# COMMON MARKET LAW REVIEW

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**Aims**
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.



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**COMMON MARKET LAW REVIEW**



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The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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# Plotting the boundary between contract and tort jurisdiction in private actions against abuses of dominance: *Wikingerhof* v. *Booking*

Case C-59/19, *Wikingerhof GmbH & Co. KG* v. *Booking.com BV*, Judgment of the Court of Justice (Grand Chamber) of 24 November 2020, EU:C:2020:950[1]

## 1. Introduction

Without any doubt, the European Court of Justice is a promoter of European law and integration. With its many innovative and courageous rulings, the Court has significantly shaped the design of EU law. Moving forward, however, is a relatively simple operation: a new principle is proclaimed and later decisions shape its reach step by step. The claim for damages for breach of the European competition (antitrust) rules is a striking example. In *Courage*, the ECJ held that the full effectiveness of the European competition rules would be put at risk if an individual harmed by infringements of Articles 101 and 102 TFEU was not entitled to claim damages from the tortfeasor(s),[2] and later decisions shaped (and "Europeanized") the claim for damages in increasing detail.[3] A much more complex operation is the retreat from a position once taken by the Court. The precise reach of the recalibration is often hard to assess given that the Court's style of reasoning does not employ an open discussion of such changes.

1. This annotation draws in large part on Wurmnest, "Der Missbrauch einer marktbeherrschenden Stellung im europäischen Zuständigkeitsrecht", (2021) *Praxis des Internationalen Zivil- und Verfahrensrechts*, 340–345.

2. Case C-453/99, *Courage* v. *Crehan*, EU:C:2001:465, para 26. *Courage* concerned the application of Art. 101 TFEU only, but the general principle proclaimed in this judgment also applies to Art. 102 TFEU; see Case C-637/17, *Cogeco Communications* v. *Sport TV Portugal*, EU:C:2019:263, paras. 39 and 40.

3. See Joined Cases C-295-298/04, *Manfredi* v. *Lloyd Adriatico Assicurazioni SpA*, EU:C:2006:461, paras. 99 and 100 (compensation must include actual loss and loss of profit plus interest, but EU law does not demand the imposition of punitive damages); Case C-557/12, *Kone and others* v. *ÖBB-Infrastruktur*, EU:C:2014:1317, para 34 (losses caused by umbrella prices must be recoverable); Case C-435/18, *Otis and others* v. *Land Oberösterreich*, EU:C:2019:1069, paras. 30 and 32 (the right to claim damages cannot be restricted to persons operating as suppliers or customers on the market directly affected by the cartel); Case C-724/17, *Vantaan kaupunki* v. *Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, EU:C:2019:204, paras. 32 and 47 et seq. (the concept of "undertaking" that generally applies to Arts. 101, 102 TFEU also determines the entities that are liable in private antitrust actions).

*Wikingerhof* v. *Booking.com*, tellingly handed down by the ECJ's Grand Chamber, is one of these cases. In *Wikingerhof,* the Court, without clearly indicating so, retreated from, or – to put it more mildly – restricted the reach of its earlier decisions on the demarcation of the boundary between contract and tort jurisdiction in cross-border cases. The judgment can be grouped alongside a recent line of cases in which the ECJ shaped the application of the European jurisdiction rules applying to private actions for the enforcement of competition (antitrust) law,[4] which are civil and commercial matters[5] in the sense of Article 1 Brussels I Regulation (recast) (hereafter: Brussels I bis),[6] which replaced the Brussels I Regulation[7] and the Brussels Convention.[8]

In *Wikingerhof*, the litigation between the parties concerned the issue of jurisdiction, a key issue in transnational litigation. Many plaintiffs have a strong interest in litigating before their home courts as litigation abroad is usually more burdensome. This was also the background to this case, where a German hotel alleged that an online booking platform domiciled in the Netherlands had abused its market power and violated competition and/or unfair competition law. The hotel did not bring an action in the Netherlands based on Article 4(1) Brussels I bis/Article 2 Brussels I Regulation. Instead, the action was brought before German courts, with the hotel arguing that abuses by dominant firms are tort matters and the effects of the unlawful conduct are felt on the German market. Thus, German courts have the power to hear and decide merits of the case under Article 7(2) Brussels I bis/Article 5(3) Brussels I Regulation. The booking platform challenged the jurisdiction of the German courts by arguing that the allegations were based on the contractual bond between the parties and contractual jurisdiction lies with the Dutch courts pursuant to Article 7(1) Brussels I bis/Article 5(1) Brussels I Regulation.

To understand the significance of the *Wikingerhof* ruling, it is necessary to recall that over the years the ECJ has steadily increased contractual jurisdiction under Article 7(1) Brussels I bis. Contractual claims are those

4. See Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide* v. *Akzo Nobel*, EU:C:2015:335; Case C-27/17, *flyLAL-Lithuanian Airlines* v. *Starptautiskā lidosta Rīga*, EU:C:2018:533; Case C-595/17, *Apple Sales International* v. *MJA*, EU:C:2018:854; Case C-451/18, *Tibor-Trans* v. *DAF Trucks*, EU:C:2019:635.

5. Case C-302/13, *flyLAL-Lithuanian Airlines* v. *Starptautiskā lidosta Rīga*, EU:C:2014:2319, para 29.

6. Regulation (EU) 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, O.J. 2012, L 351/1.

7. Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001, L 12/1.

8. Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version), O.J. 1972, L 299/32.

arising from obligations which one contractual party has freely assumed towards another,[9] and on which the claimant's action is based.[10] Enlarging the scope of contract jurisdiction inevitably comes at the expense of tort jurisdiction (Art. 7(2) Brussels I bis/Art. 5(3) Brussels I Regulation). This is so because, ever since *Kalfelis*, it is settled case law that "'matters relating to tort, delict or quasi-delict' within the meaning of [Art. 7(2) Brussels I bis] must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of [Art. 7(1) Brussels I bis]".[11] So Article 7(2) Brussels I bis only comes into play if a claim cannot be classified as being contractual.

Drawing the boundary between contract and tort claims is particularly difficult in the areas of unfair competition and competition (antitrust) law when the parties are bound by a contract, but allege unfair competition and/or a violation of competition law. In *Brogsitter*, the ECJ held that claims between contractual partners based on rules of national tort and unfair competition laws are of a contractual nature "where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract."[12] The latter is the case if it is indispensable to interpret the contract in order to establish whether the alleged conduct is lawful or unlawful.[13]

If the *Brogsitter* judgment, the precise reach of which is in dispute,[14] is taken at face value, many claims in the area of competition law would need to be classified as contractual, especially with regard to claims against dominant firms for abuse of dominance. Such abuses often involve contractual stipulations and Article 102(2)(a) TFEU prohibits dominant market players from imposing unfair prices and other unfair trading conditions. Such a wide scope of contract jurisdiction would, however, sit at odds with the general approach that certain claims for damages and/or an injunction for violations of

9. Case C-26/91, *Handte* v. *TMCS,* EU:C:1992:268, para 15; Case C-51/97, *Réunion européenne* v. *Spliethoff's Bevrachtingskantoor*, EU:C:1998:509, para 17; Case C-265/02, *Frahuil* v. *Assitalia*, EU:C:2004:77, para 24.

10. Case C-27/02, *Engler* v. *Janus Versand*, EU:C:2005:33, para 51 (on Art. 5(1) Brussels Convention); Case C-375/13, *Kolassa* v. *Barclays Bank*, EU:C:2015:37, para 39.

11. Case 189/87, *Kalfelis* v. *Schröder*, EU:C:1988:459, para 18 (on Art. 5(1) Brussels Convention); see also Case C-12/15, *Universal Music International Holding* v. *Schilling*, EU:C:2016:449, para 24; Case C-304/17, *Löber* v. *Barclays Bank*, EU:C:2018:701, para 19.

12. Case C-548/12, *Brogsitter* v. *Fabrication de Montres Normandes*, EU:C:2014:148, para 24.

13. Ibid., para 25.

14. See Mansel, Thorn and Wagner, "Europäisches Kollisionsrecht 2014: Jahr des Umbruchs", (2015) *Praxis des Internationalen Zivil- und Verfahrensrechts*, 1–32, at 15; Rademacher, "Anspruchskonkurrenz und Kognitionsbefugniskonzentration im europäischen Zuständigkeitsrecht", 24 *Zeitschrift für Zivilprozess International* (2019), 141–158, at 155–156.

competition rules should be classified as tort claims, given that the illegality of the conduct flows from a statutory obligation which is intended to protect competition. Against this background the ECJ had held in *flyLAL-Lithuanian Airways I,* without further discussion, that an action based on an alleged infringement of competition law by a dominant firm "comes within the law relating to tort, delict or quasi-delict",[15] so that claims for an alleged predatory pricing scheme can be brought under Article 7(2) Brussels I bis (*flyLAL-Lithuanian Airways II*).[16] Against this background, the ECJ redefined the dividing line between contract and tort claims in *Wikingerhof*, and strengthened tort jurisdiction in private enforcement actions.

## 2. Factual and legal background

The factual and legal background of *Wikingerhof* v. *Booking.com* is relatively simple. The claimant, Wikingerhof, is a hotel. As its name indicates, it is located in the north of Germany in an area were the Vikings once settled. The hotel had concluded a standardized contract with the digital platform Booking.com to be listed on that platform. Booking.com has its seat in Amsterdam, the Netherlands. In the course of the business relationship, Booking.com altered its standard contract terms several times. The hotel objected to one of the changes and claimed that certain business practices of the platform violated EU and/or German competition law.[17] To end this apparent unlawful conduct, the hotel sought an injunction against certain of Booking.com's practices before the German courts. It alleged that the platform had classified prices as "preferential" or "discounted" without the hotel's consent, had in an unjustified manner restricted communication with hotel guests, and had charged an unduly high commission, in excess of 15 percent, for better visibility in the results shown by the platform's search engine. As far as these practices were in line with the platform's general terms and conditions, the hotel argued that it had no choice but to conclude the contract on Booking.com's terms, given that the platform held a dominant position for intermediary services and accommodation reservation portals.

The *Landgericht Kiel* dismissed the action for lack of local and international jurisdiction. The court held that the parties had concluded a

15. Case C-302/13, *flyLAL-Lithuanian Airlines I*, para 28.

16. Case C-27/17, *flyLAL-Lithunian Airlines II*, para 51.

17. The hotel alleged a violation of Art. 102 TFEU as well its German equivalent (§19 (1), (2) Nos. 1, 2 GWB). In the alternative, the hotel relied on § 20 GWB, which prohibits abusive conduct by undertakings with relative or superior market power, see Opinion of A.G. Saugmandsgaard Øe in Case C-59/19, *Wikingerhof* v. *Booking.com*, EU:C:2020:688, para 12 with note 13.

jurisdiction agreement according to which the courts in Amsterdam had exclusive jurisdiction to determine disputes between the parties arising from the contractual agreement, including the dispute on the allegations brought forward by the hotel.[18] The hotel appealed, but the *Schleswig-Holsteinisches Oberlandesgericht* affirmed the lower court's decision, albeit with a different reasoning. The *Oberlandesgericht* left the question open as to whether a valid jurisdiction clause in favour of the courts in Amsterdam had been concluded.[19] Instead, it held that the courts at the platform's seat in Amsterdam had jurisdiction based on Article 7(1) Brussels I bis, as the claim was contractual and the relevant obligation in question had to be fulfilled at the defendant's seat. In light of the ECJ's *Brogsitter* judgment, the *Oberlandesgericht* rejected the possibility that German courts had international and local jurisdiction under Article 7(2) Brussels I bis. As the hotel wanted to change the platform's business policy as enshrined in the platform's general terms and conditions, the court held that the dispute revolved around the question of whether the contractual terms were (partly) valid or not. Therefore, the dispute fell under Article 7(1) and not Article 7(2) Brussels I bis.[20] The court was so certain that the ECJ's case law had clarified the matter, that it saw no need for a preliminary reference proceeding, and also did not allow an appeal to the *Bundesgerichtshof*.[21]

Under German civil procedure, the *Bundesgerichtshof* may nonetheless grant leave to appeal upon a complaint (*Nichtzulassungsbeschwerde*), and it was on this basis that the case came before the highest German court for civil and commercial matters. The *Bundesgerichtshof* pointed out that the parties had not concluded a valid jurisdiction agreement designating the courts of Amsterdam. Even though Booking.com had argued that such a clause was part of the standard contract terms, the lower court had found that the electronic means relied on by Booking.com did not comport with the form requirements set out in Article 25(1)(a), (2) Brussels I bis and the *Bundesgerichtshof* agreed with that view.[22] The lower court erred, however, when finding that the parties had concluded a jurisdiction agreement in a form that accords with practices which the parties had established between themselves (Art. 25(1)(b) Brussels I bis). This was because it was a matter of dispute between the parties whether a jurisdiction clause was actually put into the platform's "extranet" (the system through which hotels can consult information relating to Booking.com) and

18. LG Kiel, 27 Jan. 2017 – 14 HKO 108/15 Kart, BeckRS 2017, 154337, paras. 16 et seq.
19. OLG Schleswig,12 Oct. 2017 – 16 U 10/17 Kart, BeckRS 2017, 154336, para 46.
20. Ibid., paras. 36 et seq.
21. Ibid., para 48.
22. BGH, 11 Dec. 2018 – KZR 66/17, para 15, available at: <www.bundesgerichtshof.de> → Entscheidungen → online in unserer Entscheidungsdatenbank (all websites last visited 31 July 2021).

consented to by the hotel, so that a meeting of the minds was not clearly established.[23]

Having ruled out the possibility that the courts in the Netherlands had exclusive jurisdiction based on a jurisdiction agreement, the key to resolving the jurisdiction issue was to determine whether the dispute was of a contractual or tortious nature. If contractual, the Dutch courts would have jurisdiction under Article 7(1) Brussels I bis. However, if the dispute was tortious it could be argued that German courts had international jurisdiction under Article 7(2) Brussels I bis, provided that the place where the damage occurred or could occur could be localized in Germany. The *Bundesgerichthof* was inclined to classify the hotel's claim as a matter relating to tort, delict or quasi-delict within the meaning of Article 7(2) Brussels I bis given that the dispute revolved around the question whether the imposition of specific contractual terms by a firm that is alleged to hold a dominant position in the market should be regarded as an abusive practice. As the German court was not certain whether such a classification could be reconciled with the *Brogsitter* ruling, the Judges decided to stay proceedings and refer the following question to the ECJ for a preliminary ruling:

> "Is [Art. 7(2) Brussels I bis] 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?"

As the reference concerned a key issue of European jurisdiction and a retreat from the *Brogsitter* case law could not be ruled out, the preliminary reference was allocated to the Grand Chamber of the ECJ.

## 3. Opinion of Advocate General Saugmandsgaard Øe

Advocate General Saugmandsgaard Øe sensed correctly that the case provided a splendid opportunity to redefine generally the boundary between contract and tort. This was clear even though he phrased it more politely, by pointing out that the reference would allow the Grand Chamber to clarify the "grey areas" of the rather abstract method developed by the ECJ to distinguish

23. Ibid., para 16.

contract and tort cases, given that the application of the ECJ's case law is regularly debated before national courts.[24]

Against this background, the Advocate General first summarized the main lines of the ECJ's case law on matters relating to a contract[25] and to tort, delict or quasi-delict,[26] before taking a closer look at the general classification of civil liability actions brought between contracting parties.[27] In this context, he engaged in an extensive discussion of the *Brogsitter* judgment, the reach of which – according to Saugmandsgaard Øe – is "unclear" as the "open and abstract" reasoning of the ECJ allows for different interpretations.[28] The judgment's precise reach has never been clarified, as more recent rulings have simply restated certain passages without providing any further explanation.[29]

Saugmandsgaard Øe underlined that a "maximalist" reading of *Brogsitter* implies that any claim ought to be classified as being contractual if the alleged conduct relates to the breach of a contractual obligation. As a consequence, a claim falls under Article 7(1) Brussels I bis as soon as a harmful event may be both a tort and a breach of contract.[30] This interpretation was rejected by the Advocate General,[31] who favoured a narrow construction of *Brogsitter*. In his view, a dispute is rooted in the contract if an interpretation of the contract appears indispensable in order to assess the merits of the case based on the contractual obligations between the parties to the dispute.[32] In addition, he urged the Court to clarify the reach of such a "minimalist" (narrow) reading of *Brogsitter*. He called especially for two clarifications. First, if a national court has to interpret the contract only as a type of preliminary question to assess whether a tort was committed, that the claim can nonetheless be classified as falling under Article 7(2) Brussels I bis. Claims are thus not necessarily rooted in the contract just because a judge at some stage of the proceeding must look at the contract.[33] Second, the Advocate General argued that the classification should be assessed solely on the basis of the plaintiff's allegations and not on the defences advanced by the defendant.[34]

After having defined the general framework for the assessment, Saugmandsgaard Øe applied this reasoning to the claim advanced by Wikingerhof. Given that the hotel alleged that the booking platform had

24. Opinion, paras. 4–5.
25. Ibid., paras. 34 et seq.
26. Ibid., paras. 42 et seq.
27. Ibid., paras. 49 et seq.
28. Ibid., para 68.
29. Ibid., para 71.
30. Ibid., para 69.
31. Ibid., paras. 74 et seq.
32. Ibid., para 70.
33. Ibid., paras. 102–103.
34. Ibid., paras. 105 et seq.

abused its dominant position, he pointed out that the dispute falls within the realm of Article 7(2) Brussels I bis. The dispute does not concern a contractual claim, because the hotel alleged a breach of a legal obligation imposed by competition law – a legal obligation which is owed independently of any contractual obligation.[35] Even though the national court would have to interpret the contract to decide the dispute, for example to determine the precise content of the rights reserved by the dominant firm,[36] this does not turn the case into a contractual dispute. Looking at the contract in this way is undertaken simply in order to address a preliminary question, given that the legality of the platform's conduct does not depend on the contract, but on the interpretation of the scope of the prohibition of abuses of dominance.[37]

## 4. Judgment of the Court

The Grand Chamber endorsed the Advocate General's conclusion, although on the basis of slightly different reasoning. After repeating the general rule "that the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of [Art. 7(2) Brussels I bis] 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 [Art. 7(1)(a) Brussels I bis], that is to say, actions not based on a legal obligation freely consented to by one person towards another".[38] The boundary between contract and tort claims must follow an autonomous interpretation by reference to the scheme and purpose of the European jurisdiction rules.[39] These heads of jurisdiction are mutually exclusive and must both be interpreted narrowly.[40]

Turning to the boundary between contract and tort claims, the Court referred to the findings of the Advocate General and noted that whether a claim can be grounded under Article 7(1) or (2) Brussels I bis "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".[41] If a plaintiff relies on one of the rules of special jurisdiction, the Court repeated that the *Brogsitter* rule applies, according to which "an action concerns matters relating to a contract . . . if the interpretation of the contract between the

35. Ibid., para 119.
36. Ibid., para 123.
37. Ibid., paras. 124–125.
38. Judgment, para 23.
39. Ibid., para 25.
40. Ibid., para 26.
41. Ibid., para 29.

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 …".[42]

After this affirmation of the case law, the Court started to redefine it, by clarifying that Article 7(2) Brussels I bis applies if the plaintiff "relies, in its application, on rules of liability in tort, delict or quasi-delict," and when "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".[43]

The finding that claims flowing from legal (non-contractual) prohibitions do not fall within the realm of Article 7(1) Brussels I bis is then the key to classifying the dispute in question as a tort claim covered by Article 7(2) Brussels I bis:

> "[T]he 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."[44]

Here, the ECJ distinguishes between the need to interpret the contract to determine the reach (and breach) of a contractual obligation, and the interpretation of the contract as means to demonstrate that a violation of law had taken place. Against this background, the action brought by Wikingerhof was classified as falling under Article 7(2) Brussels I bis, as far as "it is based on the legal obligation to refrain from any abuse of a dominant position".[45]

To bolster this classification, the Court further pointed out that it is in line with the Regulation's objectives of proximity and sound administration of justice (Recital 16 Brussels I bis) given that the courts of the State whose market is affected by the alleged anticompetitive conduct, i.e. German courts, are particularly well positioned to gather and assess relevant evidence necessary to decide the case.[46]

42. Ibid., para 32.
43. Ibid., para 33.
44. Ibid., para 35.
45. Ibid., para 36.
46. Ibid., para 37.

## 5. Comment

### 5.1. *Violation of a contractual obligation vs. legal obligation*

A look at the first case notes on *Wikingerhof* reveals that this judgment has engendered very strong reactions. On the one hand, Briggs claims that the judgment is an "apocalypse" and as disastrous as the COVID-19 crisis.[47] In a more nuanced manner, Idot points out that the ECJ's classification is not convincing, as the hotel's claim is much closer to a (contractual) action for nullity than to a (delictual) claim for damages.[48] On the other hand, many German commentators praise the judgment for the retreat from *Brogsitter* and for allowing tort jurisdiction to apply to the type of abuses alleged.[49]

The mixed reactions underline that establishing the right boundary between contract and tort is a thorny issue. The wide variety of solutions found in national law on the interplay between contract and tort makes it hard to find an acceptable solution that fits all possible scenarios; and short judgments without proper explanation of the classification adopted do not help national courts to apply the framework developed by the ECJ. It is therefore important to emphasize that in *Wikingerhof* the ECJ avoided the mistake committed in *Brogsitter*, which was decided by a chamber of three judges without hearing

47. Briggs, "*Wikingerhof*: A View from Oxford", available at <eapil.org/2020/12/07/briggs-on-wikingerhof/> ("Brexit, Covid, and now *Wikingerhof*. What a wretched year. We are only one horse short of an Apocalypse").

48. Idot, "La distinction entre la 'matière contractuelle' et la 'matière délictuelle' revisitée par les actions en droit de la concurrence", (2021) *Revue critique de droit international privé*, 440–460, paras. 12 and 16.

49. See the annotations of Lehmann, "CJEU reestablishes equilibrium between contract and tort jurisdiction", available at <eapil.org/2020/12/07/wikingerhof-cjeu-reestablishes-equilibrium-between-contract-and-tort-jurisdiction/> ("The delineation may be difficult to understand, but it is nonetheless necessary and reasonable"); Mankowski, "EuGH: Gerichtliche Zuständigkeit – Grenze zwischen Vertrag und Delikt", (2020) *Lindenmaier & Möhring – Kommentierte BGH-Rechtsprechung (LMK)*, 434668, sub. 3 a) ("Für eine durchaus wichtige Konstellation gibt der EuGH dem Deliktsgerichtsstand wieder sein Recht"); Thiede, (2021) *Neue Zeitschrift für Gesellschaftsrecht*, 127–128, at 128 ("In der Sache ist der Ansatz des EuGH indes zutreffend"); Wagner, (2021) *Neue Juristische Wochenschrift*, 147–148, at 148 ("[Die Eröffnung des Deliktsgerichtstands] ist im Ergebnis zu begrüßen und trägt nicht nur dem eingangs dargelegten einfachen und praxisfreundlichen Qualifikationsraster Rechnung, sondern auch dem Umstand, dass Vorfragen im Rahmen von Ansprüchen aus unerlaubter Handlung (wie die Frage, ob ein bestimmtes Verhalten durch vertragliche Vereinbarungen gedeckt ist) bei der Entscheidung über die Zuständigkeit unbeachtlich sein sollte"); see also Wendelstein, (2021) JZ, 100–102, at 101; Mansel, Thorn and Wagner, "Europäisches Kollisionsrecht 2020: EU im Krisenmodus!", (2021) *Praxis des Internationalen Privat- und Verfahrensrechts*, 105–139, at 122; Brand and Gehann, "Zuständigkeit mitgliedstaatlicher Gerichte beim Kartellrechtsverstoß im Vertragsverhältnis", (2021) *Neue Zeitschrift für Kartellrecht*, 101–105.

the Advocate General, where the reach of the very brief judgment remained unclear. In *Wikingerhof*, Advocate General Saugmandsgaard Øe delivered a very rich Opinion and the ECJ tried to explain why the alleged claims had to be classified as a matter relating to tort.

My view is that *Wikingerhof* was correctly decided. Even though the contract plays a role in determining whether Booking.com breached the law and, at the end of the day, might result in the platform having to adapt its contractual stipulations, it cannot be denied that the contract as such cannot justify the platform's conduct if the alleged business practices are found to be a breach of German and/or EU competition law. Competition law prohibitions are mandatory and therefore cannot be altered by a contract.[50] Therefore, the legality or illegality of the platform's practices does not depend on whether they are in line with the contractual stipulations. Rather, the reach of the prohibition of abusive conduct by dominant firms lies at the heart of the dispute. The contractual stipulations come into play only insofar as they describe and explain Booking.com's business policy. Against this background, the dispute should not be classified as contractual because of the allegation that the platform had "broken or wrongfully interfered with its contract [with the hotel]".[51] Rather the contractual stipulations were the means for the abuse of dominance, and this scenario can be framed as a non-contractual matter. In sum, the Advocate General and the ECJ were right to argue that the hotel's claim cannot be classified as a contractual matter.

### 5.2. *Proximity and sound administration of justice*

Apart from basing its judgment on the argument that the legality of the alleged practices does not depend on contractual stipulations, the ECJ further relied on the objectives that the European jurisdiction rules should ensure a close connection between the action and the court, as well as an allocation of jurisdiction which facilitates the sound administration of justice. The ECJ argued that the application of Article 7(2) Brussels I bis will allow the courts "of the market affected by the alleged anticompetitive conduct" (which in the case at hand are presumably German courts), to decide the dispute. Those courts are "the most appropriate for ruling [on the alleged abuse of dominance …], particularly in terms of gathering and assessing the relevant evidence in that regard".[52] Reliance on the principles of proximity and sound administration has become a frequent occurrence when the ECJ applies the

50. Wendelstein, op. cit. *supra* note 49, at 101; see also Brand and Gehann, op. cit. *supra* note 49, at 102.

51. This is one of the arguments raised by Briggs, op. cit. *supra* note 47.

52. Judgment para 37.

EU competition rules to private enforcement actions[53] and also, beyond this area of law, the Court refers to these principles when shaping the reach of tort jurisdiction.[54]

The application of the proximity argument in competition law actions, however, is not always convincing. In *CDC*, the ECJ held that direct victims of cartel agreements must sue the infringer based on the second prong of Article 7(2) Brussels I bis before the courts at the victim's registered office. These courts were seen as being in the best position to assess such actions for damages.[55] It is, however, highly questionable whether the bulk of the evidence is located in that country. Some evidence is certainly there, but follow-on actions against cartels usually revolve around issues of causation and damage, and better information about the overcharge caused by the cartel will regularly be found at the site of the defendant.[56] In *Wikingerhof*, it is also doubtful whether German courts are in the best position to adjudicate the matter. While it is true that these courts are well placed to apply German and EU competition law, the contract as such was – according to the *Schleswig-Holsteinisches Oberlandesgericht* – governed by Dutch law due to a choice-of-law clause. As the hotel demanded an adaptation of contractual stipulations, the *Oberlandesgericht* therefore had understandable doubts about whether German courts are in a better position to adjudicate the matter than their Dutch counterparts.[57] In addition, with regard to the evidence for the alleged abuses of dominance, it is reasonable to assume that better evidence can be found at the seat of the dominant firm.[58]

In *CDC* as well as in *Wikingerhof*, the true reason for creating a *forum actoris* seems to lie elsewhere; namely in the desire to support the victim of anticompetitive conduct in effectively pursuing his or her claim against the competition law infringer.[59] The spirit of *Courage* thus also affects the Court's

53. See e.g. Case C-27/17, *flyLAL-Lithunian Airlines II*, para 40; Case C-451/18, *Tibor Trans,* para 34.

54. See e.g. Case C-360/12, *Coty Germany* v. *First Note Perfumes*, EU:C:2014:1318, para 47; Case C-47/14 *Holterman Ferho Exploitatie* v. *Freiherr Spies von Büllesheim*, EU:C:2015:574, para 73; Case C-343/19, *Verein für Konsumenteninformation* v. *Volkswagen*, EU:C:2020:534, para 38.

55. Case C-352/13, *CDC Hydrogen Peroxide*, para 52.

56. Heinze, "Der Deliktsgerichtsstand als Klägergerichtsstand? – Zum Einfluss materiellrechtlicher Wertungen auf die Auslegung des Art. 7 Nr. 2 EuGVO" in Büscher et al. (Eds.), *Rechtsdurchsetzung – Rechtsverwirklichung durch materielles Recht und Verfahrensrecht* (Heymanns, 2016), pp. 521–536, at 527; Wurmnest, "International jurisdiction in competition damages cases under the Brussels I Regulation", 53 CML Rev. (2016), 225–247, at 243.

57. OLG Schleswig, 12 Oct. 2017 – 16 U 10/17 Kart, BeckRS 2017, 154336, para 42.

58. Idot, op. cit. *supra* note 48, para 19.

59. Ibid., para 21 (who points also out that for stand-alone actions as brought in *Wikingerhof* such reasoning cannot be justified).

interpretation of the European jurisdiction scheme. It seems that an important driver of the Court's practice is the desire to promote the private enforcement of competition law by designing jurisdiction rules in a fashion that helps plaintiffs to go to court.[60]

### 5.3. *Classification at the claimant's choice?*

While the result of the ECJ's classification deserves applause, the reasoning with regard to the test to be applied raises questions. The Court pointed out that:

> "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."[61]

Taken literally, the reference to a "reliance" of the claimant's "application" seems to imply that the line between contract and tort claims must be drawn by looking at the substantive law rules on which the plaintiff relied in its application. And, indeed, Advocate General Saugmandsgaard Øe proposed that the substantive rules on which the plaintiff relied in its application can be used at least as "a lens through which to read the facts and give an indication of the 'obligation' which the claimant wishes to derive from them".[62]

As the ECJ, in paragraph 33, did not explicitly refer to the Advocate General's finding, it is very doubtful that the Grand Chamber sought to embrace this assessment, which could give the claimant the power to secure a *forum actoris* simply by alleging a breach of the competition rules.[63] In addition, the classification proposed by the Advocate General is not fully supported by the ECJ's case law. In *Brogsitter*, the ECJ held that a claim can be classified as a contractual matter, if "the legal basis [of the claims brought by the applicant] can reasonably be regarded as a breach of the rights and obligations set out in the contract",[64] which is a different approach from what

60. See generally Roth, "Internationale Zuständigkeit und private enforcement in Wettbewerbsstreitigkeiten" in Grundmann, Merkt and Mülbert (Eds.), *Festschrift für Klaus J. Hopt zum 80. Geburtstag* (De Gruyter, 2020), pp. 1071–1096, at 1096.

61. Judgment, para 33.

62. Opinion, para 96, see also paras. 86 and 94–95.

63. Idot, op. cit. *supra* note 48, para 21.

64. Case C-548/12, *Brogsitter*, para 26.

was proposed by the Advocate General. Using classifications made by national substantive law is also difficult to reconcile with the principle of autonomous interpretation of the jurisdiction rules.[65] Finally, the approach proposed by Saugmandsgaard Øe does not work when the *lex fori* allows the claimant to just state facts in his or her application and to refrain from citing legal arguments, legal rules or precedents ("*da mihi factum, dabo tibi ius*"). In such a scenario, the Advocate General proposed that the national court look at other means, namely the facts of the case and the purpose of the claims, to classify the dispute.[66] Reliance on the purpose of the claim should, however, be the general approach for the delineation between contract and tort jurisdiction.[67]

### 5.4. *General rule for all types of abuse of dominance?*

As in *Lithuanian Airlines II*, a case that concerned a predatory pricing scheme, the ECJ held in *Wikingerhof* that actions against abusive practices by dominant firms fall under Article 7(2) Brussels I bis. Does this mean that all claims against abuses of dominance prohibited by Article 102 TFEU and equivalent national rules are to be classified as non-contractual disputes?

It is evident that actions against dominant firms for exclusionary conduct such as predatory prices or exclusionary rebates are tort claims, given that it is usually competitors who sue the dominant firm for breaches of competition law. These claimants are not bound by a contract with the dominant firm, so that the determination issue does not arise. But given that the ECJ also classifies disputes between contractual parties as a tort claim as far as it is not indispensable to interpret the contract to determine liability, claims to exploit contractual partners, for example by charging excessive prices (Art. 102(2)(a) TFEU), must also be categorized as falling under Article 7(2) Brussels I bis. Even though the price is fixed by contractual agreement, the examination of the contract is only a preliminary question in the assessment whether the prices charged are excessive.

More complex is the question of how to classify a claim where the claimant is asserting a duty to enter into a contract (*Kontrahierungszwang*/duty to deal). It has been argued that claims asserting a legal obligation (or an order of court) to enter into a contract can be deemed to be contractual claims.[68] After *Wikingerhof*, such a classification cannot be upheld if the duty to enter into a

65. Wendelstein, op. cit. *supra* note 49, at 102.
66. Opinion, para 96.
67. Wendelstein, op. cit. *supra* note 49, at 101.
68. Magnus, "Anmerkungen zum sachlichen Anwendungsbereich der Rom I-VO" in Baur et al. (Eds.), *Festschrift für Gunther Kühne zum 70. Geburtstag* (Verlag Recht und Wirtschaft, 2009), pp. 779–794, at 785.

contract flows from a legal obligation, for example the prohibition of abuses of a dominant position. In such a case, it is not indispensable to interpret the contract to determine whether the dominant firm was allowed to refuse to enter into a contractual relationship. More difficult to answer is the question of whether a claim to re-establish a pre-existing contract that was terminated by the dominant firm, falls under Article 7(2) Brussels I bis. Even though the obligation to continue to supply the former contractual partner flows from a legal obligation (which in the logic of *Wikingerhof* opens the door for tort jurisdiction), the dispute clearly results from a typical contractual issue, i.e. the legality of the termination of a contract. Against this background, national courts should not hesitate to initiate further preliminary references to allow the ECJ to clarify the approach outlined in *Wikingerhof*. Without such references, national courts will not be in a position to apply the law uniformly.

### 5.5. *Tort jurisdiction and the effects principle*

Under Article 7(2) Brussels I bis, a plaintiff is entitled to sue either at the place where the damage occurred or at the place of the event giving rise to it.[69] In *Wikingerhof*, the ECJ emphasized that the effects principle is the key factor used to determine the place where the damage occurred under Article 7(2) Brussels I bis when claims against dominant firms are at stake.[70] The localization of the place where the damage occurs in competition law actions is not entirely settled.[71] Whereas commentators have long argued that the effects principle should apply,[72] the ECJ ruled in *CDC* that the place where the damages occurs for follow-on actions against cartels lies at the home of the victim harmed by the anticompetitive conduct, irrespective of the effective market.[73]

69. See e.g. Case C-360/12, *Coty Germany*, para 46; Case C-375/13, *Kolassa*, para 45.

70. Judgment para 37.

71. For a critical assessment, see Mäsch, "Third time lucky? Der EuGH zum Gerichtsstand für Kartellschadensersatzklagen am Handlungs- und Erfolgsort", (2020) *Praxis des Internationalen Privat- und Verfahrensrechts*, 305–308.

72. Maier, *Marktortanknüpfung im internationalen Kartelldeliktsrecht* (Peter Lang Verlag, 2011), pp. 152–159; Tzakas, *Die Haftung für Kartellverstöße im internationalen Rechtsverkehr* (Nomos, 2011), p. 119; Vilà Costa, "How to apply Articles 5(1) and 5(3) Brussels I Regulation to private enforcement of competition law: A coherent approach" in Basedow, Francq and Idot (Eds.), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing, 2012), pp. 17, 27; Mankowski, "Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen bei Kartelldelikten", (2012) WuW, 797–807, at 806–807; Wurmnest, "Internationale Zuständigkeit und anwendbares Recht bei grenzüberschreitenden Kartelldelikten", (2012) EuZW, 933–939, at 935.

73. Case C-352/13, *CDC Hydrogen Peroxide*, para 53.

However, in more recent judgments the ECJ has strengthened the effects principle. In *Lithuanian Airlines II*, the Court held that claims against a predatory pricing strategy can be brought before the courts of the Member States whose markets are affected by the anticompetitive conduct, as it is in those countries that the alleged damage is purported to have occurred.[74] Determining the place where the damage occurs based on the effects test is in line with the requirement of consistency laid down in Recital 7 Rome II Regulation, as under Article 6(3)(a) Rome II Regulation, "the law applicable to actions for damages based on an act restricting competition is that of the country where the market is, or is likely to be, affected".[75] Also in *Tibor-Trans*, the Court held that for claims of indirect purchasers "[w]here the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred for the purposes of applying Article 7(2) [Brussels I bis]".[76]

In sum, the recent case law of the ECJ is a step in the right direction. Further references by national courts are now needed to clarify under which conditions a market can be deemed to be affected by the anticompetitive conduct.

### 5.6. *Jurisdiction agreements after Wikingerhof*

It is very likely that the practical effect of *Wikingerhof* is much more limited than the first online comments[77] suggested.[78] The dispute was characterized by the peculiarity that no valid jurisdiction agreement was concluded according to Article 25 Brussels I bis/Article 23 Brussels I Regulation. It was only because of the unusual circumstances of the case that it could not be established that the hotel had consented to a clause proposed by Booking.com.

As jurisdiction agreements are typically laid down in general terms and conditions which are regularly incorporated into the contractual relationship, most hotels that have a contractual relationship with Booking.com will be bound by valid choice-of-forum clauses designating the courts in Amsterdam

74. Case C-27/17, *flyLAL-Lithunian Airlines II*, para 40.

75. Ibid., para 41.

76. Case C-451/18, *Tibor Trans*, para 33.

77. See Deutsches Hotel darf in Deutschland gegen Booking.com klagen, <www.lto.de/recht/nachrichten/n/eugh-c-59-19-gerichtsstand-booking-com-hotel-wikingerhof-vertrag-delikt-unerlaubte-handlung/>; EuGH: Quinn Emanuel und Rohnke Winter können Booking.com deutsche Klagen nicht ersparen, available at <www.juve.de/nachrichten/verfahren/2020/12/eugh-quinn-emanuel-und-rohnke-winter-koennen-booking-com-deutsche-klagen-nicht-erspa ren>.

78. That *Wikingerhof* will have a limited effect in practice is also predicted by Mankowski, op. cit. *supra* note 49, sub 3 b).

to be exclusively competent. Moreover, such clauses are usually broadly worded to cover for example "all disputes arising out of or in connection with this contract" or state that an "Agreement shall be governed by and construed in accordance with the laws of the Republic of Y and the parties submit to the jurisdiction of the courts of the Republic of Y."[79] This brings up the question whether such an agreement would also cover the claims of contractual partners to end abuses of a dominant position as were alleged by the hotel in *Wikingerhof*.

The ECJ clarified in *Apple Sales International* that claims brought by a distributor against its supplier for alleged violations of Article 102 TFEU and certain rules of national unfair competition law could be covered by such a wide jurisdiction agreement. This is so, explained the Court, because "the anti-competitive conduct covered by Article 102 TFEU, namely the abuse of a dominant position, can materialize in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms".[80] Even though the ECJ has so far not clearly spelled out to what extent the interpretation of the scope of a jurisdiction clause is influenced by European standards (according to the traditional view, the interpretation is governed by the applicable national law[81]), it seems that the European standards interfere with the interpretation of national courts based on national law in only limited circumstances. So far, such an exception has only been carved out in *CDC*. The ECJ held there that jurisdiction clauses in supply contracts which do not explicitly include claims for infringements of competition law, do not extend to tort claims in connection with the supplier's participation in a cartel and can therefore not derogate a court's international jurisdiction according to the general rules.[82] The Court based this finding on the argument that, given that the harmed contractual partner

> "could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause and that that undertaking had no knowledge of the

79. See for a similar clause Case C-595/17, *Apple Sales International*, para 9.

80. Ibid., para 28.

81. See Gottwald, in Münchener Kommentar zur ZPO, 5. ed. 2017, Art. 25 Brüssel I-VO para 21; Wurmnest, "Die Einbeziehung kartellrechtlicher Ansprüche in Gerichtsstandvereinbarungen" in Mankowski and Wurmnest (Eds.), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (C.H. Beck, 2014), pp. 567–582, at 574; Mäsch, "Blondes have more fun (or have they?) – Zur Bleichmittelkartell-Entscheidung des EuGH", (2016) WuW, 285–291, at 291. Moreover, how the applicable law for the interpretation of the clause must be determined is a matter of dispute, see Eichel, "Gerichtstandsvereinbarungen und europarechtliche Auslegungsregeln im Kontext des Delikts- und Kartellrechts", (2021) *Praxis des Internationalen Privat- und Verfahrensrechts*, 143–150, at 145 (also arguing in favour of European rules of interpretation).

82. Case C-352/13, *CDC Hydrogen Peroxide*, paras. 69 and 71.

> unlawful cartel at that time, such litigation cannot be regarded as stemming from a contractual relationship. Such a clause would not therefore have validly derogated from the referring court's jurisdiction."[83]

Against this background, even after *Wikingerhof* where the ECJ classified the claim to bring the alleged abusive practices by the booking platform to an end as falling under Article 7(2) Brussels I bis, it could be argued that such claims would be covered by a wide jurisdiction agreement. Despite their tortious nature, the claims have a strong connection with the contract and it would therefore not be surprising to one of the contractual partners if it were sued at the court designated in such a clause.[84] This interpretation is supported by Advocate General Saugmandsgaard Øe who underscored that the classification of the matter as tort in *Wikingerhof* does not contradict the findings of the *Apple* judgment, as jurisdiction clauses can also cover tort claims having a close connection to a contract.[85] The European influence on the interpretation of jurisdiction clauses in competition cases is, however, not clear. National courts should therefore not hesitate to initiate preliminary reference proceedings. Such a chance was recently missed by the *Oberlandesgericht München* which decided in 2017 (i.e. before the ECJ handed down the judgment in *Apple Sales International*), without further discussion, that a general jurisdiction agreement does not cover claims against a dominant firm for unlawful discrimination.[86] After *Apple Sales International* it became clear that this interpretation cannot be sustained,[87] but after *Wikingerhof* more guidance is necessary on the scope of European standards of interpretation concerning jurisdiction clauses used by dominant firms.

## 6. Conclusion

The ECJ understood the policy issues underlying the preliminary reference in *Wikingerhof* well and recalibrated the test to distinguish more clearly between contract and tort jurisdiction. As a consequence, the Court retreated in part from the approach taken in *Brogsitter*. *Wikingerhof* deals only with competition (antitrust) law claims, but it is not hard to see that this judgment

83. Ibid., para 70.

84. See generally Mankowski, op. cit. *supra* note 49, sub 3 c); Brand and Gehann, op. cit. *supra* note 49, at 104.

85. Opinion, para 140.

86. OLG München, 23 Nov. 2017 – 29 U 142/17 Kart, GRUR-RR 2018, 265 para 24 – *Academic Conditions*.

87. See Eichel, op. cit. *supra* note 81, at 149.

will likely have spillover effects into other areas of the law. Even though *Wikingerhof* was decided correctly, it has been rightly pointed out that the judgment has left many questions open and in this respect *Wikingerhof* shares something with *Brogsitter* whose reach has puzzled many commentators. After *Wikingerhof*, it is still not clear to what extent the claimant's reliance on national rules will be decisive for the classification of their claim. Moreover, the question arises whether contract jurisdiction can never be asserted when claims against abuses of dominant firms are brought. In addition, clarification is needed as to whether jurisdiction clauses will cover such claims that fall under Article 7(2) Brussels I bis/Article 5(3) Brussels I Regulation. National courts should therefore not hesitate to issue further preliminary references to clarify those matters.

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