

JUDGMENT OF THE COURT (Fourth Chamber)

11 June 2009\*

In Case C-429/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 12 September 2007, received at the Court on 17 September 2007, in the proceedings

**Inspecteur van de Belastingdienst**

v

**X BV,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

\* Language of the case: Dutch.

Advocate General: P. Mengozzi,  
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 18 December 2008,

after considering the observations submitted on behalf of:

- X BV, by G.Th.K. Meussen, advocaat,
  
- the Netherlands Government, by Y. de Vries and M. de Grave, acting as Agents,
  
- the Italian Government, by I.M. Braguglia, acting as Agent, and F. Arena, avvocato dello Stato,
  
- the Commission of the European Communities, by A. Bouquet and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2009,

gives the following

## Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).
  
- 2 The reference was made in the course of proceedings between the Inspecteur van de Belastingdienst (Inspector of Taxes, ‘the Inspector’) and X BV, a company incorporated under Netherlands law whose principal office is established at P, concerning the tax deductibility of fines imposed by the Commission of the European Communities for infringement of the Community competition rules.

## Legal context

### *Community legislation*

- 3 According to recital 21 in the preamble to Regulation No 1/2003:

‘Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81

and 82 of the [EC] Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.’

4 Article 15 of Regulation No 1/2003 provides:

‘Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.'

5 According to points 31 to 35 of the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C 101, p. 54):

'31. According to Article 15(3) of [Regulation No 1/2003], the national competition authorities and the Commission may submit observations on issues relating to the application of Articles 81 [EC] or 82 EC to a national court which is called upon to apply those provisions. That regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court ...

32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 [EC] or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.
  
33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of [R]egulation [No 1/2003], the Commission will only use those documents for the preparation of its observations ...
  
34. Since [that] regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.
  
35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 [EC] or 82 EC
  - (a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;
  
  - (b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness) ...; and

- (c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied ( ... principle of equivalence).'

*National legislation*

- 6 The Netherlands Law introducing new rules on economic competition (Law on competition) (wet houdende nieuwe regels omtrent de economische mededinging (Mededingingswet)) of 22 May 1997 (Stb. 1997, No 242), as amended by the law of 9 December 2004 (Stb. 2005, No 172; 'the Law on competition'), provides, in Article 89h thereof:

'1. The [Administrative] Board [of the Nederlandse Mededingingsautoriteit (Netherlands competition authority, "the NMa")] or the Commission of the European Communities may, when not acting as a party, submit written observations in appeal proceedings before the Administrative Court, pursuant to the first subparagraph of Article 15(3) of Regulation No 1/2003, if the Board [of the NMa] or the Commission of the European Communities has expressed its wish to do so. The court may set a time-limit for this. With the permission of the court, they may also submit oral observations during the hearing.

2. Following an application, pursuant to the second subparagraph of Article 15(3) of Regulation No 1/2003, the court shall provide the Board [of the NMa] and the Commission of the European Communities with all documents referred to in the aforementioned provision. The parties may give their opinions on the documents to be issued within a time-limit to be determined by the court.

3. The parties may respond to observations submitted by the Board [of the NMa] or the Commission of the European Communities within a time-limit to be determined by the court. The court may provide the parties with an opportunity to respond to each other's observations.'

7 Article 89h is the result of the Law amending the Law on competition and certain other laws relating to the implementation of Regulations (EC) Nos 1/2003 and 139/2004 (wet tot wijziging van de Mededingingswet en van enige andere wetten in verband met de implementatie van EG-verordeningen 1/2003 en 139/2004) of 30 June 2004 (Stb. 2004, No 345). It is apparent from the order for reference that the explanatory memorandum to that law (Kamerstukken II, session 2003-2004, 29276, No 3) contains the following explanations:

#### '2.5 Cooperation with national courts

The cooperation between the Commission and the national courts is set out in Article 15 of, and in recital 21 in the preamble to, [Regulation No 1/2003].

...

Article 15(3) thereof also provides that the Commission and the national competition authorities may submit written and oral observations during examination of a case by the court (*amicus curiae*). Those observations have the status of an opinion and the purpose of promoting the coherent application of the competition rules.



To that end, the Commission and the national competition authorities must comply with the Netherlands rules of procedure. In proceedings between two parties, the court is passive and determines the rhythm of the proceedings. Moreover, the court is not bound by the Commission's opinion (recital 21). The court's independence is not therefore called into question. The Commission and the national competition authorities must respect the rights of the parties and ensure that confidential business information remains confidential. Finally, in accordance with Article 15(1) of Regulation [No 1/2003], the national court is empowered to ask the Commission to transmit to it information in its possession or its opinion.

...

#### 3.4 Cooperation between the director-general of the NMa, the Commission and the courts

Article 15(3) of Regulation [No 1/2003] provides that the national competition authorities of the Member States and the Commission, acting on their own initiative, may submit, with regard to the application of Articles 81 and 82 EC, written observations and, with the permission of the court in question, oral observations to the national courts.

In addition, Article 15(1) of Regulation [No 1/2003] provides for the possibility that the court may ask the Commission for information or its opinion with regard to the application of Articles 81 and 82 of the Treaty ...

... The implementation of Article 15 of Regulation [No 1/2003] takes place before the administrative courts by amendment of the Law on competition (Article 1(g) [of the amending law,] Articles 89h, 89i and 89j) [of the Law on competition] and, before the civil courts, by amendment of the Code of Civil Procedure [(Wetboek van Burgerlijke Rechtsvordering)] (Article III).'

- 8 Entitled 'Non-deductible general charges', Article 3.14 of the Law on income tax 2001 (Wet Inkomstenbelasting 2001), in the version applicable to income received in 2002, provided:

'1. When assessing profits, the charges and costs relating to the following headings shall not be deductible:

...

- c. fines imposed by a Netherlands court and the sums paid to the State to avoid judicial proceedings in the Netherlands or to fulfil a condition linked to a decision on remission of a penalty, fines imposed by an institution of the European Union and fines and increases imposed pursuant to the General Law on national taxation [(Algemene wet inzake rijksbelastingen)], the Law on customs [(Douanewet)], the Law on the coordination of social insurance [(Coördinatiewet Sociale Verzekering)], the Law on the administrative enforcement of traffic regulations [(Wet administratiefrechtelijke handhaving verkeersvoorschriften)] and the Law on competition;

...'

### **The dispute in the main proceedings and the question referred**

- 9 By Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 — Plasterboard) (OJ 2005 L 166, p. 8), BPB, Knauf, Lafarge and Gyproc received fines of EUR 138.6 million, 85.8 million, 249.6 million and 4.32 million respectively. The fines were paid provisionally or secured by a bank guarantee.
- 10 The penalties thus imposed by the Commission were confirmed by the judgments of the Court of First Instance in Case T-50/03 *Saint-Gobain Gyproc Belgium v Commission*, Case T-52/03 *Knauf Gips v Commission*, Case T-53/03 *BPB v Commission* [2008] ECR II-1333, and Case T-54/03 *Lafarge v Commission*. Knauf and Lafarge lodged an appeal before the Court of Justice against the judgments of the Court of First Instance dismissing their actions (Cases C-407/08 P and C-413/08 P).
- 11 Before those judgments of the Court of First Instance were delivered, one of the companies concerned, which the file shows was established in Germany, called X KG by the referring court, passed on part of the fine imposed on it within the group of which it is the parent company, and in particular to one of its Netherlands subsidiaries, X BV.

- 12 On 13 March 2004, an assessment to corporation tax was made on X BV by the Netherlands tax authority in respect of the financial year 2002. By letter of 8 April 2004, the company lodged an objection to that assessment with the Inspector, disputing that the fine imposed by the Commission and passed on to it in part by its parent company constitutes a fine within the meaning of Article 3.14(1)(c) of the Law on income tax 2001, which does not permit the deduction of fines imposed by the Community institutions for the purpose of calculating the taxable profits of a company. The Inspector dismissed that complaint by decision of 11 March 2005.
- 13 On 19 April 2005, X BV brought an action before the Rechtbank Haarlem (Haarlem District Court) (Netherlands).
- 14 By judgment of 22 May 2006, that court held that the fine was partially deductible.
- 15 The Inspector brought an appeal against that judgment before the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) (Netherlands) by notice of 30 June 2006.
- 16 The Commission, having been informed by the press and through the national competition authorities, notified the referring court, by letter of 15 March 2007, that it wished to intervene as *amicus curiae* pursuant to Article 15(3) of Regulation No 1/2003 and in accordance with Article 89h of the Law on competition. In addition, the

Commission requested that a time-limit be set for that purpose and that any documents necessary for the assessment of the case be transmitted to it.

17 At the hearing of the *Gerechtshof te Amsterdam* of 22 August 2007, the parties to the main proceedings and the Commission were asked to express their views on the question whether the Commission was competent under Article 15(3) of Regulation No 1/2003 to submit, on its own initiative, written observations in the proceedings pending before that court.

18 It is against that background that the *Gerechtshof te Amsterdam* decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

‘Is the Commission competent, under Article 15(3) of Regulation ... No 1/2003, to submit, on its own initiative, written observations in proceedings relating to the deductibility from the (taxable) profit realised by the party concerned in 2002 of a fine for infringement of Community competition law, which was imposed by the Commission on X KG and (partially) passed on to the party concerned?’

### **The question referred for a preliminary ruling**

19 By its question, the referring court essentially asks whether the Commission is competent, under Article 15(3) of Regulation No 1/2003, to submit, on its own initiative, written observations to a national court in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission for infringement of Articles 81 EC or 82 EC.

- 20 In order to ensure the coherent application of the competition rules in the Member States, a cooperation mechanism between the Commission, the national competition authorities and the courts of the Member States was set up in Chapter IV of Regulation No 1/2003.
- 21 That cooperation is part of the general principle of sincere cooperation, referred to in Article 10 EC, which governs the relationships between the Member States and the Community institutions. As the Court has held, the duty of sincere cooperation imposed on the Community institutions is of particular importance where that cooperation involves the judicial authorities of a Member State who are responsible for ensuring that Community law is applied and respected in the national legal system (see order in Case C-2/88 *IMM Zwartveld and Others* [1990] ECR I-3365, paragraph 18).
- 22 In that context, the national courts, on the one hand, and the Commission and the Community Courts, on the other, act on the basis of the role assigned to them by the Treaty (see, to that effect, Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 56).
- 23 Articles 11 to 14 of Regulation No 1/2003 provide for various forms of cooperation between the Commission and the national competition authorities.
- 24 Article 15 of that regulation, entitled ‘Cooperation with national courts’, establishes a system for the mutual exchange of information between the Commission and the

courts of the Member States, and provides, in specific circumstances, for the possibility of intervention by the Commission and the competition authorities of the Member States in proceedings pending before national courts.

25 As recital 21 in the preamble to Regulation No 1/2003 mentions, the cooperation mechanism between the Commission and the courts of the Member States is relevant for all courts of the Member States that apply Articles 81 EC and 82 EC, whether in lawsuits between private parties, acting as public enforcers or as review courts.

26 Article 15(1) of Regulation No 1/2003 provides, on the one hand, that those courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules. Article 15(2) thereof states, on the other hand, that the Member States are to forward to the Commission a copy of any written judgment of national courts deciding on the application of Articles 81 EC or 82 EC.

27 The first and second sentences of the first subparagraph of Article 15(3) permit the competition authorities of the Member States to submit written observations on their own initiative, and, with the permission of the court concerned, oral observations to the national courts of their Member State on issues relating to the application of Articles 81 EC or 82 EC. The third and fourth sentences of that provision also permit the Commission to submit written observations on its own initiative, and, with the permission of the court in question, oral observations to courts of the Member States where the coherent application of Articles 81 EC or 82 EC so requires.

28 Thus, the first subparagraph of Article 15(3) of Regulation No 1/2003 refers to two different types of intervention with separate fields of application: intervention by the national competition authorities before the national courts of their Member State on

issues relating to the application of Articles 81 EC or 82 EC, and intervention by the Commission before courts of the Member States where the coherent application of Articles 81 EC or 82 EC so requires.

29 The four sentences of that subparagraph, and above all the fact that the second and fourth sentences are almost entirely identical, emphasises the fact that the Community legislature intended to draw a distinction between those two situations, despite the fact that they appear in the same subparagraph.

30 Consequently, a literal interpretation of the first subparagraph of Article 15(3) of Regulation No 1/2003 leads to the conclusion that the option for the Commission, acting on its own initiative, to submit written observations to courts of the Member States is subject to the sole condition that the coherent application of Articles 81 EC or 82 EC so requires. That condition may be fulfilled even if the proceedings concerned do not pertain to issues relating to the application of Article 81 or Article 82 of the Treaty.

31 That interpretation is not called in question by the fourth sentence of recital 21 in the preamble to Regulation No 1/2003, according to which the Commission and the competition authorities of the Member States should be able to submit written or oral observations to courts called upon to apply Articles 81 EC or 82 EC. That recital refers merely to a typical situation but does not exclude other situations in which the Commission may intervene. Moreover, whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule (Case 215/88 *Casa Fleischhandels* [1989] ECR 2789, paragraph 31, and Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, paragraph 32 and case-law cited).

32 Moreover, contrary to what X BV and the Netherlands Government submit, the interpretation of the first subparagraph of Article 15(3) of Regulation No 1/2003 given in paragraph 30 of this judgment is not contradicted by points 31 to 35 of the



Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, which state that the Commission may submit observations on issues relating to the application of Articles 81 EC or 82 EC. The general concept of ‘issues relating to the application of Articles 81 ... EC or 82 [EC]’ adopted by that notice includes the possibility for the Commission to submit written observations to national courts where the coherent application of Articles 81 EC or 82 EC so requires. In any event, the content of a Commission notice cannot prevail over the provisions of a regulation.

33 Community law has established a comprehensive system for monitoring cartels and abuses of dominant positions which sets out a principle of prohibition, contained in Articles 81 EC and 82 EC, and sanctions for its infringement, on the basis of Article 83 EC. Those articles must be understood as forming part of a comprehensive set of provisions designed to prohibit and punish anti-competitive practices.

34 It is apparent from Article 83(2)(a) EC that the fines and periodic penalty payments which may be imposed on undertakings in connection with the application of Community competition law are designed to ‘ensure compliance with the prohibitions laid down in Article 81(1) [EC] and in Article 82 [EC]’. The purpose of Article 83 EC is therefore inter alia to ensure the effective supervision of cartels and abuses of dominant positions.

35 The Commission’s power to impose fines on undertakings which intentionally or negligently commit an infringement of Articles 81(1) EC or 82 EC is one of the means conferred on the Commission in order to enable it to carry out the task of supervision entrusted to it by Community law (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 105, and Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 22).

- <sup>36</sup> To dissociate the principle of prohibition of anti-competitive practices from the penalties provided for where that principle has not been observed would therefore deprive of any effectiveness the action taken by the authorities responsible for monitoring compliance with that prohibition and punishing such practices. Thus, the provisions of Articles 81 EC and 82 EC would be ineffective if they were not accompanied by enforcement measures provided for in Article 83(2)(a) EC. As the Advocate General stated at point 38 of his Opinion, there is an intrinsic link between the fines and the application of Articles 81 and 82 EC.
- <sup>37</sup> The effectiveness of the penalties imposed by the national or Community competition authorities on the basis of Article 83(2)(a) EC is therefore a condition for the coherent application of Articles 81 EC and 82 EC.
- <sup>38</sup> In proceedings relating to the penalties in respect of anti-competitive practices provided for in Article 83(2)(a) EC, the decision that the court seised must give is capable of impairing the effectiveness of those penalties and therefore might compromise the coherent application of Articles 81 EC or 82 EC.
- <sup>39</sup> In the circumstances of the action in the main proceedings, it is quite clear that the outcome of the dispute relating to the tax deductibility of part of a fine imposed by the Commission is capable of impairing the effectiveness of the penalty imposed by the Community competition authority. The effectiveness of the Commission's decision by which it imposed a fine on a company might be significantly reduced if the company concerned, or at least a company linked to that company, were allowed to deduct fully or in part the amount of that fine from the amount of its taxable profits, since such a possibility would have the effect of offsetting the burden of that fine with a reduction of the tax burden.

40 It follows from all of the foregoing that the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 must be interpreted as meaning that it permits the Commission to submit on its own initiative written observations to a national court of a Member State in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission for infringement of Articles 81 EC or 82 EC.

### Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**The third sentence of the first subparagraph of Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty must be interpreted as meaning that it permits the Commission of the European Communities to submit on its own initiative written observations to a national court of a Member State in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission for infringement of Articles 81 EC or 82 EC.**

[Signatures]