Case C-393/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

28 June 2023

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

23 June 2023

Appellant:

Athenian Brewery SA

Heineken NV

Respondent:

Macedonian Thrace Brewery SA

Subject matter of the main proceedings

The main proceedings concern a dispute between, on the one hand, Macedonian Thrace Brewery SA ('MTB'), and, on the other hand, Athenian Brewery SA ('AB') and Heineken NV ('Heineken'), over an infringement of competition law committed by AB in the Greek beer market. MTB wishes to hold both AB and its parent company established in the Netherlands, Heineken, jointly and severally liable for this infringement in the Netherlands court.

Subject matter and legal basis of the request for a preliminary ruling

This application under Article 267 TFEU concerns the jurisdiction of the Netherlands court under Article 8(1) 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 ('the Brussels Ia Regulation') in respect of the claim against AB. This raises the question whether the presumption of decisive influence on the part of the parent

company on the subsidiary also extends to the assessment of whether the condition has been satisfied that the claims against the two companies are so closely connected that it is expedient to hear and determine them together.

Questions referred for a preliminary ruling

1. In a case such as that at issue in these proceedings, must the court of the parent company's domicile, when assessing its jurisdiction under Article 8(1) of the Brussels Ia Regulation with regard to a subsidiary established in another Member State, in the context of the close-connection requirement referred to in that provision, rely on the presumption – accepted as regards substantive competition law - that the parent company exercises decisive influence on the economic activity of the subsidiary which is the subject of the proceedings?

2. If the first question is answered in the affirmative, how is the criterion formulated in the judgments *Kolassa* (C-375/13, EU:C:2015:37) and *Universal Music International Holding* (C-12/15, EU:C:2016:449) to be interpreted? In such a case, where the parent company's decisive influence on the economic activity of the subsidiary is disputed, is it sufficient for the assumption of jurisdiction under Article 8(1) of the Brussels Ia Regulation as regards the subsidiary concerned, that the existence of such a decisive influence cannot be excluded *a priori*?

Provisions of EU law relied on

Articles 101 and 102 TFEU

Article 4(1), and Article 8(1) of the Brussels Ia Regulation.

Succinct presentation of the facts and procedure in the main proceedings

1 MTB is a brewery established in Greece and operating in the Greek beer market. AB is a brewery established in Greece that is part of the Heineken group. Heineken is a company established in the Netherlands that sets the strategy and objectives of the Heineken group. It does not itself have, nor has ever had, any operational activities in Greece. Heineken indirectly held approximately 98.8% of the shares in the capital of AB during the period relevant to these proceedings.

2 By decision of 19 September 2014, the Greek competition authority found that AB had abused its dominant economic position in the Greek beer market during the period from September 1998 to 14 September 2014, and that this should be deemed to be a single continuous infringement of Article 102 TFEU and Article 2 of the Greek Law on Competition.

3 MTB sought declaratory judgments from the rechtbank Amsterdam (Amsterdam District Court; 'the Rechtbank') to the effect that Heineken and AB are jointly and severally liable for the aforementioned infringement of competition law in the

Greek beer market, and jointly and severally liable to compensate MTB for the entire loss suffered as a result of that infringement. Heineken and AB brought an ancillary claim that the Rechtbank should declare itself not to have jurisdiction to hear the claims against AB. The Rechtbank granted this claim and declined jurisdiction in respect of the claims against AB.

4 On appeal, the gerechtshof Amsterdam (Amsterdam Court of Appeal; 'the Gerechtshof') annulled the judgment of the Rechtbank and dismissed the ancillary claim of lack of jurisdiction. Heineken and AB then lodged an appeal in cassation with the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

The essential arguments of the parties in the main proceedings

5 The Rechtbank held at first instance that, under the main rule of Article 4(1) of the Brussels Ia Regulation, it had jurisdiction to hear the claims against Heineken, as Heineken is domiciled in Amsterdam. In respect of AB, however, the Court is of the view that no jurisdiction exists under Article 8(1) of the Brussels Ia Regulation, as the requirement laid down in that provision that there should be a close connection between the claims against Heineken and those against AB has not been satisfied.

6 In support of its annulment of the Rechtbank's judgment, the Gerechtshof considers, first of all, that, when assessing the allegations against Heineken, a Netherlands court will have no choice but to pass judgment on AB's actions and the decision of the Greek competition authority. If the same issue is submitted to a Greek court, it cannot be ruled out that it will come to a different assessment to that of the Netherlands court. Given that risk of irreconcilable decisions, the requirement laid down in Article 8(1) of the Brussels Ia Regulation that the proper administration of justice requires that the claims be heard and determined together is thus satisfied in principle.

7 Whether the claims against Heineken are admissible will have to be determined in the main proceedings. Only if admissibility must reasonably be deemed to be ruled out a priori can bringing the case nevertheless before the Netherlands court be regarded as an abuse of the jurisdiction provisions of the Brussels Ia Regulation. That situation does not arise here. At present, it cannot be ruled out with sufficient certainty that AB and Heineken should be regarded as a single undertaking for competition-law purposes.

8 For the question of whether it was reasonably foreseeable for AB that it would be sued in a Netherlands court, it is relevant for the purposes of EU law that AB sells beer in Greece under the Heineken brand and is part of the Heineken group. The allegation made against it is that it abused its dominant position by selling, inter alia, that beer in that market. That this allegation is also directed at Heineken and is brought before the court of that company's domicile was reasonably

foreseeable, since the allegation is directly related to its membership of that group and to the brand of beer to which the Heineken group holds the rights.

9 In cassation, Heineken and AB challenge the judgment of the Gerechtshof. They take the view, inter alia, that the Gerechtshof did not adequately address the question of whether Heineken exercised a decisive influence on AB's conduct and whether they could therefore be regarded as a single undertaking.

Succinct presentation of the reasoning in the request for a preliminary ruling

10 The present case concerns the private-law enforcement of European competition law (Articles 101 and 102 TFEU). According to the case-law of the Court of Justice, legally distinct entities may be sued for a single infringement of competition law when they constitute a single undertaking, a concept which in this context refers to an economic unit. [1] That is the case where the parent company exercises control over the conduct of its subsidiary, which may be proved by demonstrating that the parent company has the possibility of exercising a decisive influence on the conduct of the subsidiary and, moreover, that it has actually exercised that influence, or that that subsidiary does not decide independently upon its own conduct in the market, but carries out, in the main, the instructions given to it by the parent company, having regard, more specifically, to the economic, organisational and legal links between those two legal entities. This decisive influence is presumed to be present if the parent company holds, directly or indirectly, all or almost all of the capital of the subsidiary. However, this presumption must also be able to be rebutted by demonstrating that, although the parent company held (almost) all of the capital of the subsidiary when the practice occurred, it was not giving instructions to the subsidiary, or participating, directly or indirectly, via, inter alia, appointed administrators, in the adoption of the decisions of that subsidiary relating to the economic activity concerned. [2]

11 The Court of Justice has already ruled on jurisdiction under (the predecessor of) Article 8(1) of the Brussels Ia Regulation in the context of competition law in its judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 21-25 and 33). In that case, the Court held that the same situation of fact and law existed because the undertakings concerned had participated, in different places and at different times, in a single and continuous infringement, which had been established by a decision of the European Commission. According to the Court of Justice, it was therefore foreseeable that they would be sued in the courts of a Member State where one of them was domiciled, since they

[1] See, inter alia, the judgments of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraphs 28-47, and 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraphs 32-44.

[2] See, inter alia, the judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 105-112.

had participated in a single infringement and it was therefore established that they were liable for the resulting loss.

12 In the judgments of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 64), and 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraphs 45 to 46), the Court of Justice held that the courts must take into account all available evidence, including the defendant's allegations. However, at the stage of determining jurisdiction, it is not necessary to take evidence in relation to disputed facts which are relevant both to the question of jurisdiction and to the existence of the claim.

13 The present case differs from that in the *CDC Hydrogen Peroxide* case in that the alleged infringement of competition law was not established by the European Commission, but by the Greek competition authority, and only in respect of subsidiary AB. It is undisputed that Heineken did not itself, directly, engage in factual acts in the Greek beer market. The claim against Heineken is based on MTB's contention that Heineken and AB formed a single undertaking during the period in which AB's infringement of Article 102 TFEU took place, in that Heineken exercised a decisive influence on the economic activity in question engaged in by AB, and that on that basis it is jointly and severally liable for the alleged infringement. The close connection referred to in Article 8(1) of the Brussels Ia Regulation can therefore be based solely on the alleged decisive influence. If, as is the case here, the respondent contests the appellant's contentions on that point in an adequately reasoned way, the question arises as to whether, also in the context of the assessment of its jurisdiction under Article 8(1) of the Brussels Ia Regulation, in accordance with the *Kolassa* and *Universal Music International Holding* judgments, the court must proceed on the assumption, referred to in paragraph 10 above, that the parent company exercises a decisive influence when it holds (almost) all the capital of the subsidiary. If the answer is in the affirmative, the court of the domicile of the parent company will have to assume jurisdiction over the claim against the foreign subsidiary, unless the latter is able to rebut the presumption a priori (without providing further evidence). On the other hand, if, in assessing its jurisdiction, the court is unable to proceed on that assumption, it must examine, on the basis of the parties' assertions and defences in this regard (without providing further evidence), whether there are sufficient indications to assume that the parent company exercised a decisive influence on the subsidiary's economic activity that is at issue here.

14 The answer to this question is subject to reasonable doubt. On the one hand, the presumption of decisive influence accepted by the Court of Justice serves to give full effect to the enforcement of European competition law and it is difficult to provide the evidence necessary to rebut the presumption of decisive influence. [3] On the other hand, the Brussels Ia Regulation has objectives of its own and it must

[3] See the judgment of 15 April 2021, *Italmobiliare and Others* v *Commissie*, C-694/19 P, not published, EU:C:2021:286, paragraph 58, and the Opinion of Advocate General Rantos in the case *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2021:998, paragraphs 159-160.

be interpreted in the light thereof. In that regard, it is important to note that Article 8(1) of the Brussels Ia Regulation must be interpreted strictly, in the sense that that interpretation may extend only to the cases expressly provided for in that Regulation, because it derogates from the main rule that the courts of the defendant's domicile have jurisdiction. An affirmative answer to the question concerned will, in most cases, result in legal persons associated with an international group, irrespective of the Member State in which they are established and in which country the economic activity in question has taken place, being able to be sued for an alleged infringement of competition law before the courts of the place of establishment of the legal person which directly or indirectly holds all or almost all of the capital. The particular ground of jurisdiction laid down in Article 8(1) of the Brussels Ia Regulation could thus acquire a wide scope of application in relation to competition law.

15 In view of this doubt about the interpretation of the Brussels Ia Regulation and the case-law on the subject, the Hoge Raad submits the aforementioned questions for a preliminary ruling.