Case C-673/23

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:

13 November 2023

Referring court:

Gerechtshof Amsterdam (Netherlands)

Date of the decision to refer:

19 September 2023

Applicants:

Smurfit Kappa Europe BV

Smurfit International BV

Smurfit Kappa Italia SpA

DS Smith Italy BV

DS Smith plc

DS Smith Packaging Italia SpA

DS Smith Holding Italia SpA

Toscana Ondulati SpA

Defendants:

Unilever Europe BV

Unilever Supply Chain Company AG

Unilever Italy Holdings Srl

Subject matter of the main proceedings

Appeal against a judgment of the rechtbank Amsterdam (District Court, Amsterdam) in which that court declared that it had jurisdiction to hear claims against the parties based outside the Netherlands in a cartel damages case.

Subject matter and legal basis of the request

Interpretation of 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.

Questions referred for a preliminary ruling

Question 1a.

Is there a close connection within the meaning of Article 8(1) of the Brussels I bis Regulation between:

(i) on the one hand, a claim against a lead defendant (also known as: anchor defendant) that is not an addressee of a cartel decision of a national competition authority but, as an entity alleged to belong to the undertaking within the meaning of European competition law (the 'Undertaking'), is held liable upstream for the established infringement of the Union law cartel prohibition and,

(ii) on the other hand, a claim against:

(A) a co-defendant who is an addressee of that decision, and/or

(B) a co-defendant who is not an addressee of the decision in respect of which it is alleged that, as a legal entity, it belongs to an Undertaking which has been held publicly liable in the decision for the infringement of the prohibition on cartels under EU law?

In that regard, does it matter:

(a) whether the anchor defendant being held liable upstream merely held and managed shares during the cartel period;

(b) – if Question 4a is answered in the affirmative – whether the anchor defendant being held liable upstream was involved in producing, distributing, selling and/or supplying cartelised products and/or providing cartelised services;

(c) whether or not the anchor defendant resides in the Member State where the national competition authority has found (only) an infringement of the prohibition on cartels under EU law on the national market;

(d) whether the co-defendant who is an addressee of the decision has been designated in the order as

(i) an actual cartel participant – in the sense that it actually participated in the infringing agreement(s) and/or concerted practice(s) found or

(ii) as a legal entity forming part of the Undertaking which has been held publicly liable for the infringement of the Union law prohibition on cartels;

(e) whether the co-defendant who is not an addressee of the decision actually produced, distributed, sold and/or supplied cartelised products and/or services;

(f) whether or not the anchor defendant and the co-defendant belong to the same Undertaking,

(g) the plaintiffs have directly or indirectly purchased products and/or or received services from the anchor defendant and/or the co-defendant?

Question 1b.

Is it relevant to the answer to Question 1a whether or not it is foreseeable that the relevant co-defendant will be sued in the court of that anchor defendant? If so, is that foreseeability a separate criterion when applying Article 8(1) of the Brussels I bis Regulation? Is that foreseeability given in principle in the light of the *Sumal* judgment of 6 October 2021 (C-882/19,EU:C:2021:800)? To what extent do the circumstances mentioned in Question 1a(a) to (g) above make it foreseeable here that the co-defendant would be sued in the court of the anchor defendant?

Question 2.

In determining jurisdiction, should consideration be given also to the assignability of the claim against the anchor defendant? If so, is it sufficient for that assessment that it cannot be excluded in advance that the claim will be upheld?

Question 3.

Must – or can – the presumption accepted in competition law of decisive influence by the (fined) parent companies over the economic activity of the subsidiaries (the '*Akzo* presumption') be applied in (civil) cartel damages cases?

Question 4a.

When applying Article 8(1) of the Brussels I bis Regulation, can different defendants domiciled in the same Member State be anchor defendants (together)?

Question 4b.

Does Article 8(1) of the Brussels I bis Regulation directly and immediately designate the relative competent court, overruling national law?

Question 4c.

If Question 4a is answered in the negative – such that only one defendant can be an anchor defendant – and Question 4b is answered in the affirmative – such that Article 8(1) of the Brussels I bis Regulation, overruling national law, directly designates the relative competent court:

When applying Article 8(1) of the Brussels I bis Regulation, is there scope for internal reference to the court of the defendant's domicile in the same Member State?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union (TFEU): Article 101

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 ('Brussels I bis Regulation'): Article 4(1), Article 6(1), Article 7(1), (2) and (3), Article 8(1), Article 11(1)(b)

Provisions of national law relied on

Code of Civil Procedure (Wetboek van burgerlijke rechtsvordering; 'Rv'): Article 107, Article 110(1) and (3), Article 209, Article 612

Succinct presentation of the facts and procedure in the main proceedings

1 This case concerns the determination of the applicants' joint and several liability for the damage caused by two separate infringements of Article 101 TFEU established by a decision dated 17 July 2019 ('the decision') of the Italian competition authority ('the AGCM'). The decision concerns a cardboard sheet cartel from 2 February 2004 to 30 March 2017 whereby the selling prices of corrugated board were manipulated and other companies were induced to participate in the offence. In addition, the decision concerns a packaging cartel from 7 September 2005 to 30 March 2017 consisting of an agreement between the main producers of cardboard packaging to distort competition (jointly, 'the cartels'). According to the decision, the packaging cartel had a supporting function in relation to the cardboard sheet cartel.

2 The referral decision merged two cases. The first three applicants (first proceedings) are referred to collectively as SK et al. and individually as SK Europe, SK International and SK Italia. The remaining five applicants (second proceedings) are referred to collectively as DS et al. and individually as DS Italy, DS Plc, DS Packaging, DS Holding and Toscana. The defendants in both proceedings are referred to collectively as Unilever et al. and individually as Unilever Europe, Unilever Supply Chain and Unilever Italy. SK Europe is based

in Naarden, SK International in Amsterdam and DS Italy in Rijswijk. The other applicants are based outside the Netherlands.

3 Since 2017, Unilever Europe has borne primary responsibility for sourcing raw and packaging materials for Unilever's European manufacturing facilities, including those in Italy. Prior to that, this responsibility lay with Unilever Supply Chain Company. Early in the cartel periods, the Unilever Group also bought corrugated cardboard packaging locally through the legal predecessors of Unilever Italy.

4 Unilever et al. are seeking a declaration that SK et al. and DS et al. are jointly and severally liable to them in tort on account of their participation in the cartels. They also claim that SK et al. and DS et al. should be ordered jointly and severally to pay damages, the amount of which will be determined in separate follow-up proceedings. Unilever et al. hold SK et al. and DS et al. liable for damages as legal entities which, according to Unilever et al., are among the undertakings in a competition law sense that committed the infringement of the prohibition on cartels under EU law established in the decision.

5 SK et al. belong to the SK Group, which operates in the paper and cardboard packaging materials sector. The top holding company of the SK Group is the company Smurfit Kappa Group PLC, based in Dublin, Ireland, which is not involved in these proceedings. SK International is an (intermediate) holding company for the global operations of the SK Group. It is the wholly owned parent company of SK Europe, which is the (intermediate) holding company for the European operations of the SK Group. Since the merger of SK Italia Holdings S.p.A with SK Italia in 2018, SK Europe has been the wholly owned parent company of SK Italia, an Italian operating company which is active in the production and trading of cardboard sheets and cardboard packaging materials in Italy and has three plants in that country.

6 DS et al. belong to the DS Group, which is engaged in the production and sale of corrugated paper, corrugated cardboard sheets and corrugated cardboard packaging. DS PLC is the ultimate company of the DS Group. DS Holding and DS Italy are holding companies. DS Italy holds 92% of the shares in Toscana. Toscana is engaged in the production of corrugated cardboard and corrugated cardboard packaging and has two plants in Italy. DS Packaging acquired SCA Packaging Italia S.p.A. in 2012 and is active in the production and sale of corrugated cardboard sheets and corrugated cardboard packaging.

7 SK Italia, DS Holding and Toscana are addressees of the decision. The decision found that SK Italia and Toscana participated in the cartels. DS Holding was held liable upstream in the decision as the (indirect) parent company. The other defendants are not addressees of the decision.

8 In the contested judgment, the rechtbank Amsterdam (District Court, Amsterdam) declared that it had jurisdiction over the claims against the defendants based

outside the Netherlands. In the opinion of the rechtbank, such a close connection exists between the claims against the Netherlands and the foreign defendants that the proper administration of justice calls for them to be tried by the same court in order to avoid irreconcilable decisions. SK et al. and DS et al. are appealing that decision.

9 Jurisdiction is a matter of public policy under Netherlands law and is therefore reviewed *ex officio*, including on appeal. Moreover, the international jurisdiction of the rechtbank was challenged by the defendants based outside the Netherlands in an incidental claim. The debate between the parties thus far has concerned only the jurisdiction of the rechtbank to hear claims against the defendants based outside the Netherlands.

10 Relative jurisdiction, that is to say the question of which court (of equal level) within the Netherlands has jurisdiction to hear the claim, is not a matter of public policy. Relative jurisdiction is in principle determined by the domicile of the defendant. Of the Netherlands defendants, only SK International is domiciled in the district of Amsterdam. The rechtbank assumed relative jurisdiction under Article 107 Rv. This provides that, where a court has jurisdiction over one of the defendants jointly involved in the proceedings, that court is to have jurisdiction also over the other defendants, provided that there is such a close connection between the claims against the various defendants that reasons of expediency justify joint proceedings. In addition, the relevant Netherlands-based defendants did not challenge the relative jurisdiction of the rechtbank. No appeal is permitted against the decision on relative jurisdiction (Article 110(3) Rv). The Gerechtshof (Court of Appeal) must therefore assume under Netherlands procedural law that the rechtbank Amsterdam has relative jurisdiction over all of the defendants that are domiciled in the Netherlands.

11 The admissibility of the claims in the main proceedings requires, first, that the liability alleged of each of the defendants by Unilever et al. be established. Unilever et al. intend for the damages to be assessed in damages proceedings (Article 612 Rv). Those are customary, but not mandatory, separate follow-up proceedings under Netherlands law. For referral of the case to the damages assessment procedure in order to determine the damage in those follow-up proceedings, it is sufficient that it is plausible that Unilever et al. have suffered damage.

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

12 The questions of interpretation are linked to the specific nature of this case, a cartel damages case following breaches of the EU law prohibition on cartels on the Italian market found by the AGCM. A number of the intended questions are also at play in other cartel damages cases pending in the Netherlands, for example in another cartel damages case in which the gerechtshof asks today partly the

same questions, and in a case in which the Hoge Raad (Supreme Court) asked questions on 26 June 2023 (C-393/23, *Athenian Brewery and Heineken*).

Question 1a and 1b

13 The gerechtshof is confronted in this case with different views as to whether a close connection within the meaning of Article 8(1) of the Brussels I bis Regulation exists or can exist between, on the one hand, the claim against SK International and/or the other defendants domiciled in the Netherlands and, on the other hand, each of the claims against the foreign defendants, and whether it is relevant that it is foreseeable that the defendant in question will be sued before the rechtbank Amsterdam, the court of the anchor defendant SK International.

14 Under the first view, espoused by Unilever et al., the existence of the close connection follows from the fact that the claims against SK International (and possibly those against the other defendants established in the Netherlands), on the one hand, and the claims against the foreign defendants, on the other, are based on joint and several liability for the same damage, all of them being brought before the courts in their capacity as entities which, according to Unilever et al., belong to the undertakings found in the decision to be guilty of a single and continuous infringement of the EU law prohibition on cartels. This view rests on the objective of compensation, which is to ensure the effective application of the prohibition on cartels under EU law (see judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 67).

15 This is contrasted with the view under which, in such a case, only an addressee of the decision or even only an entity which has actually committed competition infringements itself can act as an anchor defendant. Under this view, the upstream and/or downstream liability of entities belonging to the undertaking which were not themselves involved in the infringement does not justify such an entity (not named in the decision) being able to be an anchor defendant. The proper administration of justice would not be served by a wide group of potential anchor defendants. This would amount to an erosion of the main rule of Article 4(1) of the Brussels I bis Regulation and lead to unpredictable application of the jurisdiction rules and undesirable forum shopping since, in such a case, courts in (almost) all Member States may have jurisdiction. This is contrary to the requirement of foreseeability, the objective that jurisdiction rules should be highly predictable and the principle that special jurisdiction rules such as Article 8(1) of the Brussels I bis Regulation should be limited to a small number of narrowly construed and clearly defined cases. In particular, claims against an entity not named in the decision which is held liable upstream and against an entity held liable purely upstream in the decision as a part of the undertaking are, under this view, too far away from each other to meet the requirement of a close connection, at least in the case of claims against entities not belonging to the same undertaking. This view argues that Article 8(1) of the Brussels I bis Regulation can create jurisdiction only if it is foreseeable to the defendants that claims against

them may be brought before the court of the anchor defendant. This is not the case for entities from different undertakings which are far away from each other.

16 In the opinion of the gerechtshof, the a priori exclusion of entities with which a close connection may exist and/or which may be anchor defendants is not consistent with the objective of effective enforcement of the prohibition on cartels under EU law. It is arguable that claims which are brought as a result of the same continuous infringement of the EU law prohibition on cartels against defendants who are directly identified by EU law as liable entities relate to the same situation in fact and in law, provided that it was foreseeable to those defendants that they would be sued before the courts of the anchor defendant's domicile. For foreseeability purposes, it may be relevant that infringement of the prohibition on cartels under EU law may lead to claims for damages by many claimants against many liable entities directly designated by EU law. However, the concrete facts and circumstances of a particular case might mean that the connection between the claim against the anchor defendant and the claim against a particular defendant is so remote that the requisite close connection within the meaning of Article 8(1) of the Brussels I bis Regulation is lacking. In those cases, it cannot be maintained that there is a risk of irreconcilable judgments unless claims against different defendants are heard by the same court. Foreseeability thus acts as a corrective mechanism in the context of determining whether the same situation exists in fact and in law. This interpretation is in line with the judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335), is consistent with the purpose of Article 8(1) of the Brussels I bis Regulation (proper administration of justice), contributes to the efficient and effective enforcement of EU competition law and is consistent with the lack of hierarchy of claims and the absence of further requirements on the anchor defendant when applying Article 8(1) of the Brussels I bis Regulation.

Question 2

17 The gerechtshof is faced with two different views as to the relevance of the admissibility of the claims against the anchor defendant when applying Article 8(1) of the Brussels I bis Regulation, both of which are followed in Netherlands legal practice.

18 Under one view, the admissibility of the claims must be assessed only in the main case. In this vision, however, the bringing of a claim against an anchor defendant that patently has no chance of success, against one's better judgment, may constitute an abuse of right.

19 Under the other view, when assessing international jurisdiction, it is necessary to check whether claims which are sufficiently substantiated in fact and in law have been brought, especially as regards the claim against the anchor defendant, and Article 8(1) of the Brussels I bis Regulation cannot be applied where there is insufficient substantiation. To that end, reference is made to the judgments of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, paragraph 61, and of 16 June

2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449, paragraph 44. In those judgments, the Court considered that the determination of jurisdiction should not be limited to the applicant's claims. Consideration must also be given to the information available on the legal relationship that actually exists between the parties and to the defendant's claims. Under this view, Article 8(1) of the Brussels I bis Regulation can apply only if it is sufficiently plausible beforehand, i.e. without party debate on the merits, further factual examination or provision of evidence, that the claim against the anchor defendant is admissible.

20 There may be reasonable doubt as to which view is correct. Advocate General Mengozzi, in his Opinion in *Freeport*, C-98/06, EU:C:2007:302, point 70, considered that the assessment of the risk of irreconcilable judgments may include an evaluation of the likelihood that the claim brought against the defendant who is domiciled in the forum Member State will succeed. That evaluation, however, according to Mengozzi, is of real practical relevance for the purpose of excluding the risk of irreconcilable judgments only if that claim proves to be manifestly inadmissible or unfounded in all respects. On the other hand, in its judgment of 13 July 2006 in *Reisch Montage*, C-103/05, EU:C:2006:471, paragraph 31, the Court held that, in the circumstances of that case, Article 6(1) of the Brussels I Regulation could be relied upon in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action was already regarded under a national provision as inadmissible from the time it was brought in relation to the first defendant. That does not alter the fact that the bringing of a claim against an anchor defendant that patently has no chance of success, against one's better judgment, may constitute an abuse of right.

Question 3

21 This question is relevant only if the admissibility of the claim against the anchor defendant is relevant in the context of determining jurisdiction. If, when determining jurisdiction, only the bringing of a claim against an anchor defendant that patently has no chance of success can constitute an abuse of right and therefore result in a lack of jurisdiction, these questions – if there is no abuse – should be answered in the main case.

22 Question 3 deals with the '*Akzo* presumption', the rebuttable presumption that a parent company which holds (almost) 100% of the capital of its subsidiary that has committed an infringement of EU competition law exercises decisive influence over the conduct of its subsidiary (see judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 60 and the case-law cited). This presumption also applies where a parent company can exercise all the voting rights attaching to the shares in its subsidiary (see judgment of 27 January 2021, *The Goldman Sachs Group* v *Commission*, C-595/18 P, EU:C:2021:73, paragraph 35) and has also been applied in relation to a parent company with indirect control through an intermediate holding company

(see judgment of the General Court of 27 September 2012, *Shell Petroleum and Others* v *Commission*, T-343/06, EU:T:2012:478, paragraph 52) and a parent company that is a non-operational holding company with no economic activity (see judgments of 20 January 2011, *General Química and Others* v *Commission*, C-90/09 P, EU:C:2011:21, paragraphs 86 to 88, and of 11 July 2013, *Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraphs 42 to 44). The *Akzo* presumption was developed in the context of the enforcement under public law of EU competition law. There may be reasonable doubt as to the application of the *Akzo* presumption in civil cartel damages cases.

23 One approach emphasises that the concept of undertaking in competition law should be interpreted in the same way in public and private enforcement and that the considerations underlying the application of the *Akzo* presumption in enforcement under public law of EU competition law apply equally to enforcement under private law.

24 This is countered by a view in which the *Akzo* presumption is only a procedural presumption of evidence in favour of the Commission and national competition authorities in administrative law proceedings. According to this view, national rules of evidence and procedural law are not overruled by the *Sumal* judgment and the judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, nor can it be inferred from those judgments that this procedural rule of administrative law is applicable one-to-one in civil liability proceedings. It is considered important in that regard that the *Akzo* presumption is not mentioned as an aspect of (civil law) attributability in paragraph 43 of the *Sumal* judgment.

Question 4a to 4c

Question 4a

25 According to Unilever et al., for Article 8(1) of the Brussels I bis Regulation to be applicable, it is sufficient that the claims against the foreign defendants have a close connection, within the meaning of that provision, with one of the claims against the Netherlands defendants, even if that/those defendant(s) is/are domiciled in a district other than that of the court where the claim is brought This is countered by an approach in which only one defendant domiciled in the jurisdiction of the court before which the matter is brought can act as an anchor defendant. Both approaches can be found in Netherlands legal practice.

26 The gerechtshof notes that the text of Article 8(1) of the Brussels I bis Regulation seems to indicate that only one defendant can be an anchor defendant. If it is necessary for the claims against all co-defendants to have the said close connection with the claim against SK International, that is a much stricter standard than if a connection with the claim against one of the other defendants domiciled in the Netherlands (but not within the jurisdiction of the rechtbank Amsterdam) is sufficient. As has been considered in paragraph 10 above, the gerechtshof in this

case must assume in this case that it has jurisdiction over all defendants domiciled in the Netherlands.

Question 4b

27 Since it may be that SK International cannot be an anchor defendant, but one of the other Netherlands defendants can, it is important whether Article 8(1) of the Brussels I bis Regulation confers direct and possibly even exclusive, not only international but also relative jurisdiction, to the exclusion of the national rules of relative jurisdiction. The wording of Article 8(1) of the Brussels I bis Regulation does indeed suggest that. This dual function has already been adopted for Article 7(1) and (2) and Article 11(1)(b) of the Brussels I bis Regulation, which have similar wording to Article 8(1) of the Brussels I bis Regulation (see judgments of 15 July 2012, *Volvo and Others*, C-30/20, paragraph 33; of 3 May 2007, *Color Drack*, C-386/05, EU:C:2007:262, paragraph 30, and of 30 June 2022, *Allianz Elementar Versicherung*, C-652/20, EU:C:2022:514). Question 4b seeks to put this beyond doubt, as Question 4c assumes this dual function.

Question 4c

28 Question 4c is asked in the event that not SK International but one of the other Netherlands defendants can be an anchor defendant. Indeed, if Question 4a is answered in the negative – such that only one defendant can be an anchor defendant – and Question 4b is answered in the affirmative – such that Article 8(1) of the Brussels I bis Regulation directly designates the court with relative jurisdiction – the question arises as to whether Article 8(1) of the Brussels I bis Regulation leaves room for referral to the court of another defendant's domicile in the same Member State. In that situation (no close connection with the claim against the anchor defendant, but a close connection with a claim against another defendant in the same Member State), the case will have to be brought again before the court of the domicile of that other defendant within the same Member State without the possibility of internal referral. This leads to new proceedings, in which international jurisdiction will again have to be determined *ex officio*. The possibility of internal referral (from one Netherlands court to another, with the proceedings continuing as they are) serves procedural economy and efficiency. It therefore appears to the gerechtshof that an interpretation of Article 8(1) of the Brussels I bis Regulation which has scope for such an internal referral must be possible.