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**A new nail in the coffin: the
Booking.com judgement of 2020**

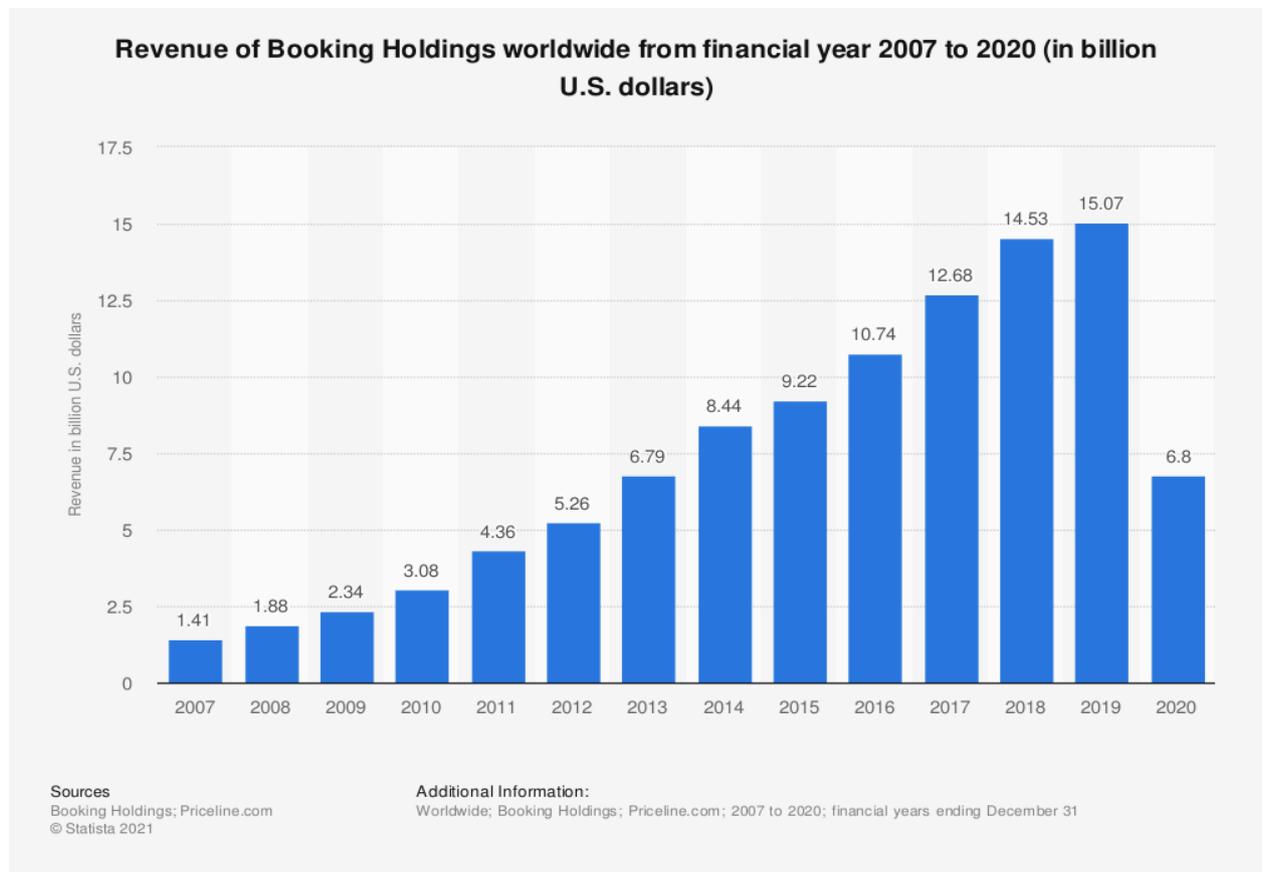
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A new nail in the coffin: the Booking.com judgement of 2020

Introduction

A few years ago, I evaluated different aspects of the travel industry in a series of working papers.¹ It is evident that at least the level of the online travel agencies (further on: OTA) in the vertical distribution chain is very concentrated, despite the fact of a large number of small OTAs. According to statistics the global travel agency market (both traditional and online) reached 315 billion USD in 2020.² In 2019 the online travel company with the highest revenue was Bookings Holdings, and it was also the largest online travel company with a market capitalization of 91 218 million USD. Evaluating the revenue of Booking Holdings we can see a very fast rise in revenue. Until 2019 we can see an astonishing 22% of YoY revenue growth on average.



The general terms and conditions of Booking.com

¹ Pál Szilágyi, 'The Evaluation of the Hungarian Sector Inquiry in the Online Travel Market' [2017] Pázmány Law Working Papers <<http://plwp.eu/evfolyamok/2016-2/207-2017-16>>; Pál Szilágyi, 'Travel Markets and Competition Law' 2017 Pázmány Law Working Papers <<http://plwp.eu/evfolyamok/2016-2/205-2017-14>>; Pál Szilágyi, 'The Booking.Com Decision of the Bundeskartellamt' [2017] Pázmány Law Working Papers <<http://plwp.eu/evfolyamok/2016/190-2016-22>>; Pál Szilágyi, 'How to Define Relevant Markets in the Tourism Sector?' [2017] Pázmány Law Working Papers <<http://plwp.eu/evfolyamok/2016-2/208-2017-17>>.

² Department Statista Research, 'Online Travel Market - Statistics & Facts' (2020) <<https://www.statista.com/topics/2704/online-travel-market/>>. 9 December 2020.

The general terms and conditions of Booking.com at the time of writing this article states that the applicable law is exclusively (except expressly otherwise stated) the law of The Netherlands and all legal contractual disputes are to be handled exclusively by the courts in Amsterdam.

The legal dispute in the Wikinghof case³

Wikinghof⁴ alleged that Booking.com imposes unfair conditions on hoteliers which constitute an abuse of a dominant position and likely to cause harm to them. The (model) contract was signed between the parties in March 2009. The company sued Booking.com before a German court based on German competition law.⁵ The case reached the Bundesgerichtshof in an appeal on the question of competences⁶ and the German Federal Court of Justice, the Bundesgerichtshof turned⁷ to the European Court of Justice on the interpretation of the Brussels I bis regulation⁸.

Article 7 points 1 and 2 of the Brussels I bis regulation state that a person domiciled in a Member State may be sued in another Member State in matters relating to contract in the court for the place of performance of the obligation in question or in matters relating to tort, delict or quasi delict in the courts for the place where the harmful event occurred or may occur.

The Opinion of AG Saugmandsgaard Øe

On 10 September 2020, AG Saugmandsgaard Øe delivered his opinion.⁹ Article 1 paragraph 1 sets the scope of application of Brussels I bis regulation, stating that the *“Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal”*. Article 4 paragraph 1 states that *“subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”* Booking.com is domiciled in the Netherlands and therefore Wikinghof could sue the company in the Netherlands according to these rules in the regulation. However as the AG refers to the regulation *“the Brussels I bis regulation also provides for rules allowing, in certain cases, the plaintiff to summon the defendant before the courts of another Member State (19). In particular, this regulation contains special powers relating to various “subjects” which offer the applicant the option of taking his action before one or more additional fors.*

Such special skills exist, in particular, in “contractual matters” and in “tort matters.” For actions in the first category, Article 7, point 1 of the Brussels I bis regulation allows the applicant to refer the “place of execution of the obligation which serves as the basis for the application” to the jurisdiction. For those in the second, Article 7, point 2 of this regulation provides that they may be brought before the jurisdiction of “the place where the damaging event occurred or is likely to occur”¹⁰. On national level the German courts established that under the regulation the place of execution of the obligation was the Netherlands, therefore the main question was whether Article 7 point 2 can be relied upon be

³ Case C-59/19 *Wikinghof GmbH & Co KG v Booking.com BV* ECLI:EU:C:2020:950.

⁴ Wikinghofer GmbH and Co. is operating a small hotel in Kropp (Germany).

⁵ LG Hannover, Entscheidung vom 13.02.2018 - 20 O 143/16.

⁶ Previously the Landesgerichtshof Kiel ruled that the action was inadmissible due to the international and territorial incompetence of the Landesgerichtshof Kiel due to the general terms and conditions of Booking.com giving exclusive jurisdiction to the Amsterdam courts.

⁷ Bundesgerichtshof, VI ZR 63/1. ECLI:DE:BGH:2020:131020BVIZR63.19.0.

⁸ 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 L 351, 20.12.2012, p. 1–32.(Further on: Brussels I bis regulation).

⁹ Case C-59/19 *Opinion of Advocate General Saugmandsgaard in Wikinghof GmbH & Co KG v Booking.com BV* ECLI:EU:C:2020:688.

¹⁰ *ibid.* [22] – [23].

Wikingerhof and whether “the “contractual” characterization outweighs the “tortious” characterization for the purposes of the Brussels I bis regulation”¹¹.

After a lengthy recollection of the main jurisprudence of the ECJ the AG argues that the fact that the two companies have concluded a contract does not suffice to apply Article 7 point 1 of the Brussels I bis regulation. The main question in such cases are the rules on which a case are based on, in this case the legal provisions of German competition law. Like the AG highlights, these “*rules are designed to protect the market and impose duties on any business to do so. Regardless of whether German law is in fact applicable to the action at issue in the main case, which is not determined at the jurisdictional review stage [...], the invocation of the rules in question indicates that the company avails itself of the alleged violation, by Booking.com, of a duty imposed by law regardless of a contract or other voluntary undertaking. This action is therefore based on a “tort obligation” within the meaning of Article 7, point 2, of the Brussels I bis regulation*”¹² and therefore “[i]n view of all of the above, I am of the opinion that an action such as the one brought by Wikingerhof falls within the “criminal matter” within the meaning of Article 7, point 2, of the Brussels I bis regulation.”¹³.

The ECJ judgement

The ECJ delivered the judgement on 24 November 2020 in a Grand Chamber.¹⁴ The relatively short judgement the court recalled earlier case law, namely “*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 [...] that is to say, actions not based on a legal obligation freely consented to by one person towards another*”¹⁵. Since the two relevant articles in this case are mutually exclusive, only one of them can be applicable and the main factors in deciding this are (1) that scheme of the regulation 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;¹⁶ and (2) 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 justice¹⁷. As the court goes on: “*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.*”¹⁸

The original case in Germany was based on an infringement of German competition law and both the AG and the ECJ argued that it is not necessary to evaluate the contract between the parties in order to decide an infringement of the German competition rules, at most the contract is only a tool to establish whether anticompetitive practices actually occur or not.

¹¹ *ibid.* [26].

¹² *ibid.* [119]. Later also referring back to *Case C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* ECLI:EU:C:2015:335.

¹³ *Case C-59/19. Opinion of Advocate General Saugmandsgaard in Wikingerhof GmbH & Co. KG v Booking.com BV.* ECLI:EU:C:2020:688. (n 9).

¹⁴ *Case C-59/19. Wikingerhof GmbH & Co. KG v Booking.com BV.* ECLI:EU:C:2020:950. (n 3).

¹⁵ *ibid.* [23].

¹⁶ *ibid.* [27].

¹⁷ *ibid.* [28].

¹⁸ *ibid.* [33].

Conclusions

AG Saugmandsgaard Øe invoked a lengthy argument on the relevant articles in the Brussels I bis regulation. The main focus of the argument was highlighting that even if there are contractual breaches, the main factor in deciding whether Booking.com can be sued in an other Member State is that of the nature of competition law, the rules invoked when seeking damages, as the AG states “*this characterization depends on the plaintiff’s claim, not on the defences raised by the defendant*”¹⁹. The ECJ basically confirmed the assessment of the AG and made a very strong case for all future applicants. The Tibor-Trans case²⁰ and the Wikingerhof case²¹ both allow plaintiffs to sue undertakings in their own respective jurisdictions which is a very necessary requirement for a successful private damages system in competition law. Competition disputes are usually characterized by a fight between those who violate the competition rules and those who suffer the damages. The former ones are usually in a much better position and much stronger than those who suffer the consequences. Both in the Tibor-Trans case and the Wikingerhof case small companies were in a legal dispute with much larger companies. Another common characteristic of the two cases is that in both cases the smaller companies were the plaintiffs seeking to address the harm caused to them. By interpreting the law in this sensible way, the ECJ strengthened the system of private competition law enforcement.

¹⁹ Case C-59/19. Opinion of Advocate General Saugmandsgaard in Wikingerhof GmbH & Co. KG v Booking.com BV. ECLI:EU:C:2020:688. (n 9). [137].

²⁰ Case C-451/18 Tibor-Trans Fuvarozó és Kereskedelmi Kft v DAF TRUCKS NV ECLI:EU:C:2019:635.

²¹ Case C-59/19. Wikingerhof GmbH & Co. KG v Booking.com BV. ECLI:EU:C:2020:950. (n 3).