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(1) ECJ's judgment of November 24, 2020, on international jurisdiction within the meaning of the EU Regulation No. 1215/2012 on allegations of behaviour contrary to antitrust law (Wikinger Hof)

The starting point of this remarkable ECJ ruling is the accusation of the German hotel "Wikingerhof" against the Dutch booking platform "Booking.com" of abusing a dominant market position. In this context, the hotel sued Booking.com before the German jurisdiction and asserted antitrust claims for injunctive relief. Booking.com opposed international and local incompetence and relied, among other things, on the fact that their behaviour was covered by contractually agreed regulations.

The District Court (LG Kiel, File no. 14 HKO 108/15 Kart) saw itself as having no international jurisdiction because the lawsuit was to be brought in Holland based on an agreement on the place of jurisdiction. The Court of Appeal (OLG Schleswig, File no. 16 U 10/17 Kart) left the question of an effective jurisdiction agreement open. It also saw no connection point for a German place of jurisdiction and assumed that the lawsuit would bring claims that were based on a contract. However, these claims are not to be met in Germany (Art. 7 No. 1 of the EU Regulation No. 1215/2012). The German Supreme Court (BGH) in the third instance considered it necessary to appeal to the ECJ as part of a preliminary ruling procedure to clarify whether a plaintiff in such a case relies on the place of jurisdiction for the unlawful act within the meaning of Art. 7 No. 2 of the EU Regulation No. 1215/2012 (File no. C-59/19). Then in the specific case, the German jurisdiction would be competent. This is finally to be determined again by the national jurisdiction.

The Grand Chamber of the ECJ now pointed out in its judgment of November 24, 2020, that it does not appear indispensable to interpret the contract between the parties to the main proceedings in order to assess whether the practices accused of Booking.com are lawful or unlawful under competition law. As a result, the ECJ decided that the jurisdiction norm of Art. 7 No. 2

of the EU Regulation No. 1215/2012 applicable to a tortious place of jurisdiction „*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*". It can therefore be assumed that legal action will continue in Germany.

(2) <u>Exception to the right of withdrawal for goods made to the consumer's specifications or clearly personalised</u> – goods which the seller has begun to produce – ECJ, judgment of October 21, 2020, C-529/19

If consumer contracts are concluded outside of business premises or at a distance, the Consumer Rights Directive 2011/83/EU generally provides for a right of withdrawal. There is an exception to this according to Art. 16 lit. c) of this Directive, for example, when goods are delivered that are manufactured according to customer specifications or that are clearly tailored to personal needs. In a legal dispute between a consumer and a manufacturer of fitted kitchens, the Potsdam District Court turned to the ECJ by posing a preliminary question. It wanted to know whether the right of withdrawal is still excluded even if the seller has not yet started manufacturing according to customer specifications and the customization should be carried out by the customer himself. It also wanted to know whether – according to previous German case law – it is of importance if the goods can be restored to the state they were in before they were individualised with only low dismantling costs, around 5% of the value of the goods. In the interests of legal certainty, the ECJ did not approve a right of withdrawal as given even under such circumstances.

(3) <u>Requirement of justification:</u> Judgments of the General Court of September 23, 2020, File No. T-411/17, T-414/17 and T-420/17, LBBW, Hypo Vorarlberg AG and Portikon AG

As part of the European Banking Union, financial institutions must make contributions to the Single Resolution Fund (SRF), which are set annually by the Single Resolution Board (SRB). LBBW, Hypo Vorarlberg Bank AG and Portikon AG (formerly WestLB AG) considered the calculation of the premium collected in advance for 2017 to be void and therefore brought an action before the General Court. Among other things, they invoked a violation of the obligation to give reasons laid down in European law (Art. 296 (2) TFEU). The European General Court has now ruled on these lawsuits in three judgments on September 23, 2020. The financial institutions were directly and individually affected by the relevant decisions of the SRB and were therefore able to bring an action. The Court criticised the fact that, on the basis of the reasons given to them, the institutions were not in a position to check the amount of their contributions, even though this was the essential part of the contested SRB's decision as far as the applicants are concerned. The reasoning puts these institutions in a position where they have no way of

knowing whether this amount has been calculated correctly or whether they should challenge it in court. The Court saw an inherent lack of transparency in the calculation of the contributions.

(4) European trademark law: judgment of the General Court of September 9, 2020, File No. T-144/19 "Adlon"

A sanitary product manufacturer wanted to have the “Adlon” brand registered with the EU Trademark Office for bathroom fittings. The operators of the Berlin Hotel Adlon at the Brandenburg Gate, who had the name “Adlon” protected as an EU trademark for hotel and restaurant services as early as 2005, turned against this. Like the EU Trademark Office, the European General Court also refused the sanitary company's right to register such a trademark. If the brand were used by the medical supply store for sanitary products, there would be the risk that consumers would associate it with the older brand "Adlon" for the accommodation and catering of guests. The medical supply store could benefit from the reputation and appreciation of the Berlin hotel without any consideration. The sanitary product manufacturer could benefit from the reputation and appreciation of the Berlin hotel without any reward.

(5) Advocate General at the ECJ on the prohibition of regional advertising in Germany-wide TV programs

In his Opinion of October 15, 2020 (File No. C-555/19), Advocate General at the European Court of Justice Maciej Szpunar came to the conclusion that the general prohibition contained in the German State Broadcasting Treaty on regionally broadcasting television advertising within the framework of programs broadcasted nationwide does not violate EU law. In particular, neither the Audiovisual Media Services Directive (2010/13/EU) nor the principle of equal treatment nor the freedom of expression from the Charter of Fundamental Rights stand in the way. The freedom to provide services (Art. 56 TFEU) does not constitute an obstacle if there are no less restrictive measures to protect diversity of opinion at a regional and local level. It remains to be seen whether the ECJ will agree with this well-founded assessment.

(6) Crypto-Assets: Commission draft for a European MiCA Regulation

In September 2020, the European Commission presented a more than 150 pages long draft of a European Regulation of crypto-assets ("Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets", or MiCA). The aim is to create a far-reaching, harmonised regulation of crypto-assets on a European level. Crypto-assets are digital representations of values or rights that can be electronically transferred and saved using distributed ledger technology (i.e. technology with decentralised data acquisition such as blockchain) or similar technology. The regulation is intended to regulate EU-wide licensing obligations, general trading in crypto-assets and supervisory powers. The MiCA Regulation is planned to come

into force at the end of 2022. The crypto-assets mainly include the blockchain-based internet currencies "bitcoin" and "ether". “Diem” (“Libra” before renaming) as a Facebook project would also be covered by the MiCA Regulation. A distinction would then be made in future between the regulations already in force in the MiFID Directive (Markets in Financial Instruments) and the new European regulations for the MiCA Regulation (Markets in Crypto Assets). Although the so-called security tokens – a digitised form of an asset with a special security status using a hardware component for identification and authentication – are also crypto assets, corresponding security token offerings (STO) should remain assigned to MiFID. Since the MiCA is to be issued in the form of a European Regulation, it will be directly applicable in all EU Member States.

(7) Germany's first “Commercial Court” in Stuttgart and Mannheim

As a result of Brexit and the associated intensification of European competition between the places of jurisdiction for major international proceedings, Baden-Württemberg set up a new Commercial Court with branches in Stuttgart and Mannheim in November 2020. The Commercial Court is formally assigned to the Stuttgart Regional Court and the Mannheim Regional Court. In future, commercial law disputes with a value in dispute of EUR 2,000,000 or more can be negotiated in English before this Commercial Court. Judgments, orders and minutes must, however, still be submitted in German given Section 184 of the German Courts Constitution Act. Special appeal bodies are also provided at the OLG Stuttgart and the OLG Karlsruhe. For further details, see the contribution by Haver & Mailänder lawyers Dr. Kläger and Dr. Brugger from November 17, 2020: “Commercial Court opened in Stuttgart and Mannheim”.

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