



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 18 July 2013¹

Case C-218/12

Lokman Emrek
v
Vlado Sabranovic

(Request for a preliminary ruling from the Landgericht Saarbrücken (Germany))

(Area of freedom, security and justice — Jurisdiction in civil and commercial matters — Regulation No 44/2001 — Consumer contracts — Article 15(1)(c) — Activity directed to another Member State — Need for a causal link between the activities of the trader directed to the Member State of the consumer — Strong evidence — Conurbation)

1. Following the judgments in first the *Pammer and Hotel Alpenhof*² and then the *Mühlleitner*³ cases, Article 15(1)(c) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁴ continues to give rise to uncertainty as to its interpretation. Specifically, the Court is once again being consulted concerning the scope of the requirement that the activities of the trader must be *directed* to the Member State of the consumer's domicile in order for the special jurisdiction applicable to consumer contracts to be applicable. In this case, the Landgericht Saarbrücken (Regional Court, Saarbrücken) is seeking to ascertain whether this connecting factor requires, as a *further unwritten condition*, that there be a causal link between the activity 'directed' to the Member State of the consumer's domicile and the consumer's decision to enter into the contract.

2. The Landgericht Saarbrücken also asks whether Article 15(1)(c) of Regulation No 44/2001 requires that the consumer contract was concluded as a distance contract. However, that question was answered a few months after this question was referred, specifically by the decision in the *Mühlleitner* case. I will therefore deal only with the question relating to the requirement of a causal link.

¹ — Original language: Spanish.

² — Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527.

³ — Case C-190/11 *Mühlleitner* [2012] ECR.

⁴ — Council Regulation (EC) of 22 December 2000 (OJ 2001 L 12, p. 1).

I – Legal framework

3. Article 15(1)(c) of Regulation No 44/2001 provides for special jurisdiction in matters relating to consumer contracts, creating an exception to the general forum of the defendant's domicile if the following conditions are met:

'1. 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, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

...

(c) in all other cases, the contract has 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.

...'

II – Facts and procedure before the national courts

4. Mr Sabranovic, the respondent in the main proceedings, operates a used car dealership in Spicheren (France) under the trade name 'Vlado Automobiles Import-Export'. The case file indicates that, at the material time, Mr Sabranovic was using a website which gave the address of his establishment and included landline, mobile and fax contact numbers. All the numbers were preceded by the international dialling code for France, with the exception of a German mobile phone number, which was preceded by the international dialling code for Germany.

5. The domicile of Mr Emrek, the appellant in the main proceedings, was, at the material time, in Saarbrücken in Germany. On 13 September 2010 he entered into a contract of sale for a used vehicle with Mr Sabranovic, apparently having travelled to the respondent's establishment for that purpose and having heard of its existence not by means of the website but through acquaintances.

6. At a later date, Mr Emrek brought an action against Mr Sabranovic in the Amtsgericht Saarbrücken (Local Court, Saarbrücken), claiming under the warranty contained in the contract of sale of the vehicle. That court held that the action was inadmissible on the grounds that there was no international jurisdiction, taking the view that Mr Sabranovic had not directed his professional activities to the Member State of the consumer's domicile, in other words, to Germany, within the meaning of Article 15(1)(c) of Regulation No 44/2001.

7. Mr Emrek appealed against the decision of the Amtsgericht Saarbrücken before the Landgericht Saarbrücken, which stayed the proceedings and referred the question to the Court of Justice for a preliminary ruling.

III – The question referred for a preliminary ruling and the procedure before the Court of Justice

8. On 10 May 2012 the Court Registry received the request for a preliminary ruling from the Landgericht Saarbrücken, which raised the following questions:

- (1) In cases in which a trader's Internet presence satisfies the "directing" requirement, does Article 15(1)(c) of Regulation No 44/2001 require, as a further unwritten condition, that the consumer was induced to enter into the contract by the website operated by the trader and, consequently, that the Internet presence must be a causal factor in regard to the conclusion of the contract?
- (2) In so far as a causal link between the "directing" requirement and the conclusion of the contract is necessary, does Article 15(1)(c) of Regulation No 44/2001 also require that the contract was concluded as a distance contract?

9. Written observations were lodged by the parties to the main proceedings, the French, Belgian and Luxembourg Governments and the European Commission.

10. At the hearing on 25 April 2013 the representative of Mr Emrek and the agents for the Kingdom of Belgium, the Grand Duchy of Luxembourg and the European Commission presented oral argument.

IV – A preliminary point on the subject-matter of these preliminary ruling proceedings

11. The Landgericht Saarbrücken asks the Court whether Article 15(1)(c) of Regulation No 44/2001 assumes two unwritten conditions in order that the special jurisdiction introduced by this provision in relation to consumer contracts are applicable. The first condition would relate to the causal link between the 'directing' of the trader's activity to the Member State of the consumer and the consumer's decision to enter into the contract. The second condition would consist of a further requirement that the contract be concluded as a distance contract.

12. Although the question relating to the first condition (the causal link) has not been previously addressed by the Court of Justice, that relating to the second condition (the distance contract) has been addressed. On 6 September 2012, that is, barely four months after this present question was referred for a preliminary ruling, the Court of Justice in the *Mühlleitner* case expressly ruled on the condition that the contract be concluded as a distance contract. On that occasion the Court of Justice, confirming a line of case-law that could be seen as implicit in *Pammer and Hotel Alpenhof*, stated that the conclusion of a consumer contract at a distance is simply an 'indication that the contract is connected' to a commercial or professional activity of a trader or service provider directed to the State of the consumer's domicile,⁵ concluding that Article 15(1)(c) of Regulation No 44/2001 must be interpreted 'as not requiring the contract between the consumer and the trader to be concluded at a distance'.⁶

13. The clarity with which the Court of Justice expressed itself in *Mühlleitner*, when taken together with the fact that the main focus of the question referred was a request for clarification of the judgment in *Pammer and Hotel Alpenhof* with respect to the condition that the contract be concluded as a distance contract, provides ample justification for restricting the analysis in this case to the only new issue raised by the Landgericht Saarbrücken: the requirement that the activity directed to the State of the consumer's domicile should have a causal link with the consumer's decision to enter into the contract.

5 — *Mühlleitner*, paragraph 44.

6 — *Ibid.*, paragraph 45.

V – Analysis

14. On the first question, namely whether the consumer must have been ‘induced’ such that there is a causal link between the commercial activity and the decision to enter into the contract, the parties to the main proceedings, as well as the governments of the intervening Member States and the European Commission, have taken opposing positions.

15. On the one hand, Mr Sabranovic and the Belgian and Luxembourg Governments argue that the German courts have no jurisdiction in this case because the causal link condition, which would have to be seen as implicit in Article 15(1)(c) of Regulation No 44/2001, has not been met. In outline, these three parties take the view that in the absence of such a condition the general rule of the forum of the defendant’s domicile would be reversed and a disproportionate burden would be placed on traders and service providers, who would be open to being sued in any Member State of the European Union simply by virtue of having a website and contracting with consumers resident in other Member States. The Belgian and Luxembourg Governments draw particular attention to the impact that an interpretation that is excessively favourable to the consumer would have on small and medium-sized enterprises in those Member States that are particularly affected by cross-border trade.

16. Mr Emrek, on the other hand, supported by the French Government and the European Commission, denies the existence of such a condition and argues that the German courts have jurisdiction. In support of their argument they point to the indicative factors listed in *Pammer and Hotel Alpenhof* in order to assist a court in assessing whether an activity was directed to the Member State of the consumer’s domicile. They argue that both in that case and in *Mühlleitner*, the Court of Justice may have emphasised the importance of these factors as ‘evidence’ that the activity was directed to the Member State of the consumer, but never as essential conditions. This interpretation is supported by the intention behind Articles 15 and 16 of Regulation No 44/2001 and by the preparatory acts relating to it.

17. Focussing now on the existing case-law in this area, it should first of all be pointed out that both in *Pammer and Hotel Alpenhof* and in *Mühlleitner*, the Court of Justice has confirmed that the phrase ‘activity directed’ to the Member State of the consumer’s domicile is to be interpreted independently and as a condition which is additional to the other conditions contained in Article 15(1)(c) of Regulation No 44/2001.⁷ On the basis of an analysis of the provision as a whole, whilst also taking into account its previous versions as well as the preparatory acts, the Court of Justice has held that the only conduct relevant for the purposes of triggering the special jurisdiction applicable to consumer matters is that of the trader or service provider.⁸ The conduct of the consumer, which was taken into consideration under the old, now superseded, wording of Article 13 of the Brussels Convention, is now quite secondary to that of the trader or service provider.⁹

18. Similarly, the Court of Justice has also rejected using a criterion of interpretation that is based entirely on seeking to establish the subjective intention of the trader.¹⁰ Just as the conduct of the consumer is not the decisive factor in triggering the jurisdiction, nor, in the case of the trader or service provider, will the latter’s ultimate intention be decisive. The Court of Justice has instead chosen to formulate an open-ended list of objective factors that can provide sufficient evidence to enable a court to form a view that an activity was directed to the State of the consumer’s domicile.¹¹

7 — *Pammer and Hotel Alpenhof*, paragraph 55, and *Mühlleitner*, paragraph 28.

8 — *Pammer and Hotel Alpenhof*, paragraph 60, and *Mühlleitner*, paragraph 39.

9 — *Pammer and Hotel Alpenhof*, paragraph 56, and *Mühlleitner*, paragraph 38.

10 — *Pammer and Hotel Alpenhof*, paragraph 80.

11 — *Pammer and Hotel Alpenhof*, paragraphs 81 to 93.

19. It should, furthermore, be emphasised that these factors constitute guidance and that it is for the national courts to look into the objectives and results of the commercial strategy pursued by the trader or service provider.¹² The Court of Justice has so far resisted turning any of these factors into either a condition or a decisive factor. It has made this clear in the case of contracts concluded at a distance, which, as held in the *Mühlleitner* case, do not constitute an essential condition for attributing jurisdiction. However, simply being on the Internet has also been ruled out as the factor that determines that an activity is directed to another Member State. Mere accessibility is not in itself decisive, it being necessary to look at the actual content of the website, by reference to the other factors that can be used to determine in an objective way the specific purpose or purposes of the commercial or professional offer.¹³

20. Finally, it is important to mention at this stage that both Regulation No 44/2001 and the case-law of the Court of Justice have emphasised the importance of the predictability of the linking factors vis-à-vis a jurisdiction. Recital 11 in the preamble to the regulation states that '[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile', such that when exceptions are made, the factors must provide a high level of legal certainty, as the Court of Justice has confirmed on several occasions.¹⁴

21. Moving on to the question of whether there is a condition based on the existence of a causal link between the commercial or professional activity directed to the State of the consumer's domicile and the decision of the consumer to enter into the contract, I can state at this point that, in the light of the case-law as it now stands, it is difficult to see that such a condition flows from either the wording of Article 15(1)(c) of Regulation No 44/2001, or from its objectives or related preparatory acts.

22. In respect of the wording of the provision, as I have explained, the Court of Justice has emphasised that it is necessary to assess whether the conditions referred to in Article 15(1)(c) have been met and whether these are sufficient for the purposes of conferring special jurisdiction. Adding a *further and implicit* condition, which is, moreover, based on the conduct of the consumer, would require an interpretation to be made on a sound basis. As I shall explain, that basis is not apparent in the objectives pursued by the Union legislature.

23. The aim of Article 15(1)(c) of Regulation No 44/2001 was not to reverse the rule that the usual forum is that of the domicile of the defendant, but to rebalance, at the level of international jurisdiction, a contractual relationship that is unequal in principle.¹⁵ To that end, the legislature introduced a rule based on fulfilling three conditions only, all of which are attributable to the trader or service provider (existence of a commercial or professional activity; activity directed to the State or States of the consumer's domicile; contract falling within the scope of such activities). Precisely because the conditions set out in Article 15(1)(c) were an exhaustive list, the criteria for defining an activity directed towards another State must be based on a range of factors, none of which should be decisive. In other words, the legislature gave a strictly limited list of the conditions required to be met in order to confer the jurisdiction, but then went on to allow the courts a degree of freedom of interpretation, particularly where activities advertised on the Internet are concerned.

12 — Ibid.

13 — *Pammer and Hotel Alpenhof*, paragraphs 75 and 76, and *Mühlleitner*, paragraph 44.

14 — See, inter alia, Case C-144/10 *BVG* [2011] ECR I-3961, paragraph 33, and Joined Cases C-509/09 and C-161/10 *eDate and Martinez and Martinez* [2011] ECR I-3961, paragraph 50.

15 — In this regard, see Magnus, U., and Mankowski, P., *European Commentaries on Private International Law, Brussels I Regulation*, second edition, Sellier, Munich, 2012, p. 546 et seq.; De Clavière, B., 'Confirmation de la protection du consommateur actif par les règles de compétence spéciales issues du règlement 44/2001', *Revue Lamy droit des affaires*, No 77, 2012, p. 48 et seq.; De Miguel Asensio, P., *Derecho Privado de Internet*, fourth edition., 2011, p. 963 et seq.; Tassone, S., 'Il regolamento Bruxelles I e l'interpretazione del suo ambito di applicazione: un altro passo della Corte di giustizia sul cammino della tutela dei diritti del consumatore', *Giurisprudenza di merito*, 2013, p. 104 et seq.; and Brkan, M., 'Arrêt Mühlleitner: vers une protection renforcée des consommateurs dans l'U.E.', *Revue européenne de droit de la consommation*, 2013, p. 113 et seq.

24. The foregoing should suffice as a basis for reaching the conclusion, also reached by the French Republic and the Commission, that Article 15(1)(c) of Regulation No 44/2001 does not require fulfilment of an ‘unwritten’ condition based on a causal link between the activity and the consumer’s decision to enter into the contract. Such a condition would significantly upset the already delicate balance put in place by the Union legislature, as well as departing from the interpretation that the Court of Justice has up to now put on the provision in question.¹⁶

25. Furthermore, as the Commission had occasion to point out at the hearing, a requirement of causality of this kind would give rise to certain evidential issues. If the consumer’s assertion that the decision to enter into the contract was taken on the basis of consulting a website, together with a telephone call to the place of business is sufficient, is it enough for consumers simply to make a statement or must they provide evidence of having undertaken such consultations? In the former case, jurisdiction would be up to the consumer, who would only have to assert that the decision to enter into the contract was based on the activity of the trader. In the second, this might be virtually impossible to prove, with the result that the special jurisdiction provided for in Articles 15 and 16 of Regulation is rendered ineffective.¹⁷

26. Although related, that is not the same as saying that such a causal link is irrelevant, which it is not. The fact that the causal link does not have the role of a condition does not in any way preclude it from being used as *evidence*, which can be assessed by court when determining whether the activity is actually directed to that State. Furthermore, as I shall be showing, a causal link would be strong evidence because, if it can be established in the specific case, it constitutes a decisive factor when it comes to applying the special jurisdiction in the area of consumer contracts.

27. If there has actually been activity directed to another Member State, one would expect there to be a causal link, whatever the degree of difficulty encountered in proving it. The problem in this case is that, as we have seen in the account of the facts, it has been proved that the causal link did not exist.

28. I had occasion to explain in my still recent Opinion in *Mühlleitner*, in connection with the question of whether there is a condition that a distance contract must previously have been entered into rather than in connection with the causal link, that ‘the purpose of the reference to a distance contract’ in the *Pammer and Hotel Alpenhof* judgment ‘is intended to underline the importance of the requirement of preparatory and prior pre-contractual activity through the Internet, which is in turn the result of information directed via the Internet to the territory of the consumer’s domicile’.¹⁸

29. In expressing myself in those terms in that case, my main aim was to emphasise the potential importance of the fact that there was ‘preparatory and prior pre-contractual activity’, which, while not constituting a necessary condition, would normally be the consequence of ‘information directed via the Internet to the territory of the consumer’s domicile’. At the same time, I was attempting to explain how the information directed via the Web gives rise, if not to the contract, then to activity that prepares for the contract.

30. In other words, when I made that observation I was not thinking in terms of the preparatory and prior pre-contractual activity or the conclusion of a contract at an early stage as being an additional condition for conferring the special jurisdiction, and nor was I saying that the existence of a causal link was such a condition. Rather, I was showing that evidence of that kind is particularly important, and, essentially, has weight.

16 — Virgós Soriano, M. and Garcimartín, F., take the same view in *Derecho Procesal Civil Internacional. Litigación internacional*, second edition, Civitas, 2007, p. 171. Opining on Article 13 of the Brussels Convention, Advocate General Darmon also reached the same conclusion, albeit in a context in which the means of communication was not the Internet but a traditional advertising method. See the Advocate General’s Opinion in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, points 82 to 85.

17 — On the evidential issues relating to the additional and unwritten causal link condition, see Leible, S. and Müller, M., ‘Keine internationale Zuständigkeit deutscher Gerichte bei Maklertätigkeit eines griechischen Rechtsanwalts’, *EuZW* 2009, p. 29.

18 — Opinion in *Mühlleitner*, point 38.

31. In more practical terms, while preparatory pre-contractual activity, like the existence of a proven causal link, is not an implied condition over and above those that are specifically laid down in Article 15(1)(c) of Regulation No 44/2001, it does make the task of the national court significantly easier when it comes to determining whether an economic activity is directed to a particular Member State. Conversely, it follows that if this is not the case, the task of the national court is made correspondingly more difficult as it will generally have to offset the absence of this factor with another factor or factors that demonstrate equally well that the activity was directed to the Member State in question.

32. Moreover, this is the underlying purpose behind the joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001. As we know, the declaration is silent on the question of causal link, but it does address the importance of certain types of evidence, such as the fact that a contract was concluded at a distance.¹⁹ This is mentioned simply by way of example and the existence of other evidence, even particularly strong evidence, relevant to the assessment of whether there is an activity ‘directed’ to another Member State is not thereby ruled out.

33. In this regard, it seems to me that the factual situation in the present case indicates the possible existence of a factor that, when duly assessed by the national court, may, due to its clarity, offset the lack of both a distance contract and any preparatory and prior activity, as well as the apparent lack of a causal link between a particular marketing strategy and the conclusion of the contract.

34. Mr Sabranovic’s business is located in a French municipality forming part of a metropolitan area that is closely linked to the city centre of Saarbrücken. As Mr Emrek’s representative confirmed at the hearing, the residents of Spicheren and those of Saarbrücken live in a virtually communal space, where the urban development of the two municipalities has caused them to become intertwined to the extent that in some places there is a continuous urban area that is unrelated to the border between the two countries.

35. In this situation, a trader offering goods and/or services in one of these municipalities might, as a result of where the activity is geographically located, amount to the same thing as an offer that is necessarily directed to another Member State, namely the neighbouring Member State whose municipalities form part of a wider metropolitan area.²⁰ By that I mean that sometimes, due to the particular circumstances, where two Member States coexist in a single urban space, the activities of all operators are naturally and without any deliberate intention directed not only to residents of the State where the trader or service provider is located, but also to the residents of the neighbouring State. In a geographical area where one is virtually unaware of having crossed a border, it is difficult to claim that the activities of traders in that area are not directed to consumers whose domicile is in the neighbouring State.

36. That said, such a conclusion does not in any way impose a disproportionate burden on the trader or professional service provider, despite first impressions to the contrary, since the economic operator in question here is operating in *one* urban space, irrespective of the fact that it is made up of two Member States. It is very likely that the trader or provider of professional services speaks the language of the neighbouring State, if a different language is spoken there. In this case there is a language

19 — It should be pointed out that the French version of the declaration refers to this fact in terms of a necessary condition (*‘encore faut-il que ce site Internet invite à la conclusion de contrats à distance et qu’un contrat ait effectivement été conclu à distance’*, emphasis added), whereas the English version treats it only as an element to be considered (*‘although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance’*, emphasis added). The Belgian Government has argued strongly that the Court of Justice should follow the French version and has inferred various consequences from it, regarding both the condition relating to a causal link and that relating to a distance contract. Nevertheless, as I have already explained in my Opinion in *Mühlleitner*, I take the view that the joint declaration, at least in this particular respect, should not be taken as conclusive, despite the fact that Regulation (EC) No 593/2008 on the law applicable to contractual obligations specifically refers to it. It seems that the Court reached the same conclusion in *Mühlleitner*, as it did not have regard to this aspect of the joint declaration in its interpretation of Article 15(1)(c) of Regulation No 44/2001.

20 — Zoido, F., et al., *Diccionario de Urbanismo. Geografía Urbana y Ordenación del Territorio*, Cátedra, 2013, pp. 37 and 106.

difference between the two Member States, but, according to the case file, that does not appear to have prevented Mr Sabranovic from providing customers with a German mobile telephone number on his website, which indicates that German-speaking customers, the majority of which will live in Saarbrücken, will be spoken to in German.

37. Furthermore, in the situation of a conurbation like the one we may have here, the risk that an action may be brought against the trader or service provider in the Courts of the neighbouring State does not seem to me to be an excessive burden which might act as a disincentive to commercial activity of the kind carried out by Mr Sabranovic. The special jurisdiction under Articles 15 and 16 of Regulation No 44/2001 might even be considered an incentive for the consumers living in a municipality to give their business to traders in their local area, as they can be assured of having a choice between the jurisdictions provided for in Article 16 of Regulation No 44/2001.

38. In other words, the jurisdictional outcome of a situation such as that described should be an entirely foreseeable scenario for the trader or provider of professional services. As I have already mentioned, such a trader or service provider, who operates in a specific geographical area that is part of a whole made up of two Member States, must be fully aware that a significant proportion, or even the majority, of his clientele will have their domicile in the neighbouring Member State.

39. In summary, I therefore take the view that Article 15(1)(c) of Regulation No 44/2001 should not be interpreted as requiring a causal link between the commercial or professional activity directed to the State of the consumer's domicile and the decision of the consumer to enter into the contract.

40. However, the causal link constitutes strong evidence when assessing whether the commercial activity is directed to a particular Member State. To justify a finding that the commercial activity is directed to another Member State where the absence of strong evidence, such as a causal link, has been proven, this absence must generally be offset by the existence of at least one item of evidence of comparable strength.

41. Similarly, when interpreting Article 15(1)(c) of Regulation No 44/2001, I am of the opinion that it is relevant that a commercial or professional activity takes place in a specific geographical area in which the territories of two Member States merge to make one conurbation. This geographical context can act as strong evidence of an activity directed to a particular Member State.

VI – Conclusion

42. In the light of the arguments set out, I propose that the Court reply in the following terms to the question referred for a preliminary ruling by the Landgericht Saarbrücken:

- (1) Article 15(1)(c) of Regulation (EC) No 44/2001 should not be interpreted as requiring, as an implicit condition over and above those specifically set out in the provision, a causal link between the commercial or professional activity directed to the Member State of the consumer's domicile and the decision of the consumer to enter into the contract. However, the causal link constitutes strong evidence when assessing whether the commercial activity is directed to a particular Member State.
- (2) To justify a finding that the commercial activity is directed to another Member State where the absence of strong evidence, such as a causal link, has been proven, this absence must generally be offset by the existence of at least one item of evidence of comparable strength. A specific geographical area in which the territories of two Member States merge to create one conurbation constitutes, when properly assessed by the national court, strong evidence of an activity directed to a particular Member State for the aforementioned purposes.