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Gloss to the Judgement of the Court of Justice of the European Union dated 23 December 2015 in the case C-297/14 Rüdiger Hobohm v. Benedikt Kampik Ltd Co. KG, Benedikt Aloysius Kampik, Mar Mediterraneo Werbe- und Vertriebsgesellschaft für Immobilien SL (ECLI:EU:C:2015:844)

"Article 15(1)(c) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, read in conjunction with Article 16(1) of that regulation, must, in so far as it relates to the contract concluded in the context of a commercial or professional activity 'directed' by the professional 'to' the Member State of the consumer's domicile, be interpreted as meaning that it may be applied to a contract concluded between a consumer and a professional which on its own does not come within the scope of the commercial or professional activity 'directed' by that professional 'to' the Member State of the consumer's domicile, but which is closely linked to a contract concluded beforehand by those same parties in the context of such an activity. It is for the national court to determine whether the constituent elements of that link are present, in particular whether the parties to both of those contracts are identical in law or in fact, whether the economic objective of those contracts concerning the same specific subject-matter is identical and whether the second contract complements the first contract in that it seeks to make it possible for the economic objective of that first contract to be achieved."

I

1. **Introduction**. Consumer protection plays a vivid role in recent developments of the EU private international law.[1] As to the rules that govern jurisdiction in civil matters the Brussels regulation[2] provides that a consumer who actually concluded a valid contract with

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[1] G. Rühl, *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, „Journal of Private International Law" 2014, vol. 10, issue 3, p. 335; Z.S. Tang, *Private International Law in Consumer Contracts: A European Perspective*, „Journal of Private International Law" 2010, vol. 6, issue 1, p. 225.

[2] Council Regulation (EC) No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (OJ L 12 dated 16 January 2001, pp. 1-39), hereinafter: Brussels regulation; Brussels regulation was amended by 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* (recast) that came into force on January 10, 2015. Commented articles of the Brussels regulation i.e. article 15 and 16 have been renumbered, though their content remained unchanged in the

a professional and such a contract falls within one of the categories referred to in Article 15(1)(a) to (c) thereof could sue the counterparty in the place of his or her own domicile.[3] This provision provides a broad exception to the basic rule *actor sequitur forum rei* and, therefore, it is crucial to precisely delimit its scope.

2. According to Article 15(1)(a)-(c) of the Brussels regulation the consumer contracts to which the protective jurisdiction rules apply are: (a) contracts "for the sale of goods on instalment credit terms"; (b) contracts "for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods" and "(c) in all other cases, the contracts that have been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities".[4]

3. As regards the latter case, it follows from the wording of Article 15(1)(c) of the Brussels regulation that, in order for the contract to be covered by the provisions on protective jurisdiction in consumer matters, two elements must be present.[5] It is necessary, first, that the professional pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State. Secondly, **that the contract at issue comes within the scope of such activities**.[6]

4. In the commented case it was not disputed that the defendant had been directing certain commercial activities to the place of consumer's domicile. However, the defendant (professional) made direct offer to the claimant (consumer) in which he proposed conclusion of a contract that aimed at ensuring economic viability of a contract agreed beforehand. The first contract fell within the scope of economic activities of the professional while the second did not.

5. The legal doubts that arose were twofold. Firstly, the question was whether a single offer addressed individually to a consumer triggers the protective jurisdiction regime as set forth in Articles 15 and 16 of the Brussels regulation. Secondly and alternatively, whether a consumer could rely on the aforementioned provisions when he sues for a breach of a contract that does not fall within the scope of economic activities of the professional but

new articles 17 and 18. Therefore the judgement and comments made thereupon remain importance in the current state of EU law.

[3] Judgement of the Court of Justice of the European Union dated 14 March 2013 in the case C-419/11 *Česká spořitelna, a.s. v Gerald Feichter.,* ECLI:EU:C:2013:165, section 30; Judgement of the Court of Justice of the European Union dated 28 January 2015 in the case 375/13 *Harald Kolassa v Barclays Bank plc*., ECLI:EU:C:2015:37, section 23; Judgement of the Court of Justice of the European Union dated 23 December 2015 in the case C-297/14 *Rüdiger Hobohm v. Benedikt Kampik Ltd Co. KG, Benedikt Aloysius Kampik, Mar Mediterraneo Werbe- und Vertriebsgesellschaft für Immobilien SL*, EU:C:2015:844, section 24.

[4] A. Kunkiel-Kryńska, *Prawo konsumenckie UE – jurysdykcja w sprawach dotyczących umów zawartych przez konsumentów*, „Europejski Przegląd Sądowy" 2012, vol. 9.

[5] U. Magnus, P. Mankowski, *Brussels I Regulation*, Köln 2016, p. 481.

[6] Judgement of the Court of Justice of the European Union dated 23 December 2015 in the case C-297/14 *Rüdiger Hobohm v. Benedikt Kampik Ltd Co. KG, Benedikt Aloysius Kampik, Mar Mediterraneo Werbe- und Vertriebsgesellschaft für Immobilien SL*, EU:C:2015:844, section 27.

which has been concluded as a result of enforcing an earlier agreement that enjoys such protection.

II

6. **Facts.** Commented case concerns the jurisdiction over consumer transaction-management contract. Rüdiger Hobohm (the Buyer), German citizen, intended to buy an apartment in a tourist complex in Spain. As the complex was a prospective investment, the purchase had been preceded by a brokerage contract in which Spanish entrepreneur B.A. Kampik (the Proxy) acted as an intermediary between the Buyer and Kampik Immobilien KG (the Developer).

7. A year later, in 2005, the Buyer and his wife (acting as buyers) and the Developer (acting as vendor) concluded a contract for sale of the apartment, referred to in the brokerage contract. After the conclusion of the contract the Buyer paid two out of three instalments. However, in 2008 the Developer encountered financial difficulties that jeopardised completion of the construction of the tourist complex.

8. In response to that problem the Proxy offered to the Buyer his services in finishing works on the apartment. The Buyer accepted the offer and travelled to Spain, where a notarised power of attorney conferring on the Proxy the task of safeguarding their interests in relation to the sale contract ('the transaction-management contract') was signed. Consequently, the Buyer provided the Proxy with a sum of the third instalment and an additional fee for deletion of the mortgages. The Proxy transferred the first sum into the account of third party and did not take any action regarding the mortgage register.

9. Because of disagreements that arose between the parties to the transaction-management contract following the Developer's insolvency, the Buyer revoked the power of attorney. Subsequently, he brought an action in Germany where he was domiciled seeking reimbursement of the sums that he had paid to the Proxy. Yet, German courts dismissed his actions on the ground that they lacked jurisdiction over the dispute. The Buyer brought an action before the referring court on a point of law against the appeal decision.

10. **The preliminary question.** The referring court noticed that the actions pursued by the Proxy were "directed to Germany" *via* Internet within the meaning of Article 15(1)(c) of the Brussels regulation as specified in the case *Hotel Alpenhof*.[7] However, the transaction-management contract, if examined in isolation, did not fall within the ambit of economic activities of the Proxy in the place where the Buyer was domiciled.[8]

11. The referring court also noticed that there is a compelling material link between the property-intermediary activity 'directed' by the Proxy 'to' Germany and the conclusion of the transaction-management contract. Namely, if the brokerage and sale contracts had been

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[7] Judgement of the Court of Justice of the European Union dated 7 December 2010 in the joined cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, ECLI:EU:C:2010:740, section 93.

[8] Opinion of Advocate General Cruz Villalón delivered on 8 September 2015 in the case C-297/14 *Rüdiger Hobohm v. Benedikt Kampik Ltd Co. KG, Benedikt Aloysius Kampik, Mar Mediterraneo Werbe- und Vertriebsgesellschaft für Immobilien SL*, ECLI:EU:C:2015:556, section 48.

performed well, the transaction-management contract would not have been concluded. The substantial aim of the last contract was not different from the first and the second, i.e. to provide the Buyer with an apartment that is finished and ready to live-in.

12. Consequently, German Federal Court of Justice stayed the proceedings and referred the question whether a consumer could rely on the provisions on the jurisdiction in consumer matters as specified in Article 15 (1)(c) of the Brussels regulation even if the contested contract does not fall within the ambit of the economic activity directed to the place of the consumer's domicile but which is closely linked to a contract concluded beforehand by the same parties in the context of such activity.

III

13. **Advocate General's opinion.** Advocate General Cruz Villalón in his opinion argued that in particular circumstances the existence of a precedent agreement between a consumer and an entrepreneur could constitute an indication of 'directing activities' to the country of consumer's domicile. Such circumstances take place where the precedent agreement is a proximate cause of the contested agreement.[9]

14. Moreover, Advocate General claimed that where an entrepreneur makes an offer to a consumer the offer falls within the ambit of the term 'by any means directs activities to that Member State'.[10]

15. **The judgement**. **The 'directed activities' connecting factor**. Court of Justice of the European Union[11] answered the preliminary question positively. Yet, it did not follow the reasoning of AG but chose the teleological approach. In its reasoning the Court started with examination whether the Proxy directs his activities to Germany. In order to do so the criteria set forth in *Hotel Alpenhof* [12] were used and CJEU summarised that: the Proxy offered his services on the internet by means of a website registered under a top-level domain name, '.com.', written in German; that website provided a contact e-mail address hosted on a server using a top-level domain name '.de'; the support service for the Proxy's commercial activity could be contacted using a Berlin telephone number; and the Proxy used prospectuses written in German for the purposes of his activity. These four indications were sufficient to establish that the Proxy directs his property intermediary activities to Germany. Therefore, potential claims steaming from the brokerage contract would be covered by Article 15 of the Brussels regulation. However, transaction-management

[9] *Ibidem*, sections 49-54.

[10] *Ibidem*, section. 55.

[11] Hereinafter referred to as CJEU

[12] L. Gillies, *Clarifying the 'Philosophy of Article 15' in the Brussels I Regulation: C-585/08 Peter Pammer V Reedere Karl Schluter Gmbh & Co and C-144/09 Hotel Alpenhof Gesmbh V Oliver Heller*, „International & Comparative Law Quarterly" 2011, vol. 60, issue 2, pp. 559–563; M. Pilich, *Kierowanie przez przedsiębiorcę działalności do państwa zamieszkania konsumenta. Glosa do wyroku TS UE z 7.12.2010 r. C-585/08 Peter Pammer p. Reederei Karl Schlüter GmbH & Co. KG i C-144/09 Hotel Alpenhof GesmbH p. Oliver Heller.*, „Polski Proces Cywilny" 2011, vol. 3; D.J.B. Svantesson, *Pammer and Hotel Alpenhof – ECJ decision creates further uncertainty about when e-businesses "direct activities" to a consumer's state under the Brussels I Regulation*, „Computer Law and Security Review: The International Journal of Technology and Practice" 2011, vol. 27.

services do not fall within the ambit of property intermediary activities. Hence the latter contract – if examined in isolation – would not be covered by Article 15 of the commented regulation.[13]

16. Nevertheless, the Court of Justice noticed that after the Developer's insolvency it was not possible to achieve the economic objective of the brokerage contract, i.e. the effective enjoyment of the apartment purchased by the Buyer as a result of the property intermediary activity 'directed' by the Proxy 'to' Germany. It was precisely in order to rectify that failure to achieve the economic objective of the precedent contracts the Proxy proposed the transaction-management contract. The purpose of the latter was to achieve the specific economic objective pursued by means of the brokerage contract.[14]

17. Consequently, even though the transaction-management contract on its own does not come within the scope of the commercial or professional activity 'directed' by the professional 'to' the Member State of the consumer's domicile, it was concluded as a **direct extension of that activity** and complementarily to the brokerage contract. Therefore, even if there is no **legal interdependence** between the brokerage contract and the transaction-management contract, it must be held that there is an **economic link** between them. That link lies in the achievement of the economic objective of the brokerage contract. Without the finishing work as agreed between the parties under the transaction-management contract, that effective enjoyment would not be possible.[15]

18. **Notion of causal link between the contracts.** In order to determine whether there is a close link between such two contracts, the national court must have regard to the constituent elements of that link, in particular: if the parties to both of those contracts are identical in law and in fact; whether the economic objective of these contracts concerning the same specific subject-matter is identical; whether the second contract complements the first, in that it seeks to make it possible for the economic objective of the first contract to be achieved.[16]

19. **Predictability of jurisdiction.** As to the predictability of the rules over the jurisdiction the Court of Justice concluded that itsoutcome should not be perceived as unpredictable for professionals. If an entrepreneur enters into the contract that falls within the scope of the protective jurisdiction regime and then he proposes to conclude and, as the case may be, does conclude a contract with the same consumer which is intended to achieve the essential objective of the first contract, that professional may reasonably expect both contracts to be subject to the same rules of jurisdiction.[17]

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[13] Judgement of the Court of Justice of the European Union dated 23 December 2015 in the case C-297/14 *Rüdiger Hobohm v. Benedikt Kampik Ltd Co. KG, Benedikt Aloysius Kampik, Mar Mediterraneo Werbe- und Vertriebsgesellschaft für Immobilien SL*, EU:C:2015:844, sections 19 and 28.

[14] *Ibidem*, section 34.

[15] *Ibidem*, sections 35-36.

[16] *Ibidem*, section 37.

[17] *Ibidem*, section 39.

IV

20. **Conclusions.** The aim of Article 15 (1)(c) *in fine* was to ensure a proper connection between the contract entered into and the activities of the other party to that contract. Mankowski gives here an example of a professional party who directs advertisements for TV sets to the Member States. When a consumer buys such a TV set his contract will be covered by Article 15 (1)(c). On the other hand, if from the same seller the consumer buys a radio, for which no advertisements have been directed to the Member State of consumer's domicile, the latter cannot rely on the aforementioned Article.[18]

21. In the commented ruling CJEU could have followed one out three ways of interpretation of Article 15(1)(c). The Court of Justice could have declared that the Brussels regulation does not extend to the facts given, or it could have interpreted the Brussels regulation extensively, or finally, it could have claimed that the facts given constitute economic activity directed to the place of the consumer's domicile.

22. The interpretation provided by AG Villalón was based on the last alternative. AG tried to prove that since the Proxy voluntarily offered to the Buyer his transaction-management services then the contract shall be treated as resulting from activity directed to Germany. This interpretation ignored the fact that the Proxy's offer had emergency nature and incidental character. The general rule on the interpretation of legal provisions – *Einmal is kein Mal*[19] – indicates that when something happens only once it should not be classified as a habit. Therefore the Proxy's activity in contract-management should not be perceived as carried on within the ambit of his business activity targeted to Germany.

23. However, the reasoning of AG revealed the sound problem of interpretation of the articles given. The question is **where is the borderline between activities carried on the once-only basis that fall and does not fall within the ambit of Article 15(1)(c).** And consequently, when a single offer made directly to a consumer is sufficient to establish that a contract concluded as a result thereof falls within the scope of economic activities directed to the place of consumer's domicile.

24. One could argue that a consumer to whom a professional addressed an offer directly should enjoy the protection in the place of his domicile.[20] On the other hand, such a broad interpretation rises a question what if an entrepreneur offers a service directly to e.g. one Polish customer while another Pole orders the same without such an offer. In the case of dispute, the question would be whether both consumers could sue counterparty in Poland. The affirmative answer would indicate that the other consumer could claim that the entrepreneur directs his activities to Poland because he made a single offer to the first consumer, which is not convincing. The problem seems unsolvable on the grounds of literal interpretation of the Brussels regulation.

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[18] U. Magnus, P. Mankowski, *op. cit.*, p. 499.

[19] Ch. Perelman, *Logique juridique. La nouvelle rhétorique,* Warsaw 1984, p. 134; G. Struck*, Topische Jurisprudenz. Argument und Gemeinplatz in der juristischen Arbeit,* Frankfurt am Main 1971, p. 20 *et seq.*

[20] Opinion of Advocate General Cruz Villalón delivered on September 8, 2015 in the case C-297/14 *Rüdiger Hobohm v. Benedikt Kampik Ltd Co. KG, Benedikt Aloysius Kampik, Mar Mediterraneo Werbe- und Vertriebsgesellschaft für Immobilien SL*, ECLI:EU:C:2015:556, section 55.

25. In its reasoning CJEU avoided answering the aforementioned problem and choose rather teleological though very narrow approach. Instead of reinterpreting facts so as to make them correspond to the legal provisions a new test regarding causal link between contracts has been formulated. The established test extends the protection of the weaker party to the situations where it is not obvious whether a concluded contract falls within the scope of activities directed to the place of consumer's domicile. So as to fulfil it parties must have agreed a new contract in order to ensure the economic viability of another one that is undoubtedly covered by the protective jurisdiction regime.

26. Despite the fact that the adopted interpretation extends the provisions of the Brussels regulation and is not supported by its literal interpretation it will have good impact on litigation policy. The CJEU provided a flexible solution to all business-to-consumer situations where parties want to give another chance and rectify a failure in order to achieve the economic objective of a precedent agreement instead of going to the court and sue for breach of the contract. After *Rüdiger Hobohm* situation of a consumer remains identical regardless of whether he sues for the breach of former or latter contract. Literal interpretation of the Brussels regulation would mean that the second contract may or may not be a subject of jurisdiction of another country depending whether the counterparty directs activities agreed in the second contract to the place of consumer's domicile. As long as 'directing activity' (connecting factor) remains very imprecise it would be difficult for consumers to establish the jurisdiction over the prospective dispute at the time of the renegotiation of the breached agreement. Now a consumer can give a professional the second chance without losing protective regime if the second offer turns out to be fraudulent.

27. Therefore, such an approach should be evaluated positively because of its simplicity, predictability and fairness in outcomes. On the other hand status of a single offer directed to the consumer is still to be clarified.[21]

[21] See more: C. Nourissat: *L'"objectif économique" au soutien des contrats de consommation et de la compétence protectrice du règlement "Bruxelles I"*, „Procédures" 2016, vol. 2, p.20; L. Idot, *Contrats conclus par les consommateurs*, „Europe", 2016 vol. 2, pp. 41-42; P. Mankowski, *Enge Verbindung zu früher geschlossenem Verbrauchervertrag – Gerichtsstand*, „Neue juristische Wochenschrift" 2016, p. 699.

Summary

Rüdiger Hobohm case concerns interpretation of the term „scope of the commercial or professional activity 'directed' by that professional 'to' the Member State of the consumer's domicile" within the meaning of article 15 (1)(c) of the regulation 44/2001. In this judgment CJEU broadened the concept of the directing activity connecting factor. Namely, consumer could sue the entrepreneur in the place of his own domicile when the second contract concluded between him and his professional counterparty is closely linked to a contract concluded beforehand by those same parties in the context of such an activity. It is for the national court to determine whether the constituent elements of that link are present, in particular whether the parties to both of those contracts are identical in law or in fact, whether the economic objective of those contracts concerning the same specific subject-matter is identical and whether the second contract complements the first contract in that it seeks to make it possible for the economic objective of that first contract to be achieved.