



C/2024/2006

18.3.2024

**Request for a preliminary ruling from the Gerechtshof Amsterdam (Netherlands) lodged on
13 November 2023 — Smurfit Kappa Europe BV and Others v Unilever Europe BV and Others**

(Case C-673/23, Smurfit Kappa Europe and Others)

(C/2024/2006)

Language of the case: Dutch

Referring court

Gerechtshof Amsterdam

Parties to the main proceedings

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

Questions referred

Question 1a.

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

⁽¹⁾ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

- (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 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?
