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Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

30 September 2021 (*)

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction, recognition and enforcement of judgments – Civil and commercial matters – Lugano II Convention – Article 15(1)(c) – Jurisdiction over consumer contracts – Transfer of the consumer’s domicile to another State bound by the convention)

In Case C-296/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 12 May 2020, received at the Court on 3 July 2020, in the proceedings

Commerzbank AG

v

E.O.,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, C. Toader (Rapporteur) and M. Safjan, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Commerzbank AG, by N. Tretter, Rechtsanwalt,
- the Swiss Government, by M. Schöll, acting as Agent,
- the European Commission, by M. Heller and I. Zaloguin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1) ('the Lugano II Convention'), and, in particular, of Article 15(1)(c) and Article 16(2) thereof.

2 The request has been made in proceedings between Commerzbank AG and E.O. concerning the repayment of a debt resulting from an overdraft on E.O.'s current account.

Legal context

3 As is clear from the 'Information concerning the date of entry into force of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007' (OJ 2011 L 138, p. 1), the Lugano II Convention entered into force between the European Union and the Swiss Confederation on 1 January 2011.

4 Title II of the Lugano II Convention, entitled 'Jurisdiction', contains, in Section 1, entitled 'General provisions', Articles 2 to 4.

5 Article 2(1) of that convention provides:

'Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.'

6 Article 3(1) of that convention is worded as follows:

'Persons domiciled in a State bound by this Convention may be sued in the courts of another State bound by this Convention only by virtue of the rules set out in Sections 2 to 7 of this Title.'

7 Article 5(1) of the Lugano II Convention, which appears in Section 2 of Title II, entitled 'Special jurisdiction', provides:

'A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

...

– in the case of the provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided.

(c) if (b) does not apply then subparagraph (a) applies;

...’

8 Title II of the Lugano II Convention contains Section 4, entitled ‘Jurisdiction over consumer contracts’, under which Article 15(1) states:

‘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 Articles 4 and 5(5), if:

...

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the State bound by this Convention of the consumer’s domicile or, by any means, directs such activities to that State or to several States including that State, and the contract falls within the scope of such activities.’

9 Under Article 16(2) of that convention:

‘Proceedings may be brought against a consumer by the other party to the contract only in the courts of the State bound by this Convention in which the consumer is domiciled.’

10 Article 17 of the Lugano II Convention provides:

‘The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same State bound by this Convention, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Commerzbank, a company incorporated under German law, has its seat in Frankfurt am Main (Germany).

12 In 2009, E.O., who was then domiciled in Dresden (Germany), had opened a current account with a branch of Commerzbank, also established in Dresden. The latter issued a credit card to him.

13 In 2014, E.O. transferred his domicile to Switzerland.

14 It is apparent from the facts established by the appellate court that Commerzbank had allowed E.O.'s current account to be overdrawn.

15 In January 2015, E.O. sought to close his account with Commerzbank. The current account showed a debit balance of EUR 6 283.37. E.O. refused to repay that balance on the ground that it resulted from fraudulent use of his credit card by third parties.

16 Having called in vain upon E.O. several times to repay the debit balance in question, in April 2015 Commerzbank terminated the 'credit relationship' between the parties with immediate effect and issued a final statement of account showing a debit balance in its favour of EUR 4 856.61.

17 Since E.O. did not repay that balance, Commerzbank brought an action in November 2016 before the Amtsgericht Dresden (Local Court, Dresden, Germany) seeking an order that E.O. pay that balance.

18 That court dismissed that action as inadmissible on the ground that it lacked jurisdiction, in the light of the defendant's domicile, which was now in Switzerland. On 14 June 2018, the Landgericht Dresden (Regional Court, Dresden, Germany) upheld the judgment at first instance on appeal.

19 Commerzbank then brought an appeal on a point of law (*Revision*) before the referring court.

20 The Bundesgerichtshof (Federal Court of Justice, Germany) emphasises that the outcome of the appeal before it depends on the interpretation of Article 15(1)(c) and Article 16(2) of the Lugano II Convention.

21 The Bundesgerichtshof (Federal Court of Justice) refers to the case-law of the Court of Justice in which the latter interpreted Article 15(1) of the Lugano II Convention and laid down three cumulative conditions permitting the application of that provision. First, a party to a contract must be a 'consumer' who is acting in a context which can be regarded as being outside his or her trade or profession; secondly, the contract between such a consumer and a professional counterparty must actually have been concluded; and, thirdly, such a contract must fall within one of the categories referred to in Article 15(1).

22 The referring court considers that the first two conditions are satisfied in the present case. As regards the third, in so far as the contract at issue in the main proceedings does not fall within the scope of Article 15(1)(a) and (b) of the Lugano II Convention, it is only capable of falling within the scope of Article 15(1)(c) of that convention.

23 Accordingly, the referring court is uncertain whether Article 15(1)(c) of the Lugano II Convention presupposes the existence of cross-border activity on the part of the consumer's counterparty at the time the contract was concluded, bearing in mind that, at that time, that is to say

in 2009, both the consumer and the professional counterparty, via its branch, were domiciled in Dresden.

24 In those circumstances the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 15(1)(c) of the Lugano [II] Convention to be interpreted as meaning that the “pursuit” of a professional or commercial activity in the State bound by [that convention] and in which the consumer is domiciled presupposes that the other party was already engaged in cross-border activity at the time when the contract was initiated and concluded or does that provision also apply for the purpose of determining the court having jurisdiction to hear proceedings where the parties were domiciled within the meaning of Articles 59 and 60 of the Lugano [II] Convention in the same State bound by [that convention] at the time when the contract was concluded and a foreign element to the legal relationship arose only subsequently because the consumer relocated at a later date to another State bound by [that convention]?’

(2) If cross-border activity at the time when the contract was concluded is not necessary:

Does Article 15(1)(c) of the Lugano [II] Convention, read in conjunction with Article 16(2) thereof, generally preclude determination of the court having jurisdiction in accordance with Article 5(1) of [that convention] in the case where the consumer relocated to another State bound by the [Lugano II] Convention between the time when the contract was concluded and the time when the proceedings were brought, or is it also necessary for the professional or commercial activities of the other party to be pursued in or directed to the new State of domicile and for the contract to come within the scope of such activities?’

Procedure before the Court

25 By decision of the President of the Court of 22 July 2020, the proceedings before the Court were stayed pending delivery of the order in Case C-98/20, *mBank* (order of 3 September 2020, *mBank*, C-98/20, EU:C:2020:672).

26 Those proceedings were resumed on 7 September 2020.

27 Following the delivery of that order, the referring court was asked by the Registry whether it wished to maintain its request for a preliminary ruling.

28 In reply, by letter of 6 October 2020, the Bundesgerichtshof (Federal Court of Justice) stated that it was withdrawing the second question relating to Article 16(2) of the Lugano II Convention but maintaining the first question in its request for a preliminary ruling, concerning the interpretation of Article 15(1)(c) of that convention.

29 Consequently, the Court proceeded with the service of the request for a preliminary ruling, together with the referring court’s reply.

Consideration of the question referred

30 The referring court states at the outset that it is only if the provisions of Section 4 of Title II of the Lugano II Convention were excluded that the international jurisdiction of the German courts could be upheld on the basis of Article 5(1) of that convention.

31 As a preliminary point, it should be noted, first, that, as the Court made clear in the judgment of 20 December 2017, *Schlömp* (C-467/16, EU:C:2017:993, paragraph 37), the Lugano II Convention entered into force between the European Union and the Swiss Confederation on 1 January 2011.

32 Thus, although the contract in the main proceedings was concluded before that date, its termination and the subsequent legal proceedings took place after that date, so that the applicability of that convention is not open to challenge.

33 Secondly, according to settled case-law, as regards the provisions of the Lugano II Convention which are, in essence, identical to those of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), and, before it, to those 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 (OJ 2001 L 12, p. 1), and, earlier still, to those of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), the case-law of the Court of Justice on the interpretation of those provisions of EU law remains relevant (order of 15 May 2019, *MC*, C-827/18, not published, EU:C:2019:416, paragraph 19 and the case-law cited).

34 Thirdly, Section 4 of Title II of the Lugano II Convention, entitled ‘Jurisdiction over consumer contracts’, includes, inter alia, Articles 15 and 16.

35 Article 15 of the Lugano II Convention lays down the three conditions, recalled in paragraph 21 above, which must be satisfied in order to trigger the application of Section 4 of that convention. All of those conditions must, according to the case-law, be satisfied, with the result that, if one of them is not satisfied, jurisdiction cannot be determined under the rules relating to consumer contracts (see, to that effect, judgment of 26 March 2020, *Primera Air Scandinavia*, C-215/18, EU:C:2020:235, paragraph 56 and the case-law cited).

36 As regards Article 16 of the Lugano II Convention, the Court has recently recalled, with regard to Article 18 of Regulation No 1215/2012, the wording of which is, in essence, identical to that of Article 16 of that convention, that the concept of ‘consumer’s domicile’ must be interpreted as designating the consumer’s domicile at the date on which the court action is brought (order of 3 September 2020, *mBank*, C-98/20, EU:C:2020:672, paragraph 36).

37 Fourthly, it is important to bear in mind that, as regards the special rules of jurisdiction concerning consumer contracts, and where, as in the present case, the action is brought against the consumer by the professional counterparty, a rule such as that laid down in Article 16(2) of the Lugano II Convention is classified as a ‘rule of exclusive jurisdiction’ under which the action may be brought only in the courts of the State in which the consumer is domiciled (see, by analogy, order of 3 September 2020, *mBank*, C-98/20, EU:C:2020:672, paragraph 26).

38 It is in the light of those considerations that the question referred must be answered.

39 By its question, the referring court asks, in essence, whether Article 15(1)(c) of the Lugano II Convention must be interpreted as meaning that it determines jurisdiction where the parties to the contract – the consumer and the professional counterparty – were, at the time that contract was concluded, domiciled in the same State bound by that convention and where an international element in the legal relationship emerged only after that date, on account of the transfer of the consumer’s domicile to another State bound by that convention, or whether, in such a case, that

provision requires that the professional counterparty already pursued a cross-border activity at the time the contract was concluded.

40 According to settled case-law, the methods of interpretation used by the Court require account to be taken not only of the wording of the provision concerned, but also of its context and the objectives pursued by the act of which it forms part (see, to that effect, judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 37 and the case-law cited).

41 In the first place, according to the wording of Article 15(1)(c) of the Lugano II Convention, the consumer's counterparty 'pursues commercial or professional activities in the State bound by this Convention of the consumer's domicile or, by any means, directs such activities to that State or to several States including that State, and the contract falls within the scope of such activities'.

42 As the European Commission submits, it does not follow either expressly or implicitly from the wording of that provision that, at the time the contract was concluded, the professional activity must necessarily be directed to a State other than that in which the professional counterparty has its seat. Similarly, there is also nothing to indicate that the State in which the consumer is domiciled must be a State other than that in which the professional counterparty has its seat.

43 Thus, the only express requirement is that the professional counterparty pursues its activity in the State in which the consumer is domiciled.

44 That finding is supported by the Court's case-law in respect of instruments equivalent to the Lugano II Convention. Thus, the Court has previously held that the uniform rules of jurisdiction were applicable notwithstanding the fact that, at the time the contract was concluded, the consumer and the professional counterparty were domiciled in the same State (see, to that effect, judgment of 17 November 2011, *Hypoteční banka*, C-327/10, EU:C:2011:745, paragraphs 22, 29, 30 and 34 and the case-law cited).

45 In the judgment of 14 November 2013, *Maletic* (C-478/12, EU:C:2013:735, paragraph 26), the Court reiterated its settled case-law according to which the application of the rules of jurisdiction requires the existence of an international element and that the international nature of the legal relationship at issue need not necessarily derive from the involvement, either because of the subject matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States.

46 It should be noted that although, in the circumstances in which the order of 3 September 2020, *mBank* (C-98/20, EU:C:2020:672), was made, the bank, established in a first State, owned a branch in the second State where, at the time the contract was concluded, the consumer was also domiciled, it is common ground that, in that case, that bank did not pursue any professional or commercial activity in the third State in which the consumer was now domiciled, without that circumstance precluding the application of Article 17(1)(c) of Regulation No 1215/2012, the provisions of which are almost identical to those of Article 15(1)(c) of the Lugano II Convention.

47 The foregoing considerations are consistent with the grounds of the judgment of 7 December 2010, *Pammer and Hotel Alpenhof* (C-585/08 and C-144/09, EU:C:2010:740). The case that gave rise to that judgment concerned the interpretation of the phrase 'direct to' in a case where the professional counterparty's activity was presented on a website, and the question whether the website's merely 'being accessible' was sufficient. Thus, it cannot be inferred from that judgment that, in principle, in connection with Article 15(1)(c) of the Lugano II Convention, the pursuit of a

professional or commercial activity must necessarily relate to another Contracting State at the time the contract was concluded and that the application of that article would be excluded where the consumer, at the time that contract was concluded, is domiciled in the same State as the professional counterparty.

48 In the second place, as regards the context, the referring court relies on a comparative reading of points (a) to (c) of Article 15(1) of the Lugano II Convention to suggest that point (c) of that provision requires an international element at the time the contract was concluded.

49 In that regard, as the Commission also noted, none of the three situations referred to in Article 15(1) of the Lugano II Convention mentions the requirement that the activity pursued must have an international element at the time the contract was concluded.

50 As regards the systematic interpretation of Article 15 of that convention, it should be noted that it is apparent from Article 17(3) thereof that an agreement conferring jurisdiction ‘is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same State bound by this Convention, and ... confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State’.

51 Thus, and as the Advocate General points out in points 76 and 77 of his Opinion, the fact that the parties were domiciled in the same State when the contract at issue in the main proceedings was concluded does not prevent the application of the provisions of Section 4 of Title II of the Lugano II Convention, such as Article 17(3) thereof.

52 It follows that a systematic interpretation of the provisions of Section 4 of Title II of the Lugano II Convention does not require that the professional counterparty already pursued a cross-border activity at the time the contract was concluded.

53 In the third place, as regards the objective pursued by the Lugano II Convention, and in response to Commerzbank’s second objection, relating to the predictability of the rules of jurisdiction and to the risk that consumers might ‘take the forum of protection with them’, it must be borne in mind that the rules of that convention are not intended to govern the scheme of the contract but to establish uniform rules of international jurisdiction (see, by analogy, judgment of 25 February 2021, *Markt24*, C-804/19, EU:C:2021:134, paragraphs 30 and 32 and the case-law cited) and that those rules are not determined before the court action is brought (see, to that effect, order of 3 September 2020, *mBank*, C-98/20, EU:C:2020:672, paragraph 36).

54 Contrary to the claims made by the applicant in the main proceedings, it must be stated that the rule of the jurisdiction of the court of the consumer’s domicile, notwithstanding any change of domicile, is not only the result of the process of legislative integration, expressed here in the rules of the Lugano II Convention, but also corresponds to the usual rule of jurisdiction based on the defendant’s domicile, established in Article 2(1) of that convention.

55 In the fourth and last place, the national court relies on Mr Schlosser’s report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71, paragraph 161) to take the view that, in the event that the consumer transfers his or her domicile to another State after the conclusion of the contract, Section 4, entitled ‘Jurisdiction over consumer contracts’, of Title II of the Convention on

jurisdiction and the enforcement of judgments in civil and commercial matters – Done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), known as the ‘Lugano Convention’, would apply to the cases referred to in point 3 of the first paragraph of Article 13 of that convention (the provisions of which are reproduced in Article 15(1)(c) of the Lugano II Convention) only if the conditions laid down in that provision were met in the new State of domicile.

56 It should be noted that paragraph 161 of that report states that it is not an absolute rule, but is subject to exceptions. That paragraph clarifies in particular the rationale for that rule, relating to the difficulties inherent in cross-border advertising for the purposes of the conclusion of the contract.

57 In that regard, it must be stated that conditions relating to communication technologies have evolved considerably since the publication of that report.

58 In any event, although the content of such a report is liable to corroborate or confirm the analysis of the provisions in respect of which the Court must provide an interpretation, it cannot override the wording of those provisions.

59 As follows from paragraphs 43 to 54 above, it is clear from the wording of Article 15(1)(c) of the Lugano II Convention, the context of that provision and the purpose of that convention that the applicability of that provision is subject only to the express condition that the professional counterparty pursues its activity in the State in which the consumer is domiciled at the time the contract was concluded, and the subsequent transfer of the consumer’s domicile to another Contracting State is not liable to prevent the applicability of that provision.

60 In the light of the foregoing considerations, the answer to the question referred is that Article 15(1)(c) of the Lugano II Convention must be interpreted as meaning that that provision determines jurisdiction where the parties to a consumer contract – the consumer and the professional counterparty – were, at the time that contract was concluded, domiciled in the same State bound by that convention, and where an international element in the legal relationship emerged only after that contract was concluded, on account of the subsequent transfer of the consumer’s domicile to another State bound by that convention.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 15(1)(c) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008, must be interpreted as meaning that that provision determines jurisdiction where the parties to a consumer contract – the consumer and the professional counterparty – were, at the time that contract was concluded, domiciled in the same State bound by that convention, and where an international element in the legal relationship emerged only after that contract was concluded, on account of the subsequent transfer of the consumer’s domicile to another State bound by that convention.

[Signatures]

* Language of the case: German.
