

**Case C-59/19**

**Request for a preliminary ruling**

**Date lodged:**

29 January 2019

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

11 December 2018

**Appellant in the appeal on a point of law:**

Wikingerhof GmbH & Co. KG

**Respondent in the appeal on a point of law:**

Booking.com BV

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**BUNDESGERICHTSHOF (Federal Court of Justice, Germany)**

**ORDER**

[...]

of

11 December 2018

in the case of

Wikingerhof GmbH & Co. KG, [...] Kropp,

Applicant, and Appellant in the appeal on a point of law,

[...]

v

Booking.com BV, [...] Amsterdam (the Netherlands),

Defendant, and Respondent in the appeal on a point of law

[...] **[Or. 2]**

On 11 December 2018, the Cartel Panel (Kartellsenat) of the Federal Court of Justice [...]

made the following order:

- I. The proceedings are stayed.
- II. The following question on the interpretation of EU law is referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

Is Article 7(2) 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) 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? **[Or. 3]**

Grounds:

- 1 A. The applicant operates a hotel in Schleswig-Holstein. The defendant, the registered office of which is in the Netherlands, operates a hotel reservation platform.
- 2 In March 2009, the applicant signed a contract form presented by the defendant, which reads, inter alia:

‘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 (...)

- 3 The General Terms and Conditions provide, inter alia, that the defendant provides the hotel with an internet system referred to as ‘Extranet’, via which the hotel information is updated and reservation details can be retrieved. They also contain a provision according to which the place of jurisdiction for all disputes arising from the contract, with the exception of payment and invoice disputes, is Amsterdam.

- 4 The defendant subsequently amended its General Terms and Conditions, which are accessible on the Extranet, several times. The applicant objected, in writing, to the inclusion of a version of the General Terms and Conditions, of which the defendant had made its contracting partners aware by email of 25 June 2015.
- 5 The applicant takes the view that relatively small hotel undertakings such as itself depended on entering into a contract with the defendant on account of the strong position of the defendant on the market for intermediary services for hotels via hotel **[Or. 4]** reservation portals. It regards certain practices of the defendant in connection with hotel reservation intermediation as an unfair impediment and therefore as an infringement of antitrust law.
- 6 The applicant requested that the defendant be ordered to desist, on pain of punitive administrative measures to compel specific conduct ('Ordnungsmittel'), which are described in greater detail, from
  - referring to a price, which the applicant has specified for its hotel, as a preferential or discounted price via an indication on the hotel reservation platform without the consent of the applicant;
  - withholding from it all or part of the contact information sent by the applicant's contracting partners via the hotel reservation platform and requesting that it make contact with the intermediary contracting partners only via the contact functions operated by the defendant;
  - making the placing of the hotel in search requests dependent on the granting of over 15% commission.
- 7 The applicant asserts that, in so far as this conduct is covered by the General Terms and Conditions established by the defendant, it expressed its consent to them only on account of the dominant market position of the defendant.
- 8 The defendant objected, *inter alia*, to the local and international jurisdiction of the Landgericht Kiel (Regional Court of Kiel), the court seised in the matter. The Regional Court regarded the action as inadmissible owing to the lack of local and international jurisdiction. The applicant's appeal on the merits was unsuccessful. The applicant opposes this by way of the appeal on a point of law for which leave was granted by the Cartel Panel. **[Or. 5]**
- 9 B. The success of the appeal on a point of law hangs on the interpretation of Article 7(2) 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, hereinafter: Regulation (EU) 1215/12). For that reason, prior to a decision on the appeal, the proceedings must be stayed and a preliminary ruling must be obtained from the Court of Justice of the European Union pursuant to Article 267(1)(b) and (3) TFEU.

- 10 I. In essence, the court dealing with the appeal on the merits gave the following grounds for its decision:
- 11 The court seised in the matter did not have local and international jurisdiction for the action brought. It did not have jurisdiction for either the place of performance (Article 7(1) of Regulation (EU) 1215/12) or matters of tort or delict (Article 7(2) of Regulation (EU) 1215/12). The question of whether an effective agreement conferring jurisdiction had been entered into was therefore irrelevant.
- 12 According to the case-law of the Court of Justice of the European Union, Article 7(2) of Regulation (EU) 1215/12 had to be given a narrow interpretation. The provision only covered actions which sought to establish the liability of a defendant and which were not related to a contract. Although the fact that there was simply a contractual relationship between the parties was not sufficient for this, a matter relating to the contract was involved if the conduct complained of could be considered a breach of the terms of the contract, which could be established by taking into account the purpose of the contract. That would a priori be the case where the interpretation of the contract was indispensable to establish the lawful or unlawful nature of the conduct complained of. Therefore, the claims asserted by means of the action were not claims [Or. 6] in tort within the meaning of Article 7(2) of Regulation (EU) 1215/12. The action sought to change the content of the contract and to change the defendant's practices. The origin of the disputes between the parties lay in their contractual relations. The subject of the dispute was therefore not just any conduct of the defendant amounting to unfair competition that was entirely outside the contract. The rights and obligations of parties had to be determined on the basis of the contract. The questions raised by the applicant's request for an injunction could not be asked without the contract between the parties having been entered into beforehand. The also applied to an assessment under antitrust law. Although the subject-matter of the dispute was not a matter relating to a contract, the subject-matter was a contract, because it was a question of whether that contract existed in whole or in part.
- 13 II. The appeal on a point of law is successful if the Regional Court of Kiel seised in the matter has local and international jurisdiction. The deciding factor in that regard is whether the court dealing with the appeal on the merits was correct in finding that the Regional Court did not have jurisdiction pursuant to Article 7(2) of Regulation (EU) 1215/12.
- 14 1. The court dealing with the appeal on the merits left open the question of whether the court seised in the matter does not have jurisdiction for the simple reason that the parties had entered into an effective agreement conferring jurisdiction. It should be answered in the negative, however.
- 15 The clause conferring jurisdiction was contained in the General Terms and Conditions used by the defendant. In this regard, the Regional Court found that the requirements of the Article 25(1)(a), (2) of Regulation (EU) 1215/12 have not been met, owing to the lack of a communication by electronic means of the

General Terms and Conditions, which provides a durable record of the agreement. That assessment is not the subject of any concerns in the context of the appeal on a point of law. **[Or. 7]**

- 16 The Cartel Panel is unable to share the Regional Court's view that an agreement conferring jurisdiction had been entered into in a form which accorded with practices which the parties had established between themselves pursuant to Article 25(1)(b) of Regulation (EU) 1215/12. No questions requiring clarification under EU law arise in this respect. The practices within the meaning of this provision can only replace the otherwise required written form, not the consent of the contracting parties [...]. In this respect, the Regional Court merely established that the General Terms and Conditions were repeatedly amended after the contract had been entered into. It is not established, however, that those amendments were placed on the Extranet and how the applicant reacted to them, in particular whether it expressed its consent to such a means of conveying information. On the other hand, the court dealing with the appeal on the merits found in this regard that the dispute between the parties concerned the question of whether the applicant had been informed of the amendments to the General Terms and Conditions in each case.
- 17 2. The appeal on a point of law is not directed at the assumption of the court dealing with the appeal on the merits that the jurisdiction of the court seized did not arise from Article 7(1)(a) of Regulation (EU) 1215/12. Nor is that assessment the subject of any concerns in the context of the appeal on a point of law.
- 18 3. According to the view taken in the appeal on a point of law, the court dealing with the appeal on the merits incorrectly found that there was no jurisdiction for matters relating to tort or delict pursuant to Article 7(2) of Regulation (EU) 1215/12. A contractual claim would be asserted only if the form of order sought was at least also based on a freely assumed obligation. There was no such obligation in the main proceedings. This is why the question requiring clarification from the perspective of EU law that arises in the operative part of the decision has been raised. **[Or. 8]**
- 19 a) According to the case-law of the Court of Justice of the European Union, the determination of jurisdiction pursuant to Article 7(2) of Regulation (EU) 1215/12 is not merely a question of whether, under the national law of the Member State, the action concerned relates to tort law. Even for such an action, the jurisdiction pursuant to Article 7(2) of Regulation (EU) 1215/12 does not exist if it concerns matters relating to a contract within the meaning of Article 7(1)(a) of Regulation (EU) 1215/12. The expression 'contract' relates to obligations freely assumed by one party towards another (Court of Justice, judgment of 17 September 2002 — C-334/00, ECR 2002 I-7357, paragraph 23 — Tacconi; judgment of 20 January 2005 — C-27/02, ECR 2005 I-481, paragraph 50 f. — Engler).
- 20 The concepts 'matters relating to a contract' within the meaning of Article 7(1)(a) of Regulation (EU) 1215/12 and 'matters relating to tort, delict or quasi-delict'

within the meaning of Article 7(2) of Regulation (EU) 1215/12 must be interpreted independently, by reference to the regulation's scheme and purpose, in order to ensure that it is applied uniformly in all the Member States (Court of Justice, judgment of 27 September 1988 — Case 189/87, ECR 1988 5565, paragraph 15 f. — Kalfelis; judgment of 18 July 2013 — C-147/12, [...] paragraph 27 — ÖFAB). Therefore, in the case of a civil action seeking compensation, it is important to check whether the claims asserted are, regardless of their classification under national law, contractual in nature (Court of Justice, judgment of 13 March 2014 — C-548/12, [...] paragraph 21 — Brogsitter, judgment of 10 September 2015 — C-47/14, [...] paragraph 70 f. — Holtermann Ferho Exploitative; judgment of 14 July 2016 — C-196/15, [...] paragraph 20 ff. — Granarolo). The same applies to preventive actions for an injunction (Court of Justice, judgment of 1 October 2002 — C-167/00, ECR 2002 I-8111 — Henkel; judgment of 5 February 2004 — C-18/02, ECR 2004, I-1417 paragraph 27 — Danmarks Rederiforening v LO Landsorganisationen i Sverige). **[Or. 9]**

- 21 It is true that the mere fact that one contracting party brings a civil liability claim against the other is not sufficient to consider that the claim is contractual in nature. Even if such a claim is made in tort under national law, however, it concerns matters relating to a contract within the meaning of Article 7(1)(a) Regulation (EU) 1215/12 where the conduct complained of may be considered a breach of the terms of the contract, which may be established by taking into account the purpose of the contract. That will a priori be the case where the interpretation of the contract is indispensable to establish the lawful or unlawful nature of the conduct complained of against the defendant by the applicant (Court of Justice, judgment of 13 March 2014 — C-548/12, NJW 2014, 1648, paragraph 23 ff. — Brogsitter).
- 22 b) In the main proceedings, the parties are in dispute as to whether the defendant has a dominant market position over the applicant and abuses that position in breach of provisions of antitrust law. The applicant then asserts that, in so far as the defendant referred to the applicant's prices as being preferential or discounted, there was no effective contractual basis for this practice. Although the other two practices that the action sought to inhibit were covered by the General Terms and Conditions, the applicant consented to the conclusion of the contract on the basis of those General Terms and Conditions only because it had no other choice in view of the defendant's dominant market position.
- 23 c) As a starting point, there is no doubt that claims arising from a tort within the meaning of Article 7(2) Regulation (EU) 1215/12 are asserted where the action relates to claims for compensation or an injunction that are based on the fact that the conduct complained of is to be regarded as an abuse of a dominant market position within the **[Or. 10]** meaning of Article 102 TFEU or a corresponding provision of national antitrust law (Court of Justice, judgment of 5 July 2018 — C-27/17, paragraph 51 f. — Lithuanian Airlines). Such abusive conduct may, in particular, consist in a company with a dominant market position making the establishment of contractual relations dependent upon the contract being based on unreasonable terms and conditions (Article 102(2)(a) TFEU [...]).

- 24 Unlike the court dealing with the appeal on the merits, the Cartel Panel leans towards the view that a different assessment is not appropriate even if, at the time when the action was brought, the applicant has already established contractual relations with the company that — according to the applicant — has a dominant market position, meaning that it is possible that the conduct complained of is covered by the contractual provisions, but the applicant objects to them on the grounds that they are unreasonable and asserts that it did not accept them voluntarily, but rather on account of the defendant's dominant market position. The reason for this is that, in that case too, it is not the interpretation of the contract that is the focus of the legal disputes between the parties, but rather the question of whether the demand for specific contractual conditions or the invoking of them by a company with an — allegedly — dominant market position is to be regarded as abusive and is therefore in breach of provisions of antitrust law. **[Or. 11]**

[...]

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