the jurisdiction of Polish courts is established and it will be first conducted by the court of first instance.

**The first question:**

17. In the opinion of the Sąd Apelacyjny (Court of Appeal), reference to the Court of Justice is justified, since the doubts raised in this case as to the interpretation of Article 7(2) of Regulation [No] 1215/2012 cannot be resolved by reference to the judgments of the Court of Justice in Case C-194/16 (judgment of 17 October 2017; EU:C:2017:766) and in Joined Cases C-509/09 and C-161/10 (judgment of 25 October 2011; EU:C:2011:685). Although the aforementioned judgments were delivered in cases in which the applicants also sought protection of their personality rights against online infringements, in all three cases the applicants were (legal and natural) persons directly described in the contested publications, which mentioned them by name (company name in the case of the company) and presented information directly related to the applicants which portrayed them in a bad light or encroached on their privacy.
18. The circumstances of the case currently being examined by the Sąd Apelacyjny (Court of Appeal) are different. In the article, the applicant is neither the protagonist nor a peripheral character. Nor does the article deal with Poland, which is mentioned only because its protagonist was born in Poland and survived part of the Second World War there.
19. However, the applicant felt aggrieved by the phrase 'Polish extermination camp' used in the publication, which in his opinion is an attempt to link the Polish nation to the construction and [Or. 8] operation of the extermination camp in Treblinka. The applicant was himself a prisoner in Auschwitz, and he is now undertaking efforts to preserve in the public consciousness the memory of the victims of crimes committed by the Germans against the Polish nation during the Second World War. He is outraged that Germans, who once tried to prevent Auschwitz from being called a 'German extermination camp' by UNESCO, should today use the term 'Polish' with respect to another extermination camp, knowing that this is misleading and offensive to Poles.
20. Given the diminishing historical awareness of successive generations of Europeans, for whom the Second World War is no longer an experience that directly shaped their own or their parents' attitudes and experiences, but is rather seen as a distant period in the history of Europe and the world, it may be assumed

[–] in the opinion of the Sąd Apelacyjny (Court of Appeal) [–] that there is a real risk that a publication using the phrase ‘Polish extermination camp’ will create for some readers (especially younger and less educated readers) the false impression that it was the Poles who established the extermination camps and were responsible for the crimes committed therein.

21. It appears that, as part of the requirements placed on the press, journalists and online publishers, particularly from Germany, can be expected to be aware of the risk of such misrepresentation. Given the historical background, it should also not be surprising that Poles, and especially former prisoners of extermination camps, are particularly sensitive to such misrepresentations or misleading mental shortcuts. When talking about Poland in the context of the Second World War, we cannot ignore the whole body of historical facts of which the German publisher should be aware, that is, the exceptionally oppressive nature of the German occupation of the territory of Poland from 1939 to 1945. Therefore, in the opinion of the Court of Appeal, it should come as no surprise to a German company that its online use of the phrase ‘Polish extermination camp’ may elicit a negative reaction in Poland; it is particularly shocking to the oldest generations and especially to those Poles who were themselves incarcerated in extermination camps or whose relatives were killed by the German occupiers during the Second World War.
22. However, the question arises as to whether the foregoing special circumstances as well as the requirements placed on the professional integrity of journalists are sufficient to determine that the defendant could have reasonably foreseen that, in connection with the content of its publication, an action for the protection of personality rights of a specific natural person might be brought against it before a Polish court. Essentially, it cannot be claimed that the publication alleges that [Or. 9] the applicant or any other specific Pole committed any reprehensible acts. Even the broadest interpretation of the article does not allow the assumption to be made that SM is the person described, directly or indirectly, in the text.
23. The Sąd Apelacyjny (Court of Appeal) also notes that the same reasons as those on which the applicant relies to justify Polish jurisdiction could be invoked by other potential applicants — Poles domiciled in other Member States of the European Union — in cases against the defendant company in connection with the disputed article, as justification for the jurisdiction of the courts of the Member State in which they have their centre of interests. Therefore, if it were to be accepted in this case that the conditions for establishing the jurisdiction of the Polish court are satisfied, it seems that this would also mean accepting that the defendant company, when it decided to publish the disputed article, should have foreseen that it might be sued in the courts of practically any Member State, given the presence of Poles in the Member States as a result of successive waves of migration both before and after [Polish EU accession in] 2004, because undoubtedly people of Polish nationality who show attachment to the Polish nation and fully preserve their Polish national identity live not just in Poland, but also in many Member States where they have the centre of their life interests.



Many such people themselves, or their predecessors, suffered at the hands of the German occupiers during the Second World War. Potentially, any of them could bring a similar action.

24. It should be noted that, in the national case-law to date, courts have recognised themselves as having jurisdiction in such cases (including the decision of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) of 9 September 2019, ref. no. I ACz 509/19, made in a similar case against another German company). However, the Sąd Apelacyjny (Court of Appeal), in its current composition, has doubts as to whether the requirement of reasonable predictability of jurisdiction laid down in recitals 15 and 16 of the Regulation can be construed as broadly as the applicant proposes. The assumption that a general negative reference to a particular nation or other large group (religious, ethnic or professional) requires an online publisher to foresee the possibility that a member of such a group might sue it in a court [having jurisdiction in the place] where the applicant has the centre of his life interests, would in fact result in a finding that the courts of several EU Member States have jurisdiction in similar judicial proceedings. Therefore, when publishing general information or assessments concerning large groups of people, the publisher would have to foresee the jurisdiction of multiple or even all EU Member States. In the view of the Sąd Apelacyjny (Court of Appeal), the effect of this legal interpretation [**Or. 10**] might be incompatible with the obligation to interpret rules on jurisdiction in a manner consistent with recitals 15 and 16 of Regulation No 1215/2012. However, since the Sąd Apelacyjny (Court of Appeal) is not empowered independently to interpret a provision of EU law which raises doubts as to its interpretation, such a power being reserved for the Court of Justice, the need has arisen to refer to the Court of Justice the question set out in Section I.1 of the operative part of this decision.

**The second question:**

25. The question set out in Section I.2 of the operative part of this decision will require an answer only if the Court of Justice finds that it is possible, in principle, to establish jurisdiction under Article 7(2) of Regulation No 1215/2012 in a case concerning the protection of personality rights in which the contested online publication does not refer explicitly to the applicant but contains references to a community, such as a nation, of which the applicant is a part and with which he strongly identifies.
26. If the above principle were to be accepted, it would be necessary to lay down more detailed assessment criteria and thus to determine whether such criteria might include, firstly, the applicant's individual characteristics as described in points 2 and 19 and, secondly, the circumstances described in point 10 on which the defendant relies, such as the profile and readership range of the online daily newspaper, the language of the article and of the website, and finally the short period during which the disputed phrase, which was subsequently corrected, remained on that website.

27. In the view of the Sąd Apelacyjny (Court of Appeal), the circumstances set out above justify suspension of the main proceedings and referral of the questions set out in the operative part of the decision to the Court of Justice for a preliminary ruling.

[...] [signatures]

WORKING DOCUMENT