The Booking judgment adopted by the ECJ: Greater access to justice for victims of abuses of a dominant digital platform

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The Grand Chamber of the Court of Justice of the European Union (ECJ) issued today its judgment in Case C-59/19 Wikingerhof v. Booking.com. This ruling will certainly be of great interest to the corporate victims of abuses of a dominant digital platform.

This judgment addresses both the nature of the action which alleged victims of an abuse of a dominant position may bring before the national courts and the question of the territorial jurisdiction of the courts in the EU before which these victims may bring their actions.

This short blog constitutes a first reaction *à chaud* to today's judgment. It briefly (i) sums up the background of the case (ii) examines the answer and the reasoning of the ECJ and (iii) identifies a few takeaways that antitrust practitioners may keep in mind.

Background of the case

A hotel located in Germany decided to sue Booking.com, the well-known hotel reservation platform based in the Netherlands, before the German Courts. The hotel was seeking an injunction against Booking, asking the German Court to put an end to some of its commercial practices implemented in the context of the services contract they had entered into. According to the hotel, these practices constituted abuses of a dominant position. (paras 7 to 10)

Both the Regional 1st instance and Appeal courts rejected Booking's request on the ground that they were not territorially competent. In essence, they found that « 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 [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], 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 ». (para 12)

The Federal Court of Justice before which an appeal on a point of law (« revision ») was lodged decided to refer to the ECJ a legal question which the ECJ reinterpreted as follows: « 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 ». (paras 12 and 19)

Answer of the ECJ

The ECJ's answer to this question reads: « Point 2 of Article 7 of Regulation (EU) No 1215/2012 [which relates to the jurisdiction of the court for the place where the harmful event occurred in matters relating to tort, delict or quasi-delict] 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 ».

In so doing, the ECJ follows Advocate General Øe's opinion issued on 10 September 2020 which proposed to answer to this question as follows : *« L'article 7, point 2, du règlement (UE) no 1215/2012 […] doit être interprété en ce sens qu'une action en responsabilité civile fondée sur la violation des règles du droit de la concurrence relève de la 'matière délictuelle ou quasi délictuelle', au sens de cette disposition, y compris lorsque le demandeur et le défendeur sont parties à un contrat et que les prétendus agissements anticoncurrentiels que le premier reproche au second se matérialisent dans leur relation contractuelle »* (No English version available).

The reasoning in the ECJ's judgment may be divided into three parts.

Firstly, the ECJ highlights the rules respectively applicable to contractual and tort actions in terms of territorial jurisdiction.

On the one hand, the ECJ stresses that if « 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 ». The ECJ explains that for contractual actions, « 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 tort actions « 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 ». (paras 21 and 22)

On the other hand, the ECJ indicated that according to settled caselaw, « 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 […] actions not based on a legal obligation freely consented to by one person towards another […] ». (para 23)

In this regard, the ECJ stresses the fact that the rules of special jurisdiction laid down in in points 1 and 2 of Article 7 of Regulation No 1215/2012 « 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 […and this] 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 […] » (para 25).

According to the ECJ, it is therefore for « the court hearing the action [to] 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 […] ». (para 31)

Secondly, the ECJ explains how contractual and tort actions are defined and may be distinguished.

On the one hand, an action is contractual "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 […] 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 […]." (para 32)

On the other hand, "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".

Thirdly, the ECJ examines the case at hand to conclude that the action brought by the applicant is not a contractual one, but a tort one.

To start with, the ECJ finds that the applicant "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" and that "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". (paras 34 and 35)

This leads the ECJ to consider that « subject to verification by the referring court, the action brought by [the alleged victim], 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 ». (para 35)

By way of conclusion, the ECJ stresses that « th[is] interpretation is consistent with the objectives of proximity and sound administration of justice pursued by [Regulation No 1215/2012]" as "the court having jurisdiction under point 2 of Article 7 of Regulation No 1215/2012, namely, in the circumstances […the court] 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 […] ». (para 37)

Some takeaways

In our view, this judgment is particularly instructive for antitrust private practitioners in three regards.

Firstly, the actions that alleged victims of an abuse of a dominant position may bring before national jurisdictions to request that the Courts put an end to these anti-competitive practices are to be considered tort actions, and not contractual ones, even though these practices are implemented in the context of a contractual relationship, whenever the disputed practices may infringe competition law.

While the ECJ's judgment addresses a question raised in the context of a case where the plaintiff brought an action for injunctive relief before a national court, such reasoning should also apply *mutatis mutandis* to the actions for damages that victims of an abuse of a dominant position would bring before the national judge. In both these cases, the victim is, in fact, seeking relief for a competition law infringement, rather than for a contractual breach.

Secondly, where an applicant relies on the specific rules of jurisdiction provided for in Article 7 of Regulation No 1215/2012, it is for the court hearing the action to establish whether this action is a contractual or a tort one within the meaning of that regulation, irrespective of its classification under national law.

In that regard, the ECJ's judgment makes a clear distinction between the two actions provided for in Article 7 of Regulation No 1215/2012.

Thirdly, in terms of territorial jurisdiction, the ECJ's judgment confirms that victims of an abuse of a dominant position, as is already the case for the victims of a cartel infringement, may bring their actions not only before the courts of the Member State of the defendant pursuant to Article 4 of Regulation No 1215/2012 but also before the court "where the harmful event occurred", i.e. namely where the abuse of a dominant position took place, pursuant to point 2 of Article 7 of Regulation No 1215/2012.

This solution is clearly adapted to this kind of litigation as it allows victims of an abuse of a dominant position to obtain from a Court in their home jurisdiction where they suffer from the alleged behaviour to obtain either

that this behaviour be stopped or that damages be awarded to make up for the losses they suffered.

To sum up, today's judgment may be considered as extremely positive as it adds a new case to the long string of cases adopted by the ECJ over the past 5 years allowing victims of antitrust infringements to finally gain greater access to justice.

A first version of the blog post can be found here.