Case C-190/21

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:

26 March 2021

Referring court or tribunal:

Oberlandesgericht Stuttgart (Germany)

Date of the decision to refer:

15 January 2021

Defendant and appellant:

PayPal (Europe) S.à r.l. et Cie, S.C.A.

Applicant and respondent:

PQ

Subject matter of the case in the main proceedings

International jurisdiction in the case of claims brought against a payment service provider in connection with prohibited online games of chance

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the first paragraph, point (b), and the second paragraph of Article 267 TFEU on the interpretation of Article 7, point 1, and Article 7, point 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 (the Brussels Ia Regulation):

1. Is a claim in tort, considered in isolation and given an independent meaning, to be regarded as a contractual claim pursuant to Article 7, point 1, of the Brussels Ia Regulation in the case where the claim in tort competes somehow with a contractual claim, but its existence does not depend upon the interpretation of the contract?

2. If Question 1 is answered in the negative: Where a payment service provider remits electronic money from a customer's account to the payment account of a gaming operator held with the same payment service provider and the involvement of the payment service provider in payments to the gaming operator might be perceived as being tortious in nature, is the place where the harmful event occurred within the meaning of Article 7, point 2, of the Brussels Ia Regulation to be found in:

2.1 The place where the payment service provider has its seat, as the place of the e-money transaction?

2.2 The place where a claim for reimbursement of expenses accrues to the payment service provider against the customer who instructed the payment as a result of the transaction (provided that it is lawful)?

2.3 The place where the customer who instructed the payment is resident?

2.4 The place where the customer's bank account, for which the payment service provider holds a direct debit mandate which allows it to top up the e-money account, is held?

2.5 The place where the money remitted by the payment service provider to the player's betting account with the gaming operator is lost during gaming, that is to say, the place in which the gaming operator has its seat?

2.6 The place where the customer plays the prohibited game (provided that this is also where the customer is resident)?

2.7 None of these places?

2.8 If Question 2.2 is answered in the affirmative and it is the place where a claim for reimbursement of expenses accrues to the payment service provider against the customer as a result of the transaction: Where does the claim for reimbursement of expenses accrue against the customer who instructed the payment? Can the place of performance of the framework contract for payment services or the place in which the debtor is resident be taken to be the place where that debt is located?

Provisions of EU law cited

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) ('the Brussels Ia Regulation'), especially Article 7, points 1 and 2

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ 2007 L 199, p. 40) ('the Rome II Regulation'), Article 4(1)

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35)

Provisions of national law cited

Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), Paragraph 823(2)

Staatsvertrag zum Glücksspielwesen in Deutschland (State Treaty on Gaming in Germany; 'the State Gaming Treaty'), Paragraph 4(1)

Brief summary of the facts and procedure

1 The applicant in the main proceedings, who is resident in Germany, claims that the defendant should reimburse payments totalling EUR 9 662.23 which he instructed the defendant to make to online gaming operators based in Malta and Gibraltar between 23 June 2017 and 15 August 2017.

2 The defendant, whose business is established in Luxembourg, provides online payment services. It made the payments instructed by the applicant and, where the amount remitted exceeded the balance on the e-money account held by the applicant with the defendant, it collected the amounts from the giro account held by the applicant with a bank in Aalen (in the federal *Land* of Baden-Württemberg, Germany).

3 For the purposes of the relationship between the gaming operators and the applicant (as the player), the applicant's betting account with the gaming operators first had to be topped up before it could be used for gaming. The betting account was topped up from time to time by means of money remitted by the defendant on the applicant's instruction. The defendant had concluded 'acceptance contracts' with the gaming operators (payees) allowing payments to be accepted via the defendant's payment service.

4 The applicant had already held, for several years, a business account with the defendant, which he used to process payments totalling approximately USD 3.6

million from his activity as a trader in multimedia accessories. The defendant's terms of business, which were included in the contract between the parties, contained a non-exclusive jurisdiction agreement in favour of the English courts and a choice-of-law clause in favour of the laws of England and Wales.

5 In mid-August 2017, following the last of the contested online games, the applicant demanded that the defendant reimburse to him the sum of EUR 9 662.23 remitted to the gaming operators. The applicant is now basing that claim on Paragraph 823(2) of the BGB, which states that a person 'who commits a breach of a statute that is intended to protect another person' must make compensation for the damage, rather than on breach of contractual terms. The applicant is of the opinion that the 'statute' for the purpose of that provision follows from Paragraph 4(1) of the State Gaming Treaty, which reads as follows: 'Public games of chance may be organised or arranged only with the permission of the competent *Land* authority. It is prohibited to organise or arrange games of chance without such permission (unlawful games of chance) or to be involved in payments in connection with unlawful games of chance.' Online games of chance are prohibited in principle under the State Gaming Treaty.

6 The State Gaming Treaty did not apply in the federal *Land* of Schleswig-Holstein (Germany) at the time when the applicant played the games. Before concluding its acceptance contracts with the gaming operators, the defendant obtained assurances from them that they had a licence to provide online games of chance for the federal *Land* of Schleswig-Holstein. However, both the applicant's place of residence and the applicant's bank account to which the defendant had access in order to top up the e-money account were located in Baden-Württemberg.

7 The Landgericht Ulm (Regional Court, Ulm, Germany) upheld the action at first instance and ordered the defendant to make payment. Although it assumed that it had jurisdiction under Article 7, point 2, of the Brussels Ia Regulation, it found that that jurisdiction applied solely for the purpose of considering the applicant's claims based on tortious actions on the part of the defendant, but that the German courts did not have jurisdiction in respect of contractual claims.

8 By its appeal, the defendant contends that the German courts do not have international jurisdiction in matters relating to tort either.

Brief summary of the basis for the request

9 The answers given to the questions referred will determine both whether the German courts have international jurisdiction to hear the action and, indirectly, which law applies. If the place of the harmful event in matters relating to tort, within the meaning of Article 7, point 2, of the Brussels Ia Regulation, is located in Germany, the relevance of German law on tort will have to be considered in accordance with Article 4(1) of the Rome II Regulation. However, in terms of the interpretation of the Brussels Ia Regulation, there is no *acte clair*.

Jurisdiction of the German courts under Article 18(1) or Article 7, point 1, of the Brussels Ia Regulation

10 The present case differs from past cases of payment services in connection with games of chance adjudicated by the German courts in that it has not been brought before the courts in Germany with jurisdiction in matters relating to consumers. That is because it would appear that the question of whether the contract was concluded for a purpose which can be regarded as being outside the applicant's trade or profession, as required by Article 17(1) of the Brussels Ia Regulation, depends on the framework contract within the meaning of Article 4, point 21, of Directive 2015/2366, rather than on the individual payment instructions. According to that provision, the relevant framework contract is a 'payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account'. The rights and obligations of the parties follow from that contract. By the individual instructions, the payer simply specifies the payment to be made by the payment service provider in each particular instance.

11 The applicant used his business account with the defendant to take part in the games of chance in question. He passed sales of over USD 3.6 million from his professional activity through that account, with the result that his professional activity is of more than secondary importance. The referring court is therefore satisfied that the applicant is not to be regarded as a consumer within the meaning of Article 17(1) of the Brussels Ia Regulation for the purposes of the payment services contract, meaning that the jurisdiction of the German courts does not follow from Article 18(1), read in conjunction with Article 17(1)(c), of that regulation, even if the individual remittances which the applicant instructed to be made from his business account for the game of chance fell outside his professional activity.

12 Nor do the German courts have jurisdiction under Article 7, point 1, of the Brussels Ia Regulation. The defendant's payment services at issue are services within the meaning of Article 7, point 1(b), of that regulation. That provision states that the place of performance of the obligation is 'the place in a Member State where, under the contract, the services were provided or should have been provided'. That depends on the centre of activity which, even in the case of online services, is, in principle, the place where the service provider has its seat (*in casu*, therefore, Luxembourg). Consequently, the international jurisdiction of the German courts can, at best, be based on jurisdiction in matters relating to tort within the meaning of Article 7, point 2, of the Brussels Ia Regulation.

Jurisdiction of the German courts under Article 7, point 2, of the Brussels Ia Regulation

13 According to the settled case-law of the Court of Justice, the expression 'place where the harmful event occurred or may occur' in Article 7, point 2, of the Brussels Ia Regulation, means both the place where the damage occurred (place of

the damage; 'Erfolgsort') and the place of the event giving rise to it (place of the act; 'Handlungsort'), meaning that the applicant may sue the defendant in the courts of either of those places (landmark judgment of 30 November 1976, *Handelskwekerij Bier* v *Mines de Potasse d'Alsace*, 21/76, EU:C:1976:166; see also judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, paragraph 45 and the case-law cited).

14 The referring court is satisfied that the place of the act is the place of the defendant's seat in Luxembourg, not in Germany. Therefore, the questions referred focus on the place of the damage in matters relating to tort within the meaning of Article 7, point 2, of the Brussels Ia Regulation (Question 2) and on the upstream relationship between the courts having jurisdiction in matters relating to tort and the courts having jurisdiction in matters relating to a contract under Article 7, point 1, of that regulation (Question 1).

Question 1: Relationship between the courts having jurisdiction in matters relating to tort under Article 7, point 2, and the courts having jurisdiction in matters relating to a contract under Article 7, point 1, of the Brussels Ia Regulation

15 The term 'tort' used in Article 7, point 2, of the Brussels Ia Regulation is to be given an independent meaning (judgment of 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459, paragraphs 14 and 16). That provision covers actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 7, point 1 (judgments of 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459, paragraph 17; of 13 March 2014, *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 20; and of 12 September 2018, *Löber*, C-304/17, EU:C:2018:701, paragraph 19). The negative criterion, namely that the action is not related to a contract, raises the question of its relationship to the courts having jurisdiction in matters relating to a contract.

16 Although the Court of Justice has long established in its case-law that contractual claims cannot be enforced in the courts with jurisdiction in matters relating to tort (landmark judgment of 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459), it has, *per contra*, yet to rule definitively as to whether claims in tort are to be enforced in the courts having jurisdiction in matters relating to a contract and the extent to which claims that, in the absence of a parallel contractual claim, would have to be qualified as claims in tort compete with a contractual claim and thus perhaps themselves become a contractual claim.

17 The Court has held that a claim in tort is to be classed as a contractual claim within the meaning of Article 7, point 1, of the Brussels Ia Regulation where 'the interpretation of the contract … is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of' (judgment of 13 March 2014, *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 25). If the right to damages in tort depends upon breach of the terms of a contract, it must thus be

enforced in the courts having jurisdiction in matters relating to a contract, to the exclusion of the courts having jurisdiction in matters relating to tort.

18 The question is how far the predominance of the courts having jurisdiction in matters relating to a contract reaches in a case such as that at issue in the main proceedings. It would be conceivable to allow it to reach a long way in the sense that, whenever the conduct complained of under the law is identical to the complaint of breach of the terms of a contract, all claims are qualified as claims in matters relating to a contract. That would also encompass cases of simple competition between contractual claims and claims in matters of tort. In the main proceedings, an action in the court having jurisdiction in matters relating to tort would not be precluded if the defendant's conduct complained of might also establish a claim of breach of the terms of a contract, regardless of whether a claim of breach of the terms of a contract is in fact enforced and whether the unlawfulness of the tort complained of depends upon it (a 'maximalist reading' of the judgment in *Brogsitter* is convincingly rejected by Advocate General Saugmandsgaard Øe in his Opinion of 10 September 2020, *Wikingerhof*, C-59/19, EU:C:2020:688, points 69 and 74 et seq.).

19 However, the referring court understands the case-law of the Court of Justice in a narrower sense (referred to as a 'minimalist reading' of the judgment in *Brogsitter* by Advocate General Saugmandsgaard Øe in his Opinion in Case C-59/19, point 70), namely to mean that the interpretation of the contract must be indispensable to establish the lawful or unlawful nature of the conduct complained of. That would not apply in a case of simply competing claims in which a claim based on tort might continue to exist were the contract to be null and void for any reason.

20 On the basis of this interpretation advocated by the referring court, the predominance of the court having jurisdiction in matters relating to a contract would extend only to cases in which the tort complained of actually depends upon breach of the terms of a contract. The referring court finds that this interpretation is corroborated in particular by the more recent case-law of the Court of Justice (judgment of 24 November 2020, *Wikingerhof*, C-59/19, EU:C:2020:950, paragraphs 33 to 38).

Question 2: Place of the damage in matters relating to tort within the meaning of Article 7, point 2, of the Brussels Ia Regulation

21 In the case of purely financial damage, it is difficult to establish predictably where the place of the damage is located in matters relating to tort without establishing a general *forum actoris*. Although one could predict, in the case of purely financial damage, that the injured party's place of residence is generally located where his 'assets are concentrated', which would, however, almost always give rise to a *forum actoris* and might thus conflict with the jurisdiction criteria in the Brussels Ia Regulation, the Court of Justice has attempted to avoid this in its case-law, admitting the applicant's place of residence or the location of his general bank

account as the place of the damage in matters relating to tort at most on the basis of additional factors (judgments of 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449, paragraphs 35 and 38, and of 12 September 2018, *Löber*, C-304/17, EU:C:2018:701, paragraphs 28 and 30). In the light of these considerations, the place of the damage may be located in one of several places in the present case.

Question 2.1: Seat of the payment service provider, as the place of the e-money transaction?

22 First, it is reasonable to suppose that the place of the damage in matters relating to tort in connection with assistance in payments is located in the place where, as a result of the payment, the funds leave the injured party's e-money account and are credited to another account with the same payment service provider. That would be at the defendant's registered office in Luxembourg in this case. The referring court is of the opinion in this regard that it cannot be inferred from the fact that an e-money account is not a conventional bank account containing scriptural money that financial damage cannot be incurred in an e-money account.

Question 2.2: Place where a claim for reimbursement of expenses accrues to the payment service provider against the customer as a result of the transaction?

23 It is also conceivable, on the basis of the abovementioned judgment in *Universal Music*, that the relevant place is the place where the assets were encumbered with a debt. Thus, the debt generated by the payment transaction would be the primary factor. The payment service provider's claim to reimbursement of expenses is provided for under both German law and English law, which arguably applies to the contract between the parties pursuant to the choice-of-law clause. However, the place where the defendant's claim is located is not easily determined in this case (see Question 2.8).

Question 2.3: Place where the customer is resident?

24 In the case of purely financial damage, it would be conceivable to take the place where the injured party is resident and his 'assets are concentrated' as the place of the damage in matters relating to tort. However, as stated previously, that would regularly give rise to a *forum actoris* and would conflict somewhat with the jurisdiction criteria in the Brussels Ia Regulation. It would be necessary to consider the applicant's place of residence at most in combination with additional factors in this case, such as the place where the online game of chance was played (see Question 2.6).

Question 2.4: Place where the customer's bank account is held?

25 The defendant had access to the applicant's giro account with a bank in Aalen via a direct debit mandate. Even if that account presents a closer connection to the

e-money transactions than some other general bank account due to the direct debit mandate, the connection to the location of an account would, however, appear to be comparatively random. Moreover, the account in this case is, alongside various credit cards, just one of the several sources of payments used to top up the e-money account (see, with regard to this argument, judgment of 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449, paragraph 38).

Question 2.5: Place where the money is lost during gaming, that is to say, the place in which the gaming operator has its seat?

26 A connection to the place in which the money remitted to the applicant's betting accounts with the online gaming operators in Malta and Gibraltar was lost might be suggested by the fact that it was only then that it was certain that the damage to the applicant had occurred and that his assets had been irrevocably reduced by his gaming losses. Even after the defendant had remitted money from the applicant's e-money account to the betting accounts, it was theoretically possible that a profit might be achieved. That was precluded only once the bet had been gambled away. However, the fact that the seats of the gaming operators are randomly located in Malta or Gibraltar suggests that the place of the damage in matters relating to tort should not be located in the legal relationship between the parties.

Question 2.6: Place where the customer plays the prohibited game?

27 Taking the place where the payment service provider's customer actually plays the prohibited online game of chance, that is to say, where he is physically present at the time of the game, as the place of the damage in connection with involvement in payments and in matters relating to tort would provide a much closer link to the relationship between the parties. Establishing the place of the damage in matters of tort thus would also have the advantage of creating a parallel to the territorial scope of the standards potentially infringed. If the applicant had played in Schleswig-Holstein or in another country outside Germany where games of chance are not prohibited, the game would not have been prohibited, nor would the defendant's involvement in the payment complained of in this case have been prohibited.

Question 2.7: None of these places?

28 Advocate General Szpunar noted and strongly argued that, with some types of direct financial damage, it is impossible to make a meaningful distinction between the place of the act ('Handlungsort') and the place of the damage ('Erfolgsort') (Opinion of 10 March 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:161, point 38). The case-law of the Court dating back over 40 years which allows the applicant to choose, in matters relating to tort, between the courts in the place where the damage occurred and the courts in the place where the harmful event occurred (landmark judgment of 30 November 1976, *Handelskwekerij Bier* v *Mines de Potasse d'Alsace*, 21/76, EU:C:1976:166) has

not been developed in the context of direct financial damage and, moreover, is certainly not intended to extend the derogations from the general rule of the courts in the place of the defendant's domicile established in Article 4 of the Brussels Ia Regulation (or the Brussels Convention in force at the time). On the contrary, the reason for that choice lies 'in the necessity of staying as close as possible to the facts of the case and of designating the court aptest for settling the case and, in that context, of conducting proceedings efficiently, for example by taking evidence and hearing witnesses' (Opinion of Advocate General Szpunar of 10 March 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:161, point 39). As, in the case of direct financial damage, this objective is hard to achieve by trying to determine the location of the place of the damage in matters relating to tort, the question arises as to whether legal certainty would be better served in such cases by leaving it with the courts with general jurisdiction and the courts with specific jurisdiction in the place where the harmful event occurred.

Question 2.8: Determining where a claim for reimbursement of expenses accrues to the payment service provider against the customer if Question 2.2 is answered in the affirmative

29 If Question 2.2 is answered in the affirmative and it is the place where the customer's assets are encumbered by the payment service provider's claim, the place where that claim accrues still needs to be established. One of two main approaches might be taken here.

30 First, the place of performance of the contract might be used to determine where that place is located. Inasmuch as EU law provides for the location of the place of performance to be determined independently for the service referred to in Article 7, point 1(b), of the Brussels Ia Regulation, it would make sense to use the relevant place of performance of all obligations pursuant to the contract to determine where the place of the damage in matters of tort is located where there has been corresponding 'damage in matters relating to an obligation'. In this case, that would be the place where the service under the payment services contract was provided, that is to say, at the defendant's seat in Luxembourg.

31 Alternatively, one might try to determine the place where the individual claim is located based on the conduct complained of towards the injured party. If the individual claim is considered to be part of the creditor's assets, it is usually taken as being located in the place where the debtor is domiciled for various purposes (e.g. for enforcement).

Conclusion

32 Inasmuch as the place of the damage must always be determined separately from the place of the act even in the case of direct financial damage, where involvement in payment in connection with a prohibited game of chance is complained of, the referring court is inclined, in the first place, to take the place where the game was

played, provided that this coincides with the place where the injured party is resident, or, in the second place, the place where the involvement in payment caused the sum of money to leave the injured party's e-money account, that is to say, the place where the payment service provider has its seat (place of the payment transaction), as the place of the damage.