

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

24 November 2020 (*)

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EU) No 1215/2012 – Jurisdiction – Article 7, points 1 and 2 – Special jurisdiction in matters relating to tort, delict or quasi-delict – Action seeking an injunction against commercial practices considered to be contrary to competition law – Allegation of abuse of a dominant position occurring in commercial practices covered by contractual provisions – Online accommodation booking platform booking.com)

In Case C-59/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 11 December 2018, received at the Court on 29 January 2019, in the proceedings

Wikingerhof GmbH & Co. KG

v

Booking.com BV,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev and A. Prechal, Presidents of Chambers, T. von Danwitz, C. Toader, M. Safjan (Rapporteur), D. Šváby, S. Rodin, K. Jürimäe, C. Lycourgos and P.G. Xuereb, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 27 January 2020,

after considering the observations submitted on behalf of:

- Wikingerhof GmbH & Co. KG, by V. Soyez and C. Aufdermauer, Rechtsanwälte,
- Booking.com BV, by T. Winter, N. Hermann, L. Alexy and C. Bauch, Rechtsanwälte,
- the Czech Government, by M. Smolek, J. Vláčil and A. Kasalická, acting as Agents,
- the European Commission, by M. Heller and G. Meessen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2020,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of point 2 of Article 7 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).
- 2 The request has been made in proceedings between Wikingerhof GmbH & Co. KG, a company governed by German law operating a hotel in the *Land* of Schleswig-Holstein (Germany), and Booking.com BV, a company governed by Netherlands law which has its seat in the Netherlands and operates an accommodation booking platform, concerning certain practices of the latter company which Wikingerhof claims constitute an abuse of a dominant position.

Legal context

- 3 Recitals 15, 16 and 34 of Regulation No 1215/2012 are worded as follows:

‘(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(16) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

...

(34) Continuity between the Convention [of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the successive conventions on the accession of new Member States to that convention], [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 this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of [that] Convention and of the Regulations replacing it.’

- 4 Chapter II of Regulation No 1215/2012, entitled ‘Jurisdiction’, contains, inter alia, a Section 1, entitled ‘General provisions’, and a Section 2, entitled ‘Special jurisdiction’. Article 4(1) of that regulation, which features in Section 1, provides:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

- 5 Article 7 of Regulation No 1215/2012, which features in Section 2 of Chapter II of that regulation, is worded as follows:

‘A person domiciled in a Member State may be sued in another Member State:

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

...

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

...’

6 Article 25(1) of Regulation No 1215/2012, which features in Section 7 of Chapter II of that regulation, entitled ‘Prorogation of jurisdiction’, provides:

‘If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. ...’

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

7 In March 2009, Wikingerhof concluded with Booking.com a standard form contract provided by the latter, which stated, inter alia, the following:

‘General Terms and Conditions

The hotel declares that it has received a copy of Version 0208 of the General Terms and Conditions ... of Booking.com. These are available online at Booking.com ... The hotel confirms that it has read and understood the terms and conditions and agrees to them. The terms and conditions form an integral part of this contract ...’

8 Subsequently, and on several occasions, Booking.com amended its general terms and conditions, accessible on that company’s Extranet, a system by which hotel information can be updated and the data relating to bookings consulted.

9 Wikingerhof objected, in writing, to the inclusion in the contract between it and Booking.com of a new version of the general terms and conditions which Booking.com had brought to the attention of its contracting partners on 25 June 2015. Wikingerhof claimed that it had had no choice but to conclude that contract on account of the strong position held by Booking.com on the market for intermediary services and accommodation reservation portals, even though certain practices of Booking.com are unfair and therefore contrary to competition law.

10 Wikingerhof brought an action before the Landgericht Kiel (Regional Court, Kiel, Germany) seeking an injunction prohibiting Booking.com from affixing to the price specified by Wikingerhof, without the latter’s consent, the indication ‘preferential price’ or ‘discounted price’ on the accommodation reservation platform, from withholding the contact information provided by its contracting partners on that platform and, lastly, from making the placement of the hotel which it operates in search requests dependent on the granting of commission in excess of 15%.

11 Booking.com pleaded that the Landgericht Kiel (Regional Court, Kiel) lacked territorial and international jurisdiction in so far as there was an agreement conferring jurisdiction in the contract concluded with Wikingerhof, according to which the courts of Amsterdam (Netherlands) have territorial jurisdiction to hear disputes arising from that contract.

12 The Landgericht Kiel (Regional Court, Kiel) held that it could not hear and determine the action brought by Wikingerhof on the ground that it lacked territorial and international jurisdiction. That judgment was upheld on appeal by a judgment of the Oberlandesgericht Schleswig (Higher Regional Court, Schleswig, Germany), according to which neither the jurisdiction of the court for the place of performance of the contractual obligation, under point 1 of Article 7 of Regulation No 1215/2012, nor the jurisdiction of the

court for the place where the harmful event occurred in matters relating to tort, delict or quasi-delict, under point 2 of Article 7 of that regulation, was established in the present case.

13 Wikingerhof thereupon lodged an appeal on a point of law (*Revision*) against that judgment before the Bundesgerichtshof (Federal Court of Justice, Germany).

14 That court observes that the question of the possible effect of the agreement conferring jurisdiction, relied on by Booking.com, on the jurisdiction of the German courts before which Wikingerhof brought proceedings does not arise because that agreement was not validly concluded in accordance with the requirements of Article 25 of Regulation No 1215/2012.

15 In the present case, the appeal on a point of law is based on the contention that the appeal court erred in finding that the action before it did not come within its jurisdiction in matters relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012.

16 According to the referring court, which cites the judgment of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533), an action concerns matters relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012 where it relates to claims for civil liability or an injunction that are based on the fact that the conduct complained of amounts to an abuse of a dominant position. Such an abuse of a dominant position could result from making the conclusion of a contract subject to the acceptance of unfair trading terms.

17 The referring court is inclined to take the view that the case in the main proceedings concerns a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012, in so far as Wikingerhof agreed to sign the terms of the contract at issue, which it considers unfair, solely because of the dominant position of Booking.com and did not therefore freely consent to it. Thus, in the view of the referring court, the dispute in the main proceedings not only involves a question of interpretation of that contract, but also raises the question whether the imposition of certain contractual terms by an undertaking assumed to be in a dominant position must be regarded as abusive and therefore as being contrary to the rules of competition law.

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

‘Is [point 2 of Article 7 of Regulation No 1215/2012] to be interpreted as meaning that jurisdiction for matters relating to tort or delict exists in respect of an action seeking an injunction against specific practices if it is possible that the conduct complained of is covered by contractual provisions, but the applicant asserts that those provisions are based on an abuse of a dominant position on the part of the defendant?’

Consideration of the question referred

19 By its question, the referring court asks, in essence, whether point 2 of Article 7 of Regulation No 1215/2012 must be interpreted as applying to an action seeking an injunction against certain practices implemented in the context of the contractual relationship between the applicant and the defendant, based on an allegation of abuse of a dominant position by the latter in breach of competition law.

20 As a preliminary point, it should be noted that, in accordance with recital 34 of Regulation No 1215/2012, that regulation repeals and replaces Regulation No 44/2001, which itself replaced the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the successive conventions on the accession of new Member States to that convention. Consequently, the Court’s interpretation of the provisions of the latter legal instruments also applies to those of Regulation No 1215/2012 whenever those provisions may be regarded as ‘equivalent’. That is the case with point 3 of Article 5 of that convention and Regulation No 44/2001, on the one hand, and point 2

of Article 7 of Regulation No 1215/2012, on the other (see, to that effect, judgment of 9 July 2020, *Verein für Konsumenteninformation*, C-343/19, EU:C:2020:534, paragraph 22).

21 While Article 4(1) of Regulation No 1215/2012 establishes the general jurisdiction of the courts of the Member State of the defendant, point 1 of Article 7 and point 2 of Article 7 of that regulation provide for special jurisdiction in matters relating to a contract and matters relating to tort, delict or quasi-delict, allowing the applicant to bring an action before the courts of other Member States.

22 Thus, for actions within the first category, point 1 of Article 7 of that regulation allows the applicant to bring proceedings before the courts for the place of performance of the obligation in question, while, for actions within the second category, point 2 of Article 7 of that regulation provides that they may be brought before the courts for the place where the harmful event occurred or may occur.

23 It is the Court's settled case-law that the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of point 2 of Article 7 of Regulation No 1215/2012 covers all actions which seek to establish the liability of a defendant and do not concern matters relating to a contract within the meaning of point 1(a) of Article 7 of that regulation (see, to that effect, judgments of 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459, paragraph 18, and of 12 September 2018, *Löber*, C-304/17, EU:C:2018:701, paragraph 19), that is to say, actions not based on a legal obligation freely consented to by one person towards another (judgment of 20 January 2005, *Engler*, C-27/02, EU:C:2005:33, paragraph 51).

24 In the present case, conferral of jurisdiction to hear the case in the main proceedings on the court before which Wikingerhof brought proceedings depends specifically on the distinction to be made between, on the one hand, matters relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012 and, on the other hand, matters relating to a contract within the meaning of point 1(a) of Article 7 of that regulation. Indeed, it is apparent from the order for reference that, if Wikingerhof's claim were a matter relating to a contract and could therefore be brought in the place where the obligation that serves as the basis for that claim has been or must be performed, the court before which the action was brought would not have jurisdiction to hear it.

25 According to the Court's settled case-law, the two rules of special jurisdiction laid down in those provisions must be interpreted independently, by reference to the scheme and purpose of Regulation No 1215/2012, in order to ensure that that regulation is applied uniformly in all the Member States (see, to that effect, judgments of 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459, paragraph 16; of 17 September 2002, *Tacconi*, C-334/00, EU:C:2002:499, paragraph 19; and of 18 July 2013, *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 27). That requirement, which applies in particular to the definition of the respective scopes of those two rules, means that the concepts of 'matters relating to a contract' and of 'matters relating to tort, delict or quasi-delict' cannot be taken to refer to the way in which the legal relationship at issue before the national court is classified by the applicable national law (see, to that effect, judgment of 13 March 2014, *Brogssitter*, C-548/12, EU:C:2014:148, paragraph 18).

26 As regards, in the first place, the scheme of Regulation No 1215/2012, it is based on the principle that jurisdiction lies with the courts of the Member State in which the defendant is domiciled, whereas the rules on special jurisdiction laid down in, inter alia, Article 7 thereof constitute derogations from that principle and, as such, are to be interpreted restrictively (see, to that effect, judgment of 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459, paragraph 19) and are mutually exclusive in the application of that regulation.

27 At the same time, as the Advocate General observed, in essence, in point 87 of his Opinion, that scheme is characterised by the possibility which it confers on the applicant of relying on one of the rules of special jurisdiction laid down by that regulation.

28 As regards, in the second place, the purpose of Regulation No 1215/2012, it is apparent from recital 16 of that regulation that the rules of special jurisdiction on which the applicant may rely under, on the one hand, point 1 of Article 7 of that regulation and, on the other hand, point 2 of Article 7 thereof, were introduced

on account of the existence, in the matters covered by those provisions, of a particularly close connecting factor between an action and the court which may be called upon to hear it, or in order to facilitate the sound administration of justice (see, to that effect, judgment of 4 October 2018, *Feniks*, C-337/17, EU:C:2018:805, paragraph 36).

29 It must therefore be held that the applicability of either point 1 of Article 7 of Regulation No 1215/2012 or point 2 of Article 7 thereof depends, first, on the applicant's choice whether or not to rely on one of those rules of special jurisdiction and, second, on the examination, by the court hearing the action, of the specific conditions laid down by those provisions.

30 In that regard, where an applicant relies on one of those rules, it is necessary for the court hearing the action to ascertain whether the applicant's claims concern, irrespective of their classification under national law, matters relating to a contract or, on the contrary, matters relating to tort, delict or quasi-delict within the meaning of that regulation.

31 In particular, as the Advocate General observed in point 90 of his Opinion, the court hearing the action must decide whether a claim between contracting parties is connected to matters relating to a contract, within the meaning of point 1 of Article 7 of Regulation No 1215/2012, or to matters relating to tort or delict, within the meaning of point 2 of Article 7 of that regulation, by reference to the obligation, whether contractual or a matter relating to tort, delict or quasi-delict, which constitutes the cause of action (see, to that effect, judgment of 13 March 2014, *Brogstetter*, C-548/12, EU:C:2014:148, paragraph 26).

32 Thus, an action concerns matters relating to a contract within the meaning of point 1(a) of Article 7 of Regulation No 1215/2012 if the interpretation of the contract between the defendant and the applicant appears indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter (see, to that effect, judgment of 13 March 2014, *Brogstetter*, C-548/12, EU:C:2014:148, paragraph 25). That is in particular the case of an action based on the terms of a contract or on rules of law which are applicable by reason of that contract (see, to that effect, judgments of 10 September 2015, *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 53, and of 15 June 2017, *Kareda*, C-249/16, EU:C:2017:472, paragraphs 30 to 33).

33 By contrast, where the applicant relies, in its application, on rules of liability in tort, delict or quasi-delict, namely breach of an obligation imposed by law, and where it does not appear indispensable to examine the content of the contract concluded with the defendant in order to assess whether the conduct of which the latter is accused is lawful or unlawful, since that obligation applies to the defendant independently of that contract, the cause of the action is a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012.

34 In the present case, Wikingerhof relies, in its application, on an infringement of German competition law, which lays down a general prohibition of abuse of a dominant position, independently of any contract or other voluntary commitment. Specifically, Wikingerhof takes the view that it had no choice but to conclude the contract at issue and to suffer the effect of subsequent amendments to Booking.com's general terms and conditions by reason of the latter's strong position on the relevant market, even though certain of Booking.com's practices are unfair.

35 Thus, the legal issue at the heart of the case in the main proceedings is whether Booking.com committed an abuse of a dominant position within the meaning of German competition law. As the Advocate General stated in points 122 and 123 of his Opinion, in order to determine whether the practices complained of against Booking.com are lawful or unlawful in the light of that law, it is not indispensable to interpret the contract between the parties to the main proceedings, such interpretation being necessary, at most, in order to establish that those practices actually occur.

36 It must therefore be held that, subject to verification by the referring court, the action brought by Wikingerhof, in so far as it is based on the legal obligation to refrain from any abuse of a dominant

position, is a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012.

37 That interpretation is consistent with the objectives of proximity and sound administration of justice pursued by that regulation, referred to in recital 16 thereof and recalled in paragraph 28 above. The court having jurisdiction under point 2 of Article 7 of Regulation No 1215/2012, namely, in the circumstances at issue in the main proceedings, that of the market affected by the alleged anticompetitive conduct, is the most appropriate for ruling on the main issue of whether that allegation is well founded, particularly in terms of gathering and assessing the relevant evidence in that regard (see, by analogy, judgments of 29 July 2019, *Tibor-Trans*, C-451/18, EU:C:2019:635, paragraph 34, and of 9 July 2020, *Verein für Konsumenteninformation*, C-343/19, EU:C:2020:534, paragraph 38).

38 In the light of all the foregoing considerations, the answer to the question referred is that point 2 of Article 7 of Regulation No 1215/2012 must be interpreted as applying to an action seeking an injunction against certain practices implemented in the context of the contractual relationship between the applicant and the defendant, based on an allegation of abuse of a dominant position by the latter in breach of competition law.

Costs

39 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 (Grand Chamber) hereby rules:

Point 2 of Article 7 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 must be interpreted as applying to an action seeking an injunction against certain practices implemented in the context of the contractual relationship between the applicant and the defendant, based on an allegation of abuse of a dominant position by the latter in breach of competition law.

[Signatures]

* Language of the case: German.