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Online gambling: An experienced poker player remains a “consumer” according to the CJEU

Does a player who is a little too experienced and victorious for an online poker site - this player having won 227,000 euros in less than a month and a half - retain the status of non-professional “consumer” within the meaning of Regulation (EC) No 44/2001 of December 22, 2000 (known as the Brussels I Regulation)[1]?

In a judgment issued on December 10, 2020[2], the Court of Justice of the European Union answered yes to this question.

The dispute

The initial dispute was between Personal Exchange International Limited (“PEI”), a company offering online gambling services (including poker), and Mr. B.B., a private individual residing in Slovenia.

Mr. B.B. had registered on PEI’s online gaming site and had won, in less than a month and a half, 227,000 euros in poker winnings.

Faced with this user a little too victorious for it, PEI decided to block Mr. B.B.’s account.

Mr. B.B. decided to initiate legal proceedings before the Slovenian courts. He won his case both before the First Instance Court and before the Court of Appeals. PEI then appealed to the *Vrhovno sodisce* (Supreme Court of Slovenia) to challenge the appellate judgment.

The issue at stake

The question of the international jurisdiction of the courts with regard to European Union law lied at the heart of the discussions.

Since the beginning of this dispute, Mr. B.B., in his capacity as consumer, asserted that Slovenian courts were competent, which allowed him to bring the matter before the court having jurisdiction over the place where he was domiciled, i.e. Slovenia.

Indeed, it should be reminded that Section 4 “Jurisdiction over consumer contracts” 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 (known as the Brussels I Regulation) in force at that time provided as follows:

“Article 15

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:*

[...]

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.

[...]

Article 16

1. **A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled. »**

According to Mr. B.B., his capacity as a consumer was established insofar as he had accepted the general terms and conditions unilaterally set by PEI, thus placing him in an economically weaker position, he was not registered as a professional for this poker playing activity, he had never offered his services to third parties in return for payment, and he had no sponsor whatsoever.

Conversely, PEI claimed that the courts of the Republic of Malta (as designated in the general terms and conditions accepted by Mr. B.B.) were competent to hear the case on the ground that Mr. B.B. was allegedly a professional poker player and could not, therefore, benefit from the more protective EU jurisdictional rules that apply to consumers.

In support of this claim, PEI pointed out that Mr. B.B. had been living off his poker games for several years, and reportedly played poker for an average of nine hours a day.

According to the Slovenian Supreme Court, the issue of international jurisdiction at the heart of this dispute therefore depended on whether Mr. B.B. could be considered, within the meaning of EU law, as having concluded a contract with PEI as a “consumer, for a purpose that can be regarded as being outside his professional activity” within the meaning of the Brussels I Regulation.

The Slovenian Supreme Court therefore referred the following question to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling:

“Must Article 15(1) of Regulation No 44/2001 be interpreted as meaning that an online poker playing contract, concluded remotely over the internet by an individual with a foreign operator of online games and subject to that operator’s general terms and conditions, can also be classified as a contract concluded by a consumer for a purpose which can be regarded as being outside his trade or profession, where that individual has, for several years, lived on the income thus obtained or the winnings from playing poker, even though he has no formal registration for that type of activity and in any event does not offer that activity to third parties on the market as a paid service?”

Decision of the CJEU

The CJEU provided the following answer:

“Article 15(1) 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 is to be interpreted as meaning that a natural person domiciled in a Member State who, on the one hand, has concluded a contract with a company based in another Member State to play poker on the Internet, pursuant to terms and conditions determined by the latter, and on the other hand, has neither officially registered such activity nor offered such activity to third parties as a paid service does not lose the status of “consumer” within the meaning of this provision, even if that person plays the game for a large number of hours per day, has extensive knowledge and receives substantial winnings from that game.”

The reasoning of the CJEU can be summarized as follows.

First of all, it pointed out that the rules provided for in Regulation (EC) No 44/2001 that constitutes a derogation from the general rule of jurisdiction are to be interpreted strictly and that the concept of “consumer” within the meaning of that Regulation must be interpreted autonomously.

It then specified that the provisions of that Regulation must be interpreted objectively, namely for a “consumer”, according to the *“position of the relevant person concerned in a given contract, in relation to the nature and purpose of that contract, and not to the subjective situation of that person”*.

According to the CJEU, the fact that Mr. B.B. had won substantial sums of money was not a determining criterion for the qualification or non-qualification as consumer, since recognizing a differentiation depending on the winnings received would lead to legal uncertainty as to the interpretation of the European provisions and would undermine the predictability of jurisdictional rules.

For the same reasons, the CJEU specified that an individual’s knowledge in the area covered by the contract that has been entered into does not make him/her lose his/her capacity as “consumer”.

It also indicated that the fact that Mr. B.B. was playing poker on a very regular basis – nine hours a day – was indeed an element to be taken into account, but this element ought to be considered among and with others and could not in itself rule out the qualification as consumer.

According to the CJEU, the element that was really decisive, following a strict interpretation of Article 15 of Regulation 44/2001, was whether the relevant person acted outside and independently of any professional activity, which seemed to be the case for Mr. B.B..

As such, an experienced poker player who receives substantial winnings and spends a significant number of hours playing online is still a consumer, insofar as he/she has not registered this activity as a professional or provided paid services in this respect to third parties and has accepted the general terms and conditions determined unilaterally by the online gambling company.

Finally, it should be noted that Regulation (EC) No. 44/2001, applicable at the material time, has since been replaced by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as the Brussels I recast Regulation).

However, as the provisions on jurisdiction over consumer contracts are identical in these two Regulations, it is reasonable to transpose the CJEU’s reasoning to Regulation (EU) No. 1215/2012 currently applicable.

[1] <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R0044&from=NL>

[2] C-774/19 – Personal Exchange International

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