Opinion of Advocate General Poiares Maduro delivered on 17 January 2008

Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard

Reference for a preliminary ruling: Cour de cassation - France

Regulation (EC) No 44/2001 - Section 5 of Chapter II - Jurisdiction over individual contracts of employment - Section 2 of Chapter II - Special jurisdiction - Article 6, point 1 - More than one defendant

Case C-462/06

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1. By the present reference for a preliminary ruling the Cour de cassation (Court of Cassation) (France) asks the Court for an interpretation 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, (2) which is the successor to and replaces the Brussels Convention. (3)

2. More specifically, the referring court wishes to ascertain whether Section 5 on employment contracts, introduced by Regulation No 44/2001, must be regarded as governing exhaustively and exclusively the rules on jurisdiction concerning such contracts or whether, on the contrary, the rules on jurisdiction laid down in the section on employment contracts may be supplemented by the rules on special jurisdiction laid down in Article 6(1) of Section 2 of that regulation.

I – Legal and factual framework of the dispute

A – Legal framework

3. Article 2 of Regulation No 44/2001 states:

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

4. Article 6 of Regulation No 44/2001, which forms part of Section 2, entitled 'Special Jurisdiction', provides that a person domiciled in a Member State may be sued in another Member State:

'...

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;

...'.

5. Section 5 of Regulation No 44/2001, entitled 'Jurisdiction over individual contracts of employment', consists of Articles 18 to 21.

6. More specifically, Article 18(1) of Regulation No 44/2001 provides:

'1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.'

7. In that same Section 5 Article 19 of the Regulation states:

'An employer domiciled in a Member State may be sued:

(1) in the courts of the Member State where he is domiciled; or

(2) in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.'

B – The legal context of the dispute

8. Mr Rouard, the defendant in the main proceedings, was engaged in 1977 by the company Laboratoires Beecham Sévigné, now Laboratoires Glaxosmithkline, the seat of which is in France. He was sent by that company on various postings to third countries. In 1984 he was sent to Morocco under a new employment contract concluded with Beecham Research UK, established in the United Kingdom, which belongs to the same group as Laboratoires Beecham Sévigné. Under that contract, the second employer undertook to maintain certain contractual rights acquired by Mr Rouard under his initial contract of employment (in particular to preserve his rights derived from length of service and his entitlement to certain payments in the event of dismissal).

9. On 9 March 2001 Beecham Research UK, now Glaxosmithkline, dismissed Mr Rouard. On 4 June 2002 he brought an action before the Conseil de prud'hommes de Saint-Germain-en-Laye (Employment Tribunal, Saint-Germain-en-Laye) (France) against both Laboratoires Glaxosmithkline and Glaxosmithkline, which had assumed the rights of Laboratoires Beecham Sévigné and Beecham Research UK respectively. Mr Rouard requests that those companies be ordered jointly and severally to pay various amounts of compensation, together with damages for non-compliance with the dismissal procedure, dismissal without genuine and serious cause and wrongful breach of contract.

10. In support of his claims Mr Rouard considers that the two companies must be regarded as his joint employers, since the clause of the second contract providing that certain contractual rights acquired initially under the first contract are to be maintained confirms that he had a single, continuous contract of employment with the two companies, which, in addition, belong to the same group. Since the French courts have jurisdiction in respect of Laboratoires Glaxosmithkline, the seat of which is in France, those courts, he submits, also have jurisdiction, pursuant to Article 6(1) of Regulation No 44/2001, in respect of Glaxosmithkline even though that company is established in the United Kingdom.

11. The Conseil de prud'hommes, in accordance with the line of defence of the two employers, declined jurisdiction, however, pointing out that the employment contracts in force at the time of his dismissal were governed by English and Moroccan law. Therefore, there was no longer any employment relationship between Mr Rouard and Laboratoires Glaxosmithkline in France. The Cour d'appel de Versailles (Court of Appeal, Versailles) set aside that decision and remitted the case back to the Conseil de prud'hommes. The appellant companies in the main proceedings then brought an appeal before the Cour de cassation.

12. It is in those circumstances that the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the rule of special jurisdiction stated in Article 6(1) of Council Regulation … No 44/2001 …, by virtue of which a person domiciled in a Member State may be sued "where he is one of a number of defendants, in the courts for the place where any 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", apply to proceedings brought by an employee before a court of a Member State against two companies belonging to the same group, one of which, being the one which engaged that employee for the group and refused to re-employ him, is domiciled in that Member State and the other, for which the employee last worked in non-Member States and which dismissed him, in another Member State, when that applicant relies on a clause in the employment contract to claim that the two [companies] were his co-employers from whom he claims compensation for his dismissal or does the rule in Article 18(1) of [R]egulation [No 44/2001], by virtue of which, in matters relating to individual contracts of employment, jurisdiction is to be determined by Section 5 of Chapter II [of that regulation], exclude the application of Article 6(1) [of that regulation], so that each of the two companies must be sued before the courts of the Member State where it is domiciled[?]'

II – Legal analysis

13. The question referred falls into two parts. In order to answer the question it must, first, be determined whether the rule of special jurisdiction stated in Article 6(1) of Regulation No 44/2001 may be applied in the context of individual contracts of employment, even though there is a section within the Regulation which concerns specifically the rules of jurisdiction applicable to disputes concerning such contracts, and, if so, the conditions governing the application of Article 6(1) of the Regulation in such matters must then be considered and defined.

A – The applicability of Article 6(1) of Regulation No 44/2001 in matters relating to individual contracts of employment

14. The Court is requested, in essence, to determine whether Section 5 of Chapter II of Regulation No 44/2001 governs exhaustively and exclusively jurisdiction over individual contracts of employment to the exclusion of all other rules of jurisdiction laid down in that regulation, or whether it permits the interpretation that Section 5 does not exclude the application of the special rule of jurisdiction when the specific circumstances of the case so require, in particular, when related claims concerning a number of defendants are referred to the courts where any one of them is domiciled.

15. Anticipating the arguments that follow, I would point out at this juncture that the applicability to a dispute concerning an individual contract of employment of the special jurisdiction provided for in Article 6(1) of Regulation No 44/2001, which makes it possible, when the claims are related, to sue a number of defendants before the courts where any one of them is domiciled, must, in my view, be accepted even though a literal interpretation of Section 5 concerning contracts of employment appears, at first sight, to preclude it. In order to clarify the solution which I propose that the Court should adopt, I will begin by setting out, first of all, the arguments which appear to exclude the applicability of Article 6(1) in the context of disputes concerning individual contracts of employment and then explain why such an interpretation should not, in my view, be adopted by the Court.

16. It is true that, in stating that '[i]n matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5 [of the Regulation]', Article 18(1) of Regulation No 44/2001, read in isolation, appears to confirm an interpretation to the effect that any rule of jurisdiction which is not laid down in or expressly authorised by Section 5 should be rejected if the dispute concerns a contract of employment.

17. It follows from that provision, first, that any dispute concerning an individual contract of employment must be brought before the court having jurisdiction under the rules laid down in Section 5 of that regulation (Articles 18 to 21) and, second, that if there are any exceptions to the application of the principles set out in Section 5, they are expressly laid down in the Regulation. In so far as Article 6(1) does not fall within Section 5 and is not referred to, as Articles 4 and 5(5) are, as an exception to the application of the rules laid down in that section, the special jurisdiction under Article 6(1) is not therefore applicable to disputes concerning contracts of employment.

18. In addition, since Section 5 constitutes a derogation from the principle, laid down in Article 2 of the Regulation, (4) that the courts having jurisdiction must be those for the place where the defendant is domiciled, the rules laid down in Article 18 to 21 of Section 5 should be interpreted strictly, so that only the exceptions to the application of the principle that jurisdiction is based on the defendant's domicile that are expressly laid down in that section are allowed.

19. That interpretation cannot, however, prevail, in so far as it not only disregards the teleological and contextual scope of Regulation No 44/2001, but also the sense of the provisions relevant in this case. In particular, it is based on the incorrect premise that Article 6(1) is an exception to the rules of jurisdiction laid down in the section concerning individual contracts of employment. As I will show, the special rule of jurisdiction in Article 6(1) of the Regulation does not constitute an exception to the rules of jurisdiction concerning individual contracts of employment, but a supplement to the provisions concerning them which does not call into question the principle underlying those provisions.

20. First of all, it should be remembered that, although the Brussels Convention did not contain a specific section on contracts of employment, the rules of jurisdiction which it laid down none the less applied to such contracts. Thus, under the Convention, Article 6(1), allowing a number of defendants to be sued in the courts for the place where any one of them is domiciled, was, as acknowledged by the Commission of the European Communities, perfectly well applicable to contracts of employment. As is pointed out in recital 5 in the preamble to Regulation No 44/2001, which followed on from the Brussels Convention, that regulation is a continuation of, and not a break from, the rules laid down in the Convention. Regulation No 44/2001 is thus not intended to amend substantially the content of the rules of jurisdiction, so that it is reasonable to believe that the authors of that text did not wish to exclude the application of Article 6(1) of the Regulation in the field with which we are concerned.

21. Further, when Regulation No 44/2001 was drafted, it was considered desirable to create a specific section on jurisdiction in matters relating to contracts of employment because 'the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for'. (5) In those circumstances, it would be surprising if, in adopting Regulation No 44/2001, the legislature had intended to deprive employees of the benefit of the more favourable rules which applied under the Brussels Convention prior to the entry into force of that regulation. The Court has, moreover, consistently pointed out that, in matters relating to contracts of employment, that convention was to be interpreted '[taking account] of the concern to afford proper protection to the party to the contract who is the weaker from the social point of view, in this case the employee'. (6) An interpretation to the effect that, even in the case of related actions concerning a number of defendants, an employee would be required to sue each of them individually in the courts having jurisdiction in each Member State, would not only be contrary to the sound administration of justice, (7) but would also fail to protect the contracting party in the weaker position and, furthermore, deprive that party of a possibility that was previously available.

22. Accordingly, it must be considered that, although Regulation No 44/2001 provided for an exception to the rule of the defendant's domicile in respect of contracts of employment, with a view to preserving the interests of the weaker party to the contract, the failure to take account of the case where a number of related claims are brought against a number of defendants in Section 5 must be understood as a lacuna in that text. That lacuna is filled by Article 6(1) of the Regulation, which makes it possible to supplement the rules applicable to contracts of employment without thereby calling into question the principles underlying those rules, namely, in particular, the protection of the weaker party to the contract and, more generally, the desire to prevent the multiplication of courts having jurisdiction. The applicability of Article 6(1) is of use in correcting the failure to take account of a characteristic of these cases, namely related claims in matters relating to contracts of employment, without however undermining the rules of jurisdiction which govern them.

23. For all of those reasons, I would invite the Court to find that Article 6(1) of Regulation No 44/2001 is applicable in the context of individual contracts of employment.

B – The conditions governing the application of Article 6(1) of Regulation No 44/2001 in the context of individual contracts of employment

24. It is established case-law that, in the procedure laid down by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end and by reason of the complex and sometimes contradictory facts of this case, it would seem important to set out the conditions which the national court will need to examine in order to determine whether Article 6(1) of Regulation No 44/2001 may properly be relied on in the present case.

25. As has been pointed out, Regulation No 44/2001 does not mark a break from the principles laid down in the Brussels Convention, but is a continuation of the rules laid down therein. Consequently, the Court's case-law on Article 6(1) of the Convention remains relevant in the context of the application to the dispute of Article 6(1) of Regulation No 44/2001.

26. The application of Article 6(1) of Regulation No 44/2001 is subject to the condition that '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'.

27. That condition, which did not appear in the original version of the provision in the Brussels Convention, is taken directly from Article 22 of that convention, according to which actions are deemed to be related where they 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.

28. In *Kalfelis*, the Court found it necessary to transpose the requirement of a connection between the claims in the context of the interpretation of Article 6(1) of the Brussels Convention. That requirement was later adopted when Article 6(1) of Regulation No 44/2001 was drafted, in order to prevent the use of that special jurisdiction from affecting the principle that the courts for the place where the defendant is domiciled have jurisdiction. In the Court's view, 'that possibility might arise if a plaintiff were at liberty to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled'. (8)

29. The term 'irreconcilable judgments' in the proviso governing the application of Article 6(1) of Regulation No 44/2001 may be interpreted in many ways. On a strict interpretation, the application of special jurisdiction where there are a number of defendants is conditional on the fact that there is a risk that separate trial and

judgment of cases might give rise to mutually exclusive legal consequences. By contrast, under a broad interpretation of the term 'irreconcilable judgments', it is sufficient that the separate trial and judgment of cases would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences. (9) Without deciding in favour of either of those interpretations, the Court has also pointed out that, 'in order that decisions may be regarded as contradictory, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact'. (10)

30. In reality, it is not necessary to pursue that debate further. It is clear from Regulation No 44/2001 and from the case-law cited that the decisive element for determining whether Article 6(1) of the Regulation is applicable is, above all, the existence of a particularly close connection between the claims. That connecting factor can probably only be assessed on a case-by-case basis and, more specifically, in relation to the particular matters concerning which that special rule of jurisdiction is applicable.

31. However, it must be considered, first, that the primary objective of Article 6(1) of Regulation No 44/2001 is to promote the proper administration of justice, irrespective of the context in which it applies. From that point of view, any line of argument based on protection of the weaker contracting party has no relevance and cannot therefore be validly upheld when the conditions governing the application of Article 6(1) of Regulation No 44/2001 are being interpreted. In order to safeguard such an objective and to prevent special jurisdiction from being misused, a connection between claims necessarily implies a particularly close relationship between a dispute and the court best placed to take cognisance of the matter. (11) However, contrary to the interpretation adopted by the United Kingdom, the requirement of a connection between the dispute and the court before which the claim is brought never requires the courts to be ordered hierarchically so that the application should be brought before the court which is most closely connected to it. Such an interpretation would be tantamount to introducing an additional condition to the application of Article 6(1), which as a derogation from the basic rule of jurisdiction, can only be interpreted strictly. (12) To sum up, the connection to which the application of Article 6(1) is subject requires a finding of a link between the claims. That link must exist in order to ensure, regardless of the court seised, that it has a close relationship to the case, to ensure that that special jurisdiction is properly used for its intended purpose.

32. Second, that connection, when it has to be verified in the context of employment contracts, requires, in the light of the matters concerned, that account be taken of a certain number of criteria calculated to reveal the existence of a close connection between the cases in this particular field.

33. In that context, the defendant in the main proceedings considers that the requirement that the two claims be connected is met, in so far as, first, there was 'only one contract of employment or, at the very least, there was a continuous employment relationship' (13) with his two employers and, second, the two companies belong to the same group of companies.

34. As acknowledged by the Commission and the United Kingdom at the hearing, the solution to this problem must be sought in *Pugliese*. The Court, which was called to give a ruling on the interpretation of 'the place where the employee habitually carries out his work', incidentally provided guidance for determining the extent to which two contracts of employment concluded with different employers are linked. That case-law strikes me as being particularly relevant as regards the factors which may be taken into account by the national court when verifying the connection between claims relating to contracts of employment that enables a number of defendants to be sued in the courts where any one of them is domiciled. (14)

35. The Court thus ruled that, 'when an employee is connected to two different employers, the first employer can be sued before the courts of the place where the employee carries out his work for the second employer only when, at the time of the conclusion of the second contract of employment, the first employer itself has an interest in the employee's performance of the service for the second employer in a place decided on by the latter … [T]he existence of that interest does not have to be strictly verified according to formal and exclusive criteria, but must be determined in an overall manner taking into consideration all the facts of the case'. (15) The Community Court states, inter alia, that among the relevant factors may feature the following: 'the fact that the conclusion of the second contract was envisaged when the first was being concluded; the fact that the first contract was amended on account of the conclusion of the second contract; the fact that there is an organisational or economic link between the two employers; the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts; the fact that the first employer retains management powers in respect of the employee; and the fact that the first employer is able to decide the duration of the employee's work for the second employer'. (16) Consequently, it is in the light of all of those criteria, which are not exhaustive, that the national court will have to determine whether there is a sufficient connection between the two claims to enable the defendant in the main proceedings to sue the two appellant companies in the French courts.

36. In the light of the above, the Court could conclude that a prerequisite for the application of Article 6(1) of Regulation No 44/2001 is a connection between the claims sufficient to ensure, whatever court is seised, that it has a close link to the case. To assess such a connection in the context of individual contracts of employment, account could be taken, inter alia, of the fact that the conclusion of the second contract was envisaged when the first was being concluded, the fact that the first contract was amended on account of the conclusion of the second contract, the circumstance that there is an organisational or economic link between the two employers, the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts, the fact that the first employer retains management powers in respect of the employee, or the circumstance that the first employer is able to decide the duration of the employee's work for the second employer.

III – Conclusion

37. In conclusion, I suggest that the Court should answer the question referred for a preliminary ruling as follows:

The rule of special jurisdiction set out in 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 can apply in the context of Section 5 relating to the rules relating to jurisdiction over individual contracts of employment.

A prerequisite for the application of Article 6(1) of Regulation No 44/2001 is a connection between the claims sufficient to ensure, whatever court is seised, that it has a close link to the case. To assess such a connection in the context of individual contracts of employment, account could be taken, inter alia, of the fact that the conclusion of the second contract was envisaged when the first was being concluded, the fact that the first contract was amended on account of the conclusion of the second contract, the circumstance that there is an organisational or economic link between the two employers, the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts, the fact that the first employer retains management powers in respect of the employee, or the circumstance that the first employer is able to decide the duration of the employee's work for the second employer.

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1 – Original language: French.

2 – OJ 2001 L 12, p. 1.

3 – Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), OJ 1998 C 27, p. 1.

4 – See, inter alia, Case 189/87 *Kalfelis* [1988] ECR 5565, paragraphs 8 and 9; Case 32/88 *Six Constructions* [1989] ECR 341, paragraph 18; Case C-51/97 *Réunioneuropéenne and Others* [1998] ECR I-6511, paragraph 47; and Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535, paragraphs 19 to 23).

5 – Recital 13 in the preamble to Regulation No 44/2001.

6 – Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 18. That clarification was already apparent in Case 133/81 *Ivenel* [1982] ECR 1891, paragraphs 14 and 16. See also for later confirmation: Case C-383/95 *Rutten* [1997] ECR I-57, paragraph 17, and Case C-437/00 *Pugliese* [2003] ECR I-3573, paragraph 18.

7 – The Court has pointed out that, in a case where work is performed in more than one Member State, it is important to avoid the multiplication of courts having jurisdiction in order to preclude the risk of irreconcilable decisions and to facilitate the recognition and the execution of judgment in States other than those in which they were delivered: Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 18, and Case C-37/00 *Weber* [2002] ECR I-2013, paragraph 42.

8 _ *Kalfelis*, paragraph 9.

9 – For a discussion and analysis of that question, reference can be made to the Opinion of Advocate General Léger in the case which gave rise to the judgment in *Roche Nederland and Others*, and to Bomhoff. J, *Judicial Discretion in European Law on Conflicts of Jurisdiction*, SDU, The Hague, 2005.

10 – *Roche Nederland and Others*, paragraph 26, and Case C-98/06 *Freeport* [2007] ECR I-0000, paragraph 40.

11 – See, inter alia, *Ivenel*, paragraph 11, and *Pugliese*, paragraph 17.

12 – The Court has always refused to accept the 'spider in the web' theory elaborated, in particular by Dutch judges for the interpretation of Article 6(1) of Regulation No 44/2001. The Community Court clearly rejected that theory in *Roche Nederland and Others*.

13 – See the observations submitted by Mr Rouard, p. 7.

14 – A hint of such use of that judgment has already appeared in legal literature. See, inter alia, Moizard. N, *RJS*, 10/03, p. 756, where it is stated: 'It is highly likely that the criteria in *Pugliese* will be very useful for determining which courts have jurisdiction in a dispute following international relocation within a group of companies'.

15 – *Pugliese*, paragraphs 23 and 24.

16 – Ibid., paragraph 24.