Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 26 September 2024[1]

**Case C-393/23**

**Athenian Brewery SA,**
**Heineken NV**
**v**
**Macedonian Thrace Brewery SA**

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Judicial cooperation in civil and commercial matters – Jurisdiction in civil and commercial matters – Regulation (EU) No 1215/2012 – Special grounds of jurisdiction – Article 8(1) – Multiple defendants – Close connection – Article 102 TFEU – Concept of an undertaking – Parent company and subsidiary – Infringement by the subsidiary – Presumption of a decisive influence on the part of the parent company – Joint and several liability – Decision of a national competition authority – Follow-on actions for damages)

## I. Introduction

1. Can a person injured by an infringement of the competition rules sue the company which committed that infringement at the seat of its parent company in another Member State? That, in essence, is the question underlying the present request for a preliminary ruling.

2. The request gives the Court the opportunity to further develop its case-law on the scope of the special ground of jurisdiction based on a factual connection, provided for in Article 8(1) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels Ia Regulation'),[2] in the context of actions for damages for infringements of EU competition law (private enforcement). In the judgment in *CDC Hydrogen Peroxide*,[3] the Court has already held that that special ground of jurisdiction allows multiple participants in a cartel contrary to Article 101 TFEU to be sued in the place where one of them is domiciled, if their participation has previously been established in a binding European Commission decision ('follow-on' actions for damages).

1 Original language: German.

2 Regulation of the European Parliament and of the Council of 12 December 2012 (OJ 2012 L 351, p. 1).

3 Judgment of 21 May 2015 (C-352/13, EU:C:2015:335).

3. By contrast, this case is concerned with whether a (subsidiary) company which has been found by decision of a national competition authority to have abused its dominant position within the meaning of Article 102 TFEU can be sued together with its parent company at the latter's seat, which is located in a Member State (in this instance, the Netherlands) other than that of the subsidiary (in this instance, Greece).

4. In that context, the referring court wishes to know to what extent the case-law on the concept of an undertaking for the purposes of Articles 101 and 102 TFEU and on the attribution of liability within an economic unit has an impact on the allocation of jurisdiction in accordance with Article 8(1) of the Brussels 1a Regulation. In that case-law, the Court has recognised a rebuttable presumption that a parent company exercises decisive influence on the economic activity of the subsidiary where it holds (almost) 100% of the shares in the capital of that subsidiary ('the presumption of control'), with the result that an infringement by the latter may be imputed to the former and the former may be held jointly and severally liable for that infringement. [4]

## II. Legal framework

### *A. Brussels Ia Regulation*

5. Recitals 15, 16 and 21 of the Brussels Ia Regulation read:

'(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

…

(21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously'.

[4] Settled case-law since the judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 54 et seq.).

6. Article 4(1) of the Brussels Ia Regulation reads:

'1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

7. Article 5(1) of the Brussels Ia Regulation reads:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

8. Article 8(1) of the Brussels Ia Regulation governs a special ground of international jurisdiction:

'A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

…'

### *B. Regulation No 1/2003*

9. Article 16(1) of Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] reads: [5]

'When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.'

### *C. Directive 2014/104*

10. Article 2(2) and (3) of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [6] defines the terms 'infringer' and 'national competition law' as follows:

'For the purposes of this Directive, the following definitions apply:

…

(2) "infringer" means an undertaking or association of undertakings which has committed an infringement of competition law;

[5] Council Regulation of 16 December 2002 (OJ 2003 L 1, p. 1).

[6] Directive of the European Parliament and of the Council of 26 November 2014 (OJ 2014 L 349, p. 1).

(3) "national competition law" means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced;

…'

11. Article 3(1) of Directive 2014/104 concerns the right to full compensation:

'Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.'

12. Article 9 of Directive 2014/104 concerns the effect of decisions of national competition authorities:

'1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.'

## III. Facts and request for a preliminary ruling

13. 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 its (great-)grandparent company Heineken NV ('Heineken'). Heineken has its registered office in the Netherlands, while AB has its registered office in Greece. Nevertheless, MTB wishes to hold both AB and Heineken jointly and severally liable before the Netherlands courts for the damage which it claims to have suffered as a result of an infringement of, inter alia, Article 102 TFEU committed by AB on the Greek beer market.

14. MTB is a brewery established in Greece and operating on the Greek beer market. AB is part of the Heineken group and also operates in Greece. Heineken sets the strategy and objectives of the Heineken group but does not itself carry on 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.

15. By decision of 19 September 2014, the Greek competition authority found that AB had abused its dominant position on 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.

16. MTB had asked the Greek competition authority to include Heineken in the investigation. In its decision, however, the Greek competition authority stated that it saw no reason to do so. It stated, inter alia, that there was no evidence of Heineken having been directly involved in the infringements. Nor were there any special circumstances that would inevitably support the assumption that Heineken had exercised decisive influence on AB. It did not comment on the presumption of control.

17. MTB sought from the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) a declaration that Heineken and AB were jointly and severally liable for the aforementioned infringement on the Greek beer market and, therefore, jointly and severally liable for compensating MTB for the entire loss which it had suffered as a result of that infringement. Heineken and AB made an ancillary claim that the rechtbank Amsterdam should declare itself not to have jurisdiction to hear the action against AB. The rechtbank Amsterdam granted that claim and declared itself not to have jurisdiction in respect of the action against AB.

18. On appeal, the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands) set aside the judgment of the rechtbank Amsterdam (District Court, Amsterdam) and dismissed the ancillary claim. Heineken and AB then lodged an appeal in cassation before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, Netherlands).

19. The Hoge Raad (Supreme Court) stayed the proceedings and referred the following two questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

‘(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 [of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37) and of 16 June 2016, *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?’

## IV. Legal assessment

20. The referring court asks whether, in the examination of international jurisdiction under Article 8(1) of the Brussels Ia Regulation, reliance is to be placed on the presumption of control referred to in point 4 of this Opinion and recognised in competition law, according to which there is a rebuttable presumption that a parent company exercises decisive influence on the

economic activity of a subsidiary where it holds (almost) 100% of the shares in the capital of that subsidiary. If that question is to be answered in the affirmative, the referring court wishes to ascertain what criterion for examination must be applied where the defendant disputes the existence of a decisive influence by the parent company on the economic activity of the subsidiary.

21. Those questions have arisen in the course of the main proceedings because only Heineken, whose registered office is in the Netherlands, is subject to the jurisdiction of the Netherlands courts on the basis of the general ground of jurisdiction provided for in Article 4(1) of the Brussels Ia Regulation, whereas AB, which is established in Greece, is not. AB can, however, be sued jointly with Heineken in the Netherlands if the actions against Heineken and AB are 'closely connected' within the meaning of Article 8(1) of the Brussels Ia Regulation. It is for this reason that the referring court asks to what extent the presumption of control based on the fact that Heineken holds almost 100% of the shares in AB's capital can be relied on to substantiate such a close connection.

22. In essence, therefore, the question is whether and, if so, to what extent the presumption of control is to be taken into account in the determination of international jurisdiction, and to what extent it falls to be examined whether that presumption has been rebutted (see sections B and C).

23. In order to be able to examine the possible effects of the presumption of control on the interpretation of Article 8(1) of the Brussels Ia Regulation, it is necessary first of all to provide a brief explanation of its meaning and purpose and its function in EU competition law (see section A).

### *A. Concept of an undertaking, 'economic unit' and rebuttable presumption of control under Articles 101 and 102 TFEU*

24. According to settled case-law, the concept of 'undertaking', that is to say the perpetrator of an infringement under Articles 101 and 102 TFEU, designates an 'economic unit' which may consist of several persons, natural or legal.[7]

25. Where such an economic unit infringes EU competition rules, it is for that unit, in accordance with the principle of personal liability, to answer for that infringement.[8] However, such an infringement must be imputed to a person on whom fines can be imposed or against whom actions for damages can be brought. The application of the concept of an 'undertaking' or that of an 'economic unit' may therefore entail the application of joint and several liability as between the natural or legal persons that comprised the economic unit concerned at the time when the infringement was committed.[9]

26. It is the settled case-law of the Court that, where persons with separate legal personalities are organised as a group, those persons form a single undertaking when they do not decide independently upon their own conduct on the market in question but, having regard, more

[7] See judgments of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 105), of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 48), and of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 55).

[8] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 106 and the case-law cited).

[9] See, to that effect, judgments of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 44 et seq.), and of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 107).

specifically, to the economic, organisational and legal links between those persons and a parent company, those companies are subject to the effects, to that end, of the actual exercise of that decisive influence, by being run as one. [10]

27. The presumption of control explained in point 4 of this Opinion concerns the case where there is a (rebuttable) presumption that a parent company which holds, *directly* or *indirectly*, (almost) all of the capital of the subsidiary actually exercises decisive influence. [11] That presumption therefore holds good not only in the direct relationship between a parent company and a subsidiary but also, as in the present case, in the indirect relationship between a (great-)grandparent company and a (sub-)sub-subsidiary. [12] For that reason, I shall hereafter refer only to the parent company and the subsidiary.

28. As the Commission has rightly submitted, the presumption of control must, in accordance with case-law, apply not only in the field of the enforcement of the EU competition rules by the Commission and the national authorities (public enforcement), but also in the case of actions for damages for infringement of those rules (private enforcement). Both of these mechanisms form an integral part of the system for the enforcement of the EU competition rules. [13] The concept of 'undertaking' within the meaning of Articles 101 and 102 TFEU must be interpreted uniformly in this regard. [14] The position cannot be otherwise in relation to the presumption of control as developed by case-law in the context of the meaning of 'undertaking'.

29. The parent company can, however, rebut the presumption of control by demonstrating that, at the time of the infringement, it was not giving instructions to the subsidiary or participating, directly or indirectly, in the decisions of that subsidiary relating to the economic activity concerned. [15]

30. If, on the other hand, the presumption of control does not apply, the competition authority or the applicants must prove that the parent company actually exercised decisive influence on the economic activity of the subsidiary during the infringement, in particular by giving instructions. [16]

31. That presumption thus has the effect of reversing the burden of proof in favour of the injured party seeking damages and to the detriment of the defendant parent company. [17] It makes it easier for the injured party to enforce the law and, in so doing, at the same time increases the

[10] See judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 108 and the case-law cited).

[11] Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraphs 109 and 110 and the case-law cited).

[12] See, to that effect, judgment of 20 January 2011, *General Química and Others* v *Commission* (C-90/09 P, EU:C:2011:21, paragraph 86 et seq.).

[13] See judgments of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraph 45), and of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 37).

[14] See judgments of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraph 47), and of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 38); see also, to that effect, the Opinion of Advocate General Emiliou in *MOL* (C-425/22, EU:C:2024:131, point 65).

[15] See, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 112). On the rebuttable nature of the presumption, see, inter alia, judgment of 8 May 2013, *Eni* v *Commission* (C-508/11 P, EU:C:2013:289, paragraph 47 and the case-law cited).

[16] Judgment of 25 March 2021, *Deutsche Telekom* v *Commission* (C-152/19 P, EU:C:2021:238, paragraph 74 et seq.).

[17] See, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraphs 114 and 123).

enforceability of the EU competition rules. This is because actions for damages also help to deter companies from engaging in anti-competitive conduct and thus to maintain effective competition in the European Union. [18]

32. I shall examine now whether and, if so, to what extent the presumption of control is relevant to the interpretation of Article 8 of the Brussels Ia Regulation (first question referred for a preliminary ruling).

### *B. The first question referred for a preliminary ruling: The influence of the presumption of control on the application of Article 8(1) of the Brussels Ia Regulation*

#### *1. The concept of 'closely connected' in Article 8(1) of the Brussels Ia Regulation*

33. Article 8 of the Brussels Ia Regulation – supplementing the general ground of jurisdiction based on the Member State in which the defendant is domiciled (Article 4(1) of the Brussels Ia Regulation) – provides for special grounds of jurisdiction based on the factual connection.

34. Article 8(1) of the Brussels Ia Regulation provides that a person domiciled in a Member State, where he is one of a number of defendants, may be sued in the courts for the place where any one of them, the 'anchor defendant', is domiciled. However, this is the case only where the claims are so 'closely connected' that it is expedient to hear and determine them together. This serves to ensure that separate proceedings do not lead to irreconcilable judgments.

35. The conditions under which such a close connection may exist are to be determined by reference to the scheme and the purpose of the provisions of the Brussels Ia Regulation. [19] It is then for the national court to assess whether there is such a connection between the various claims in the particular case. [20]

36. Hereafter I shall explain first that claims are closely connected where the parent company and the subsidiary are jointly and severally liable for an infringement (see section 2). Next, I shall explain why, in most cases, such a close connection already exists even when there is only a presumption of control to begin with, that is to say when the parent company holds, directly or indirectly, (almost) all of the capital in the subsidiary, but it is not yet definitively clear whether the two are jointly and severally liable or whether the presumption of control can be rebutted (see section 3).

[18] See, to that effect, judgment of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraphs 35 and 36 and the case-law cited).

[19] See, to that effect, in connection with Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ('the Brussels I Regulation'): judgment of 13 July 2006, *Reisch Montage* (C-103/05, EU:C:2006:471, paragraphs 29 and 30); see also, in connection with Article 6(1) of the Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32) ('the Brussels Convention'): judgment of 27 September 1988, *Kalfelis* (189/87, EU:C:1988:459, paragraph 10).

[20] See, to that effect, in connection with Article 6(1) of the Brussels I Regulation: judgment of 12 July 2012, *Solvay* (C-616/10, EU:C:2012:445, paragraph 23 and the case-law cited).

*2. Joint and several liability of the parent company and the subsidiary as a scenario for the application of Article 8(1) of the Brussels Ia Regulation*

37. The objective of Article 8(1) of the Brussels Ia Regulation, in accordance with recitals 16 and 21 thereof, is to facilitate the sound administration of justice, to minimise the possibility of concurrent proceedings and thus to avoid irreconcilable outcomes if cases are decided separately. [21]

38. However, the risk of divergent decisions in different disputes is not in itself sufficient for this purpose. Rather, that divergence must relate to the same situation of fact and law. [22]

39. Accordingly, Article 8(1) of the Brussels Ia Regulation is applicable to multiple defendants where several undertakings have participated in different places and at different times in a single and continuous infringement of Article 101 TFEU which has been established by a decision of the Commission, and are jointly and severally sued for damages. The situation of fact and law being the same in those circumstances, all of the undertakings concerned can be sued in the place where an anchor defendant is domiciled. [23]

40. The situation of fact and law is certainly all the more the same where both the parent company and the subsidiary are jointly and severally sued for an infringement of Article 102 TFEU [24] because they form an economic unit, that is to say, one and the same 'undertaking'. Here too, after all, the claims are defined by the same factual situation, that is to say an infringement committed by the subsidiary which (by virtue in particular of the presumption of control) is imputed to the parent company as if the latter had committed that infringement itself. The actions against the parent company and the subsidiary are thus based on the same facts triggering liability. Since both actions are concerned with the same infringement of Article 102 TFEU, the legal situation in relation to the criteria for the incurrence of liability is also the same. There will therefore be a risk of irreconcilable judgments if different courts rule on the liability of the parent company, on the one hand, and that of the subsidiary, on the other.

*3. Significance of the presumption of control in relation to the application of Article 8(1) of the Brussels Ia Regulation*

41. However, this raises the follow-up question as to whether a close connection within the meaning of Article 8(1) of the Brussels Ia Regulation may be present even if the joint liability of the parent company and the subsidiary for the infringement has not yet been established. This may arise in particular in the case of stand-alone actions, which, unlike follow-on actions, cannot be based on a (binding) decision of a competition authority, be this the Commission (Article 16(1) of Regulation No 1/2003) or a national authority (Article 9 of Directive 2014/104). What is more, the joint liability of the parent company and the subsidiary may also be uncertain in the case where a decision of a competition authority does exist but establishes the commission of the

[21] Judgment of 7 September 2023, *Beverage City Polska* (C-832/21, EU:C:2023:635, paragraph 34). See, in connection with Article 6(1) of the Brussels I Regulation: judgment of 12 July 2012, *Solvay* (C-616/10, EU:C:2012:445, paragraph 19 and the case-law cited).

[22] See, to that effect, judgment of 7 September 2023, *Beverage City Polska* (C-832/21, EU:C:2023:635, paragraph 28). See, in connection with Article 6(1) of the Brussels I Regulation: judgment of 27 September 2017, *Nintendo* (C-24/16 and C-25/16, EU:C:2017:724, paragraph 45 and the case-law cited).

[23] See, to that effect, in connection with Article 6(1) of the Brussels I Regulation, judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 21 and 33).

[24] The *Jenard Report* cites joint and several liability as a typical example of the presence of a connection between claims against individual defendants; see Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1, at p. 26).

infringement by only one of the companies involved. So it is that, in this case, the joint liability of AB and Heineken does not arise from the decision of the Greek competition authority, since this established the commission of the infringement by AB alone, but did not include Heineken in its examination. Consequently, a follow-on action is present only in relation to AB, but not in relation to Heineken.

42. Is a close connection between actions brought against the parent company and the subsidiary in such circumstances present only where the decisive influence of the parent company is uncontested or proven at the stage of the examination of jurisdiction under Article 8(1) of the Brussels Ia Regulation? Or is that provision also applicable in the case where the decisive influence exercised by the parent company is not proven but, on the basis of the (rebuttable) presumption of control, is presumed because the parent company holds, directly or indirectly, almost all of the capital in the subsidiary company? Conversely, is a close connection within the meaning of Article 8(1) of the Brussels Ia Regulation to be found not to exist where the parent company furnishes evidence to rebut the presumption of control?

43. I shall explain below why, in my opinion, the fact in support of the presumption of control that the parent company holds (almost) all of the capital in the subsidiary is such a strong indication of the existence of a close connection between the actions directed against the parent company and the subsidiary for the purposes of Article 8(1) of the Brussels Ia Regulation that no further evidence of the existence of that close connection is usually required (see in this regard section a). That interpretation does not infringe the requirement as to the foreseeability of the court having international jurisdiction (see in this regard section b). What is more, it ensures the practical effectiveness of Article 8(1) of the Brussels Ia Regulation without leaving open the possibility of the applicant's being accused of abusive behaviour (see section (c)).

*(a) The holding of (almost) all the shares in a company's capital as a strong indication of the existence of a close connection*

44. The Brussels Ia Regulation does not expressly govern the extent of the verification obligations to which the national courts are subject in the course of determining their international jurisdiction.[25] This is an aspect of national procedural law which has not been unified by the Brussels Ia Regulation.[26] However, the application of the relevant national laws must not impair the effectiveness of that regulation.[27]

45. The Court has rightly held in this regard that, for reasons of legal certainty, the court seised must be able readily to decide without difficulty whether it has jurisdiction, without having to consider the substance of the case.[28] At this stage, the court seised does not examine either the admissibility or the substance of the application, but identifies only those points of connection with the State in which that court is sitting that support its claim to jurisdiction under the relevant

[25] See, to that effect, in connection with the Brussels I Regulation, judgment of 10 March 2016, *Flight Refund* (C-94/14, EU:C:2016:148, paragraph 58 and the case-law cited).

[26] See, to that effect, in connection with the Brussels I Regulation, judgment of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 60).

[27] See, to that effect, in connection with the Brussels I Regulation, judgment of 10 March 2016, *Flight Refund* (C-94/14, EU:C:2016:148, paragraph 58 and the case-law cited).

[28] Judgment of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 61 and the case-law cited).

provision.[29] The national procedural rules must nonetheless enable the referring court to examine the question of international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant's arguments.[30]

46. The fact that the parent company holds almost all of the capital in the subsidiary, thus triggering a presumption of control, is a strong indication that the actions brought against those companies are closely connected within the meaning of Article 8(1) of the Brussels Ia Regulation.

47. In such a case, after all, it is highly likely that the parent company and the subsidiary will be jointly and severally liable for the infringement committed by the latter. This is because the presumption of control is specifically based on the assumption that the parent company exercises decisive influence on the economic activity of the subsidiary where the parent company holds almost all of the shares in the capital of the subsidiary.[31] Furthermore, it is important to note in this regard, as the long-standing case-law first established in the judgment in *Akzo Nobel*[32] shows, that it is extremely difficult for the parent company to adduce the counter-evidence necessary to rebut that presumption.[33]

48. It is for this reason that, in order to establish the presence of a close connection within the meaning of Article 8(1) of the Brussels Ia Regulation, the court seised does not have to examine the facts and evidence put forward by the parent company to rebut the presumption of control. Neither does it have to examine whether the parent company has actually exercised decisive influence over the subsidiary. Rather, this is relevant only in the context of the merits of the action.

49. Consequently, the presumption of control is not to be applied as such without change in the context of the determination of jurisdiction. The rule of jurisdiction contained in Article 8(1) of the Brussels Ia Regulation does not, after all, require the parent company to have exercised decisive influence on the subsidiary but presupposes only a close connection between the claims. It is only in the examination of the merits that the parent company must be proved to have exercised decisive influence on the economic activity of the subsidiary in order to be held liable, and it is only at that stage, therefore, that the presumption of control as such is triggered, along with the reversal of the burden of proof which that presumption entails.

50. The fact that the parent company holds almost all of the shares in the capital of the subsidiary means therefore, on the one hand, from the point of view of the substance of the case, that the parent company is presumed to exercise decisive influence, and, on the other hand, from the point of view of jurisdiction, that the claims brought against the parent company and the subsidiary are closely connected.

51. It is for this reason that the objection that, in the examination of jurisdiction, the presumption of control is irrebuttable if it is relied upon in that context in order to substantiate the existence of a close connection within the meaning of Article 8(1) of the Brussels Ia Regulation, is also

[29] See, to that effect, judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 44 and the case-law cited).

[30] See, to that effect, judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraphs 45 and 46 and the case-law cited).

[31] See, to that effect, judgment of 27 January 2021, *The Goldman Sachs Group* v *Commission* (C-595/18 P, EU:C:2021:73, paragraphs 32 and 35).

[32] Judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 54 et seq.).

[33] See judgments of 29 September 2011, *Arkema* v *Commission* (C-520/09 P, EU:C:2011:619, paragraph 37 et seq.), and of 8 May 2013, *Eni* v *Commission* (C-508/11 P, EU:C:2013:289, paragraph 68).

untenable. After all, a different criterion is examined for the purposes of determining jurisdiction. Whether a decisive influence actually exists does not have to be decided in the context of the examination of jurisdiction.

*(b) Foreseeability of the court having international jurisdiction*

52. That interpretation is in keeping with the principle of legal certainty. That principle requires the special rule of jurisdiction to be interpreted in such a way as to enable a reasonably well-informed defendant to foresee before which courts, other than those of the State in which he or she is domiciled, he or she may be sued. [34] In addition, for reasons of legal certainty, the national court must be able to decide whether it has jurisdiction without having to consider the substance of the case. [35]

53. The courts of which place will have jurisdiction does not become unforeseeable in a situation, such as that in the present proceedings, where the close connection required in Article 8(1) of the Brussels Ia Regulation is regarded as being sufficiently established by the fact that the parent company directly or indirectly holds (almost) all of the capital in the subsidiary. For the defendant companies (parent and subsidiary), after all, this is a clear and simple criterion that can easily be verified both by them and by the court seised.

54. The position would be otherwise if the establishment of jurisdiction were subject to proof of the exercise by the parent company of decisive influence on the economic activity of the subsidiary. Even at this stage of the proceedings, this would call for a comprehensive and sometimes complex examination and assessment of facts and evidence, the outcome of which the parties would specifically not find to be highly predictable within the meaning of recital 15 of the Brussels Ia Regulation. This would operate to the detriment of the injured applicant, who bears the risk of the action being dismissed as inadmissible.

55. Neither is adequate foreseeability contingent, in my view, upon the Commission's having previously established by binding decision that the parent company and the subsidiary are jointly and severally liable for any fines imposed. Whether a rule of jurisdiction which makes enforcement easier for the injured party is applicable in the context of private enforcement cannot be dependent on whether the Commission has previously taken any action.

56. Furthermore, there is a risk of irreconcilable outcomes arising if the claims for compensation brought against the parent company and the subsidiary are adjudicated upon by different courts in a case in which there is no Commission decision rendering the finding of an infringement binding in all Member States, in accordance with Article 16(1) of Regulation No 1/2003. If, as in the present case, a national competition authority has previously decided that liability exists (at least on the part of the subsidiary), that decision is, in accordance with Article 9(1) of Directive 2014/104, binding only on the courts of the Member State concerned, while the courts of other Member States, such as, in this instance, those of the Netherlands, are required to take this into account only as prima facie evidence (Article 9(2) of Directive 2014/104).

[34] See, in connection with Article 6(1) of the Brussels I Regulation: judgment of 13 July 2006, *Reisch Montage* (C-103/05, EU:C:2006:471, paragraphs 24 and 25).

[35] Judgments of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 27), and of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 61).

57. To this extent, the fact of the claims brought against the parent company and the subsidiary being dealt with by different national courts would give rise to a risk of irreconcilable outcomes, as regards both the prior question of whether an infringement has been committed in the first place, and the later question of the attribution and extent of the liability for it.

*(c) No abuse or circumvention of the rule of jurisdiction*

58. The abovementioned interpretation of Article 8(1) of the Brussels Ia Regulation makes the examination of jurisdiction simple. It also makes it easier for the injured party to enforce his or her claims for damages before the courts, precisely because it is likely, in the light of the presumption of control, that the parent company and the subsidiary will be jointly and severally liable.

59. Abusive conduct on the part of the applicant or a circumvention of the rule of jurisdiction would be conceivable only if the claim against the anchor defendant were manifestly inadmissible or unfounded and, therefore, capable only of serving the purpose of removing the other defendant from the jurisdiction of the courts of the Member State in which that defendant is domiciled.[36] Where claims are closely connected within the meaning of Article 8(1) of the Brussels Ia Regulation, a finding of such circumvention is only exceptionally conceivable, that is to say, where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability.[37] The fact that the claim against the anchor defendant (possibly) appears to be unfounded is not sufficient to sustain such a finding. Rather, that claim must be manifestly unfounded or contrived or be devoid of any real interest to the claimant at the time when it is brought.[38] This might be so where, notwithstanding the presumption of control, it is obvious from the circumstances of the particular case that the parent company does not exercise decisive influence on the subsidiary and joint liability on the part of the parent company is therefore precluded from the outset. This is likely to arise only in rare exceptional cases.

60. It is not a circumvention of the rule of jurisdiction for the injured party to sue the Greek subsidiary too in the place where the Netherlands parent company is domiciled and thereby to remove the former from the jurisdiction of the Greek courts. If, after all, the defendants are domiciled in different Member States, Article 8(1) of the Brussels Ia Regulation allows the applicant to select the place before the courts of which it brings its claim.[39] That freedom of choice includes the possibility for the applicant to bring the dispute only before the court that best suits its interests.[40]

[36] See, to that effect, in connection with Article 6(1) of the Brussels I Regulation: judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 27 and the case-law cited); and, in connection with Article 6(1) of the Brussels Convention: judgment of 27 September 1988, *Kalfelis* (189/87, EU:C:1988:459, paragraph 9).

[37] See, to that effect, in connection with Article 6(1) of the Brussels I Regulation, judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 29).

[38] See, in connection with Article 6(1) of the Brussels I Regulation, the Opinion of Advocate General Mengozzi in *Freeport* (C-98/06, EU:C:2007:302, point 66).

[39] See to that effect, in connection with Article 6 of the Brussels I Regulation, the Opinion of Advocate General Mengozzi in *Freeport* (C-98/06, EU:C:2007:302, point 52) and the Opinion of Advocate General Jääskinen in *CDC Hydrogen Peroxide* (C-352/13, EU:C:2014:2443, point 89).

[40] See to that effect, in connection with Article 6 of the Brussels I Regulation, the Opinion of Advocate General Mengozzi in *Freeport* (C-98/06, EU:C:2007:302, point 52) and the Opinion of Advocate General Jääskinen in *CDC Hydrogen Peroxide* (C-352/13, EU:C:2014:2443, point 89).

61. Consequently, the fact that there is a closer connection with the courts of another place, for example because the infringement took place exclusively on the Greek beer market and the Greek subsidiary alone is named as the perpetrator of that infringement in the decision of the Greek competition authority, is also irrelevant. The reason for this is that rules of jurisdiction do not generally[41] look for the *closest* link but only for a *close* link, which, in the present case, is already guaranteed by the 'close connection' referred to in Article 8(1) of the Brussels Ia Regulation. This is confirmed by recital 16 of the Brussels Ia Regulation, according to which, *in addition to* jurisdiction based on the defendant's domicile, there may be alternative grounds of jurisdiction based on the close connection between the court and the action.

### *C. The second question referred for a preliminary ruling*

62. By the second question referred for a preliminary ruling, the referring court wishes to ascertain, in essence, whether, if the parent company denies having exercised decisive influence on the economic activity of the subsidiary, it is sufficient for the assumption of jurisdiction under Article 8(1) of the Brussels Ia Regulation as regards the subsidiary, that the existence of such a decisive influence cannot be excluded a priori.

63. It follows not least from my comments in point 48 et seq. of this Opinion that the second question referred for a preliminary ruling must be answered in the affirmative, in so far as the conditions governing the presumption of control are – as here – met. This, after all, is a particularly strong indication in support of the assumption as to the existence of a 'close connection' establishing jurisdiction for the purposes of Article 8(1) of the Brussels Ia Regulation and can only exceptionally be rebutted.

## V. Conclusion

64. I therefore propose that the Court should give the following joint answer to the two questions referred for a preliminary ruling by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands):

In the context of actions for damages for infringements of EU competition law, the court of the parent company's domicile, when examining its jurisdiction under Article 8(1) of the Brussels Ia Regulation in respect of a subsidiary established in another Member State, must regard the fact that the parent company directly or indirectly holds (almost) all of the capital in that subsidiary as a strong indication of the existence of a close connection between the actions brought against those companies. No additional evidence of the existence of such a close connection is therefore required as a rule.

[41] The only exception to this are exclusive grounds of jurisdiction. These are not at issue here.