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Translation of Court Order of Regional Court of Bonn of 30 May 2018

Certified copy

Docket no. 10 O 171/18



Regional Court of Bonn

Court Order

In the preliminary injunction proceedings

of Internet Corporation for Assigned Names and Numbers (ICANN), represented by its president, Göran Marby, 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA,

Applicant,

Attorneys of record: JONES DAY Rechtsanwälte, Breite Straße 69,
40213 Düsseldorf

Versus

EPAG Domainservices GmbH, [REDACTED]
[REDACTED]

Defendant,

Attorneys of record: [REDACTED]
[REDACTED]
[REDACTED]

On May 29, 2018,
the 10th Civil Chamber of the Regional Court of Bonn
through presiding judge at the Regional Court [REDACTED], Judge at the Regional Court
[REDACTED] and Judge at the Regional Court [REDACTED]
ordered:

The Application for preliminary injunction of May 25, 2018 is rejected at the expense of the Applicant.

The value in dispute is set at 50,000.00 Euro.

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I.

The Applicant asks for an injunction to be issued prohibiting the Defendant from waiving the (additional) collection of data for a technical and administrative contact when awarding Internet domains.

The Applicant is a non-profit organization that coordinates the allocation of unique names and addresses on the internet to ensure the stable and secure functioning of the unique identifier system on the Internet. This includes the coordination of the domain name system. In this function, the Applicant concludes agreements with other organizations on the allocation of so-called generic Top Level Domains and - here in dispute - Second Level Domains within the respective Top Level Domains. With regard to the specific Top Level Domains assigned by the Applicant, reference is made to Annex AS 1.

Under the so-called "WHOIS" service, data collected and stored in connection with new registrations are published on a publicly accessible internet portal for identification purposes.

As a so-called "accredited registrar" of the Applicant, the Defendant is authorized by an agreement concluded between the parties to assign second level domains under a top level domain assigned by a separate agreement to registrants.

Section 3.4 of the Agreement concluded between the parties, the "Registrar Accreditation Agreement" of 22.0-1.2014 (Annex AS 4, RAA), stipulates the following on the basis of the translation of the Agreement originally provided by the Applicant:

"3.4.1 For each Registered Name sponsored by Registrar within a gTLD, Registrar shall collect and securely maintain, in its own electronic database, as updated from time to time:

[...]

3.4.1.2 The data elements listed in Subsections 3.3.1.1 through 3.3.1.8;"

The sections referred to stipulate the following:

"3.3.1.1 The name of the Registered Name;

3.3.1.2 The names of the primary nameserver and secondary nameserver(s) for the Registered Name;

3.3.1.3 The identity of Registrar (which may be provided through Registrar's website);

3.3.1.4 The original creation date of the registration;

3.3.1.5 The expiration date of the registration;

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3.3.1.6 The name and postal address of the Registered Name Holder;

3.3.1.7 The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the Registered Name; and

3.3.1.8 The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the Registered Name.”

Section 3.7.2 of the RAA provides that the registrar shall comply with applicable laws and government regulations.

On the basis of this RAA, the Defendant, as a so-called registrar, assigns internet domains to "third parties willing to register", i.e. natural and legal persons. Up to now, in accordance with the above-mentioned contractual provisions, the Defendant has also collected (and stored) other personal data in addition to the domain holder's contact data, both for technical and administrative contact. Now - under the impression of the GDPR which recently entered into force - the Defendant announced to the Applicant that in the future allocation of domain names only the data of the domain holder itself will be collected and the additional collection of data of a technical and administrative contact will be waived.

The Applicant is of the opinion that the Defendant is contractually obliged to also collect the data for the technical and administrative contact. These data are also absolutely necessary to achieve the Applicant's purposes. The GDPR, which recently came into force, is not opposed to this. The matter was urgent as the Defendant had announced that it wanted to change its previous practice.

The Applicant requests,

to order Defendant by way of a preliminary injunction, due to the urgency without prior oral hearing and issued by the presiding judge instead of the full bench, and under penalty of a disciplinary fine of up to EUR 250,000.00, to cease and desist,

as an ICANN accredited registrar with regard to any generic Top Level Domain listed in Appendix AS 1, from offering and/or registering second level domain names without collecting the following data of the registrant that registers that second level domain name through the Defendant:

The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the registered second level domain names;

and/or

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The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the registered second level domain name.

The Defendant requests in its protective letter

to dismiss the application for an injunction.

It is of the opinion that the collection (and storage) of personal data of the administrative and technical contact violates the provisions of the GDPR that came into force on 25 May 2018, in particular Article 5 (1) (c) in conjunction with Article 5 (1) in connection with Art. 25 GDPR, and it is therefore no longer admissible to require the Defendant to do so, especially since it is also regulated in the Contract that the Defendant must comply with the applicable law.

For further facts and details of the case, reference is made to the Applicant's application together with its appendices and the Defendant's protective letter.

II.

1.

The Regional Court of Bonn has jurisdiction to decide on the application for an interim injunction. It is true that the parties have agreed on an arbitration clause in Art. 5.8 of the RAA in dispute, according to which the following applies:

"In support of the arbitration and/or to protect the rights of the parties during the arbitration, the parties have the right to request interim relief from the arbitral tribunal or from a court in Los Angeles, California USA, which does not constitute a waiver of this arbitration clause."

However, a derogation with regard to the state court located at the seat of the agreed arbitration court is not effectively possible in the area of interim legal protection, which is why it remains (also) within the jurisdiction of the state court competent according to general rules (see OLG Köln GRUR-RR 2002, 309).

2.

The admissible application for the sought interim injunction had to be rejected, since it proves to be unfounded. A claim for relief was not substantiated.

Although the Applicant may formally rely on the content of the Contract concluded with the Defendant, in particular 3.4.1 in conjunction with 3.3.1.7 and 3.3.1.8 RAA, according to which, in

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In addition to the data of the registrant, further data on the so-called Tech-C and Admin-C must be collected (and stored), which also corresponded to the Defendant's previous practice. However, the Contract also contains the - generally valid - regulation that the Defendant, for its part, as registrar, must comply with applicable laws and regulations. Against this background, the Applicant can only claim loyalty to the Contract from the Defendant to the extent that the contractual agreements are in accordance with applicable law, § 242 BGB.

According to the provisions of Art. 5 para. 1 lit. b) and c) GDPR, according to which "personal data" – which is at least partially undisputed - may only be collected for "specified, explicit and legitimate purposes" (lit. b) and must be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (lit. c), a sufficient necessity in the aforementioned sense has not been substantiated by the Applicant in the view of the Chamber - even taking Art. 6 para. 1 GDPR into account.

The Applicant has not demonstrated that the storage of other personal data than that of the domain holder, which continues to be indisputably collected and stored, is indispensable for the purposes of the Applicant. It is obvious that more data makes the identification of persons behind a domain and contacting them appear more reliable than if only one data record of the person generally responsible for the domain is known. However, the domain name holder registered or to be registered is the person responsible for the contents of the relevant website, who does not necessarily have to be different from the Tech-C and Admin-C categories, in other words, can combine all those functions on itself.

In so far as the general interests to be ensured by the Applicant relate primarily to criminally relevant or otherwise punishable infringements or security problems which the Applicant watches over, the Chamber considers that this need is satisfied solely by the collection and storage of the data of the domain holder willing to register (whereby the Chamber does not see why less data is collected on the domain holder than on the additional categories Tech-C and Admin-C). Against the background of the principle of data minimization, the Chamber is unable to see why further data sets are needed in addition to the main person responsible. In any case, with regard to the so-called Tech-C, the Applicant also speaks decisively of the solution of (purely) technical problems, which, however, can only be indirectly related to the safety aspects in the foreground.

Above all, it must be taken into account that according to the concurring argument of both parties in this respect, the same personal data could be used in all three categories, i.e. those of the domain holder himself, the so-called Tech-C as well as the Admin-C, i.e. with corresponding information from a registrant only one data record instead of three was collected and stored and this also in the past did not lead to the fact that a registration of the domain had to be denied in the absence of data going beyond the domain holder himself. However, if this was possible and should continue to be possible, this is proof that any data beyond the domain holder - different from him - was not previously necessary to achieve the purpose of the Applicant. If they had been necessary in the real sense, it would not have been possible to do without them before; rather, a registration would have been made dependent on the specification of different data records in terms of content and such a

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registration would not otherwise have been approved. Insofar as the choice of providing different contact data for the Tech-C and Admin-C from the domain holder was in fact already made in the past by the person who wanted to register (and was not an indispensable prerequisite for registration by the Defendant), this means that the person wishing to register will also be able to voluntarily provide their consent to the collection and storage of corresponding personal data in the future (Art. 6 para. 1 lit. a) GDPR and para. 7.2.2 of the RAA) - but he was not forced to do so even before.

It does not even matter whether the Defendant's information to the number of domain holders who have not provided different contact details is accurate.

Insofar as the Applicant bases its claim to relief on a parallel of the so-called "WHOIS" system to international agreements on trade mark registers, the Chamber is unable to follow this. The legal basis for the trademark registers on the basis of international agreements is missing in relation to the "WHOIS" service claimed by the Applicant. The fundamental comparability of the respective general need for protection does not change this.

The decision on costs follows from § 91 Paragraph 1 ZPO.

III.

The amount in dispute was to be limited to EUR 50.000,00. Economic impacts in the amount indicated in the request have not been demonstrated by the Applicant, who describes itself as a non-profit organization, which is why the Chamber, failing further indications, refers to the amount herein set.