

Pre-closure letter for a multiple complaint on an alleged breach by Germany of EU rules on enforcement of judgments - CHAP(2020)1541

In 2020, the European Commission received a large number of complaints about a decision of the German Federal Court of Justice refusing to enforce a judgment of the Court of Appeal of Kraków, in which it ruled that a German TV station violated the personal rights of a former prisoner of the Auschwitz concentration and extermination camp by publishing on its website the phrase “Polish extermination camps”. The complaints allege an infringement by Germany of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), which has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments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 (Brussels Ia Regulation).

The case concerns infringement of personality rights of Mr Tendera, who passed away in 2019 and who was a former prisoner of the Auschwitz camp, active in organisations preserving and promoting historical truth and memory of Nazi crimes in occupied Poland. On 15 July 2013 the ZDF (“Zweites Deutsches Fernsehen”), in an announcement on its website of a TV programme, referred to former Nazi German concentration and extermination camps in the occupied territory of Poland as “Polish extermination camps”. Following an intervention of the Polish embassy in Germany, the ZDF corrected that historically incorrect remark on the same day. Nevertheless, Mr Tendera brought judicial proceedings against ZDF in Poland for infringing his personality rights to national identity and national dignity by the use of that remark. Subsequently, ZDF in a message on its website deplored the remark as an error and apologised to all persons that had been offended by it. It also apologised to Mr Tendera personally. At first instance Mr Tendera’s case was dismissed. His appeal to the Court of Appeal of Krakow was partially successful. In its judgment, which became final, that court ordered ZDF to apologise to Mr Tendera by publishing on its main website for a month a declaration with specific text¹. That judgment was subject of proceedings for its enforcement in Germany, which were concluded by the decision of the German Federal Court of Justice in Karlsruhe (*Bundesgerichtshof* (BGH)) refusing recognition and enforcement. That decision of the BGH is the subject of this complaint.

The BGH based itself on Articles 34(1) and 45 of the Brussels I Regulation² deciding that obliging ZDF not only to recognise its factual mistake which is undisputed but also to express an opinion as its own, which would be the case if forced to publish the specific declaration, is precluded by the fundamental right of freedom of expression as enshrined in the German constitution (*Grundgesetz*) and is contrary to the German *ordre public*.

¹ The declaration reads as follows: [The defendant] “*is expressing regret for the appearance in the article titled “[...]”, of 15 July 2013 on the portal www.zdf.de, of an incorrect formulation which falsifies the history of the Polish nation, suggesting that extermination camps in Majdanek and Auschwitz were built and operated by Poles, and apologises to Mr K.T., who was incarcerated in a German concentration camp, for violating his personality rights, in particular the nationality identity (feeling of belonging to the Polish Nation) and his national dignity.*”

² Council Regulation (EC) 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1. It has been repealed by Regulation (EU) 1252/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation), OJ L OJ L 351, 20.12.2012, p. 1, applicable from 10 January 2016.

At the time of proceedings in Mr Tendera's case, recognition and enforcement of judgments in civil and commercial matters in the Union was regulated by Brussels I Regulation. Article 45(2) of that Regulation states that under no circumstances the foreign judgment which is the subject of recognition and enforcement may be reviewed as to its substance. Article 34(1) of that Regulation provides that a judgment shall not be recognised if such recognition and enforcement is manifestly contrary to public policy in the Member State addressed.

The complainants submit that the order of the BGH infringes the prohibition of a substantive assessment of the judgment which is the subject of the exequatur procedure. The BGH, in carrying out its own assessment of whether the declaration of specific content ordered in the Polish judgment was true and appropriate to the seriousness of the infringement committed by ZDF, carried out a substantive assessment of the Polish decision, ultimately taking a different view on the substance.

Furthermore, the complainants question the "manifest nature" of the alleged contradiction between the Polish court's order to publish a statement of specific content imposed on ZDF and the German rules on the protection of freedom of expression, relied on by the BGH to refuse to recognise the Polish judgment.

Finally they express doubts that ordering the ZDF to apologise in accordance with the strict instructions of the Court of Appeal in Kraków is contrary to the freedom of expression/opinion invoked by the German BGH because such a form of remedying the consequences of the violation of personality rights is considered by the European Court of Human Rights to be compatible with Article 10 of the European Convention on Human Rights.

The Commission has communicated its assessment on this matter in the context of a petition addressed to the European Parliament (petition no. 1311/2019):

"The Court of Justice of the European Union (CJEU) in its case-law has established that while Member States remain in principle free to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter of interpretation of the Regulation³.

The courts of Member States define public policy within the limits set by the CJEU of what can be considered manifestly in breach of public policy. Irrespective of the specific context of this case, due to the different constitutional systems across Member States, the protection of personality rights and the protection of the freedom of expression and of the press may involve different choices of level of protection of the fundamental rights at hand and give rise to legitimate public policy concerns in the recognition and enforcement of judgments.

The decision of the BGH is an individual court decision based on the Brussels I Regulation. It invokes a permissible ground for refusal of recognition and enforcement under that Regulation and it is final.

In this context, the Commission does not consider to have sufficient indication of an infringement of EU law by the German judicial decision in question."

The Commission confirms its view that there is no sufficient evidence of an infringement of EU law by the decision of the German Federal Court of Justice in Karlsruhe (BGH) of 19 July

³ For instance Case 302/13, *flyLAL-Lithuanian Airlines* and case C-420/07, *Apostolides*.

2018 by which it refused enforcement in Germany of a judgment of the Court of Appeal in Krakow of 22 December 2016. The complainants' specific observations do not change that assessment.

First, the Commission notes that examining an *ordre public* refusal necessarily involves reviewing the merits of the foreign decision. Articles 34(1) and 45(2) of the Brussels I Regulation have to be read together, the public policy exception being also an exception to the prohibition of the review on the merits set out in Article 45 to the extent that such review is indispensable to assess whether the recognition and enforcement would be manifestly contrary to public policy.

Moreover, the order of the BGH is largely restricted to the characterisation of the statement imposed on the defendant in the decision of the Court of Appeal in Krakow in light of the fundamental rights protection in Germany. It does not replace the latter's court reasoning and conclusion that personal rights of the plaintiff were infringed. Rather, the Federal Supreme Court considers that the statement in question is not a mere rectification of a factual incorrectness but amounts to an expression of an opinion that the defendant would have to make as if this were their own opinion, which would violate the fundamental right to freedom of expression, as protected in Germany.

Regarding the complainant's allegation that Article 10 ECHR does not prevent the imposition of an apology along the lines of the Polish decision, the Commission reiterates that different choices of level of protection of the freedom of expression and the freedom of media may be made by Member States in balancing those rights with the protection of personality rights, an area not harmonised by EU law. Within the context of the Brussels I Regulation they may decide to define the solution identified under their national constitutional system as a matter of public policy within the limits set by the Court of Justice. The question of whether Article 10 ECHR provides the same level of protection to the freedom of expression does not appear to be of relevance in that respect.

Against this background, the Commission intends to close this complaint. Should the complainants have any new information that might be relevant for the reassessment of this complaint, they can contact the Commission within four weeks of the publication of this notice, after which date the case will be closed.