



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

27 March 2014\*

(Appeal — Competition — Agreements, decisions and concerted practices — Netherlands market in road pavement bitumen — Setting of the gross price for road pavement bitumen — Setting of a rebate for road builders — Regulation (EC) No 1/2003 — Article 27 — Rights of the defence — Reduction of the fine)

In Case C-612/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 December 2012,

**Ballast Nedam NV**, established in Nieuwegein (Netherlands), represented by A. Bosman and E. Oude Elferink, advocaten,

appellant,

the other party to the proceedings being:

**European Commission**, represented by F. Ronkes Agerbeek and P. Van Nuffel, acting as Agents, and by F. Tuytschaever, avocat, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby (Rapporteur) and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 November 2013,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

\* Language of the case: Dutch.

## Judgment

- 1 By its appeal, Ballast Nedam NV seeks to have set aside the judgment in Case T-361/06 *Ballast Nedam v Commission* (EU:T:2012:491) ('the judgment under appeal') by which the General Court of the European Union dismissed Ballast Nedam's action for the annulment of Commission Decision C(2006) 4090 final of 13 September 2006 relating to a proceeding under Article [81 EC] (Case COMP/F/38.456 — Bitumen (Netherlands)) ('the contested decision'), in so far as that decision concerned it; in the alternative, Ballast Nedam seeks (i) the annulment in part of the contested decision in so far as it sets the duration of the infringement with respect to Ballast Nedam and (ii) a reduction of the fine imposed on it.

### Legal context

- 2 Article 27(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1) provides:

'Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.'

### Background to the dispute and the contested decision

- 3 The background to the dispute was described in paragraphs 1 to 7 of the judgment under appeal and may be summarised as follows.
- 4 Ballast Nedam heads the Ballast Nedam group, which operates in the construction sector in the Netherlands. From 1995, the group's road construction activities were centralised in Ballast Nedam Grond en Wegen BV ('BNGW'), a wholly-owned subsidiary of Ballast Nedam Infra BV ('BN Infra'), itself wholly-owned by Ballast Nedam. From 1 October 2000 onwards, Ballast Nedam's road construction activities were carried out directly by BN Infra.
- 5 On 1 and 2 October 2002, following an application from British Petroleum plc for immunity from fines under the Commission Notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), alleging the existence of a cartel relating to the market in road pavement bitumen in the Netherlands, the Commission carried out surprise inspections at the premises of certain companies and, on 4 July 2003, sent requests for information to several companies, including BN Infra. BN Infra replied on 12 September 2003. On 10 February 2004, the Commission sent Ballast Nedam a request for information, to which it replied on 9 March 2004.
- 6 On 18 October 2004, the Commission initiated the administrative procedure and adopted a statement of objections which it sent on the following day to several companies, including Ballast Nedam and BN Infra, to which Ballast Nedam replied on 20 May 2005.
- 7 On 13 September 2006, the Commission adopted the contested decision finding that the companies to which that decision was addressed had participated in a single and continuous infringement of Article 81 EC by regularly fixing collectively, for the periods indicated, for sales and purchases of road pavement bitumen in the Netherlands, the gross price, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders.

- 8 Ballast Nedam was held liable for that infringement in respect of the period from 21 June 1996 to 15 April 2002, as was its subsidiary BN Infra.
- 9 In view of BN Infra's direct participation in the infringement during the period from 1 October 2000 to 15 April 2002 and the fact that it wholly owned BNGW during the period from 21 June 1996 to 30 September 2000 and of Ballast Nedam's 100% direct and indirect shareholding of BN Infra and BNGW, a fine in the amount of EUR 4.65 million was imposed jointly and severally on Ballast Nedam and BN Infra.

### **The procedure before the General Court and the judgment under appeal**

- 10 By application lodged at the Registry of the General Court on 5 December 2006, Ballast Nedam sought the annulment of the contested decision and, in the alternative, the annulment in part of that decision in so far as it sets the duration of the infringement with respect to Ballast Nedam, and a reduction of the fine imposed on it.
- 11 In support of its action, Ballast Nedam raised two pleas in law.
- 12 By its second plea in law, which alone is relevant for the purposes of the present appeal, Ballast Nedam submitted that the Commission had infringed Article 27(1) of Regulation No 1/2003 and the rights of the defence by omitting to mention in the statement of objections that it presumed that Ballast Nedam was liable for BNGW on the ground that Ballast Nedam in fact exercised decisive influence over BNGW during the period from 21 June 1996 to 1 October 2000.
- 13 In paragraph 64 of the judgment under appeal, the General Court recalled the case-law according to which the statement of objections must be sufficiently clear, so that an undertaking is afforded the opportunity during the administrative procedure to make known its views on the relevance of the facts alleged. According to that case-law, the statement of objections must also indicate in which capacity an undertaking is called upon to answer the allegations (Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission*, EU:C:2009:500, paragraph 39).
- 14 In paragraphs 68 to 71 of the judgment under appeal, the General Court held as follows:
- ‘68 In the statement of objections, the Commission first of all pointed out that each group of undertakings concerned constituted a single undertaking and that the parent company of the group was in a position to exercise decisive influence over the conduct of its subsidiaries (point 324). Next, it stated that [Ballast Nedam] had participated in the cartel through the managing director of BNGW (point [235] of the statement of objections), then through BN Infra (point 339 of the statement of objections) and that, since [Ballast Nedam] controlled the entire capital of BN Infra (previously Ballast Nedam Wegenbouw BV and BNGW) through the intermediary entity Ballast Nedam Nederland, it presumed the exercise of decisive influence by the parent company over the conduct of those two subsidiaries. Lastly, the Commission adduced certain additional evidence for the existence of a unitary undertaking between [Ballast Nedam] and BN Infra (point 340 of the statement of objections). On the basis of all of that evidence, the Commission decided that the statement of objections should be addressed to BN Infra for its direct participation (and the participation of its predecessors) in the arrangements and to [Ballast Nedam] for its participation through the actual exercise of decisive influence over the conduct of BN Infra (point 342 of the statement of objections).
- 69 It is clear from all those considerations that, even though the wording used in the statement of objections could have been clearer, in particular as regards the relationship between BN Infra and BNGW, the Commission gave [Ballast Nedam] enough information for an understanding of the facts and circumstances used in support of its allegation that there had been an infringement,

and specified unequivocally the legal persons on whom fines might be imposed. The mere fact that the Commission did not provide in the statement of objections any additional evidence for the existence of a unitary undertaking between [Ballast Nedam] and BNGW is not sufficient for it to be held not to have clearly indicated its intention to apply the presumption of the actual exercise of decisive influence by [Ballast Nedam] over the commercial conduct of BN Infra and BNGW. The Court accordingly takes the view that, on the basis of the information contained in the statement of objections, [Ballast Nedam] could not have been unaware that it was likely to be the addressee of a final Commission decision in its capacity as the parent company of BNGW.

70 Moreover, it must be observed that, in reply to that allegation made in the statement of objections, [Ballast Nedam] asserted ... that BN Infra was not the successor of BNGW, but its 100% parent company and put forward arguments to show that BNGW was autonomous.

71 In those circumstances, the Court is of the view that [Ballast Nedam] was enabled, from the stage of the statement of objections, to understand the scope of the Commission's objection regarding its participation in the infringement in its capacity as the parent company of BNGW and thus to conduct its defence properly.'

15 The General Court dismissed the action in its entirety.

### **Forms of order sought**

16 Ballast Nedam claims that the Court of Justice should:

- set aside in full or in part the decision of the General Court as set out in the operative part of the judgment under appeal;
- in the event that the appeal is allowed, uphold in full or in part the form of order sought by Ballast Nedam at first instance; and
- order the Commission to pay the costs of the proceedings at both instances.

17 The Commission contends that the Court should:

- dismiss the appeal; and
- order Ballast Nedam to pay the costs.

### **The appeal**

18 Ballast Nedam puts forward two grounds of appeal, alleging respectively: (i) infringement of Article 27(1) of Regulation No 1/2003 and the rights of the defence; and (ii) misapplication by the General Court of the fundamental principles governing the imputation to parent companies of liability for cartel infringements committed by their subsidiaries.

*The first ground of appeal: error of law as regards the interpretation of Article 27(1) of Regulation No 1/2003 and the rights of the defence*

#### Arguments of the parties

- 19 By its first ground of appeal, directed against paragraphs 68 to 71 of the judgment under appeal, Ballast Nedam submits that the General Court erred in law by concluding in paragraph 69 of that judgment that, on the basis of the information contained in the statement of objections, Ballast Nedam could not have been unaware that it was likely to be the addressee of a final Commission decision in its capacity as the parent company of BNGW.
- 20 By its appeal, Ballast Nedam submits that, in the statement of objections, the Commission should have identified BNGW as an offender and should have expressly informed Ballast Nedam that it risked being held jointly and severally liable for the fine imposed on BNGW. Yet point 342 of the statement of objections does not mention BNGW – which, moreover, was not one of the addressees of that statement.
- 21 The Commission contends that this ground of appeal is unfounded.

#### Findings of the Court

- 22 The General Court did not commit an error of law in recalling, in paragraph 64 of the judgment under appeal, the case-law according to which the statement of objections must be sufficiently clear, so that an undertaking is afforded the opportunity during the administrative procedure to make known its views on the relevance of the facts alleged.
- 23 As can be seen from paragraph 68 of the judgment under appeal, the General Court found that, in the statement of objections, the Commission had established the existence of links between Ballast Nedam and BN Infra, to the extent that, in paragraph 342 of the statement of objections, the Commission decided that the statement of objections should be addressed to BN Infra for its direct participation (and the participation of its predecessors) in the arrangements and to Ballast Nedam for its participation through the actual exercise of decisive influence over BN Infra's conduct.
- 24 As regards BNGW's participation, the General Court acknowledged, in paragraph 69 of the judgment under appeal, that the Commission did not provide in the statement of objections any additional evidence for the existence of a unitary undertaking between Ballast Nedam and BNGW and that, in that respect, the statement of objections could have been clearer. However, the General Court stated that that is not sufficient for the Commission to be held not to have clearly indicated its intention to apply the presumption of the actual exercise of decisive influence by Ballast Nedam over the commercial conduct of BN Infra and BNGW.
- 25 In so doing, the General Court erred in law with regard to the requirement that the statement of objections be sufficiently clear, in accordance with which it is necessary for the statement of objections to indicate in which capacity an undertaking is called upon to answer the allegations (*Papierfabrik August Koehler and Others v Commission*, EU:C:2009:500, paragraph 39).
- 26 The General Court was wrong in finding, in paragraph 69 of the judgment under appeal, that Ballast Nedam could not have been unaware that it was likely to be the addressee of a final Commission decision in its capacity as BNGW's parent company, when it is apparent from the General Court's own findings that, in point 342 of the statement of objections, the Commission had not indicated that the statement of objections was addressed to Ballast Nedam on the ground that it exercised decisive influence over BNGW's commercial conduct, and the General Court acknowledged that the statement of objections was unclear in that regard.



- 27 In particular, the General Court cannot hold that the finding made in point 235 of the statement of objections that Ballast Nedam had participated in the cartel through BNGW's managing director clearly indicated to Ballast Nedam that the Commission intended to hold it, in its capacity as BNGW's parent company, liable for its subsidiary, when the only reference made to BGNW in the statement of objections is to BGNW in its capacity as BN Infra's predecessor.
- 28 Moreover, the ambiguity in the wording of the statement of objections is exacerbated by the fact that no statement of objections was sent to BNGW.
- 29 With regard to Ballast Nedam's reply to the statement of objections and concerning BNGW, referred to in paragraph 70 of the judgment under appeal, it cannot be concluded that Ballast Nedam had understood from its reading of the statement of objections that it would be held liable by the Commission for BNGW's conduct.
- 30 In the light of those considerations, the Court finds that the General Court erred in law in finding that Ballast Nedam's rights of the defence had not been infringed.
- 31 Since the first ground of appeal is well founded, the present appeal must be upheld and, consequently, the judgment under appeal must be set aside to the extent that it rejects Ballast Nedam's plea in law alleging infringement of Article 27(1) of Regulation No 1/2003 and the rights of the defence during the administrative procedure leading up to the contested decision.

*The second ground of appeal: error of law as regards the imputation of the infringement to Ballast Nedam*

- 32 By its second ground of appeal, directed against paragraphs 72 to 77 of the judgment under appeal, Ballast Nedam submits that the General Court misconstrued the meaning of the arguments that it put forward at the hearing on 30 June 2011 and, accordingly, erred in law in finding, in paragraph 75 of that judgment, that '[Ballast Nedam] cannot ... maintain that the Commission was not in a position either to impute to it the unlawful conduct of BNGW for the period from 21 June 1996 to [30 September 2000] or to order it jointly and severally to pay the fine', when no infringement has been found to have been committed by BNGW, Ballast Nedam's subsidiary.
- 33 Since the second ground of appeal is also intended – admittedly, for reasons other than those put forward in support of the first ground of appeal – to prevent the imputation to Ballast Nedam of liability for the conduct of its subsidiary, BNGW, it is not capable, even supposing it to be well founded, of causing more of the judgment under appeal to be set aside than already has been as a result of the success of the first ground of appeal.
- 34 There is no need, therefore, to consider the second ground of appeal.

### **The action before the General Court**

- 35 Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. It may then give final judgment in the matter itself, where the state of the proceedings so permits.
- 36 That is the position in the present case.

- 37 For that purpose, Ballast Nedam, referring to the observations that it submitted at first instance, seeks the annulment in part of the contested decision in so far as that decision concerns it, and claims that the Court should reduce the fine in the amount of EUR 4.65 million imposed on it, on a joint and several basis, under Article 2(a) of that decision.
- 38 In the present case, as Ballast Nedam was not afforded the opportunity to conduct its defence properly during the administrative procedure as regards its participation in the infringement in question by virtue of being the parent company of BNGW, its wholly-owned subsidiary, Article 1(a) of the contested decision must be annulled as regards the imputation of BNGW's conduct to Ballast Nedam for the period from 21 June 1996 to 30 September 2000.
- 39 Moreover, as regards BN Infra's conduct, for which the contested decision also held Ballast Nedam liable, the General Court definitively reduced the fine to EUR 3.45 million, stating that BNGW's conduct for the period from 21 June 1996 to 1 October 2000 could not be imputed to BN Infra (Case T-362/06 *Ballast Nedam Infra v Commission*, EU:T:2012:492).
- 40 In those circumstances, it is appropriate to set the amount of the fine imposed jointly and severally on Ballast Nedam under Article 2(a) of the contested decision at EUR 3.45 million.

### **Costs**

- 41 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.
- 42 Under Article 138(1) of the Rules of Procedure, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 43 Since the appeal brought by Ballast Nedam has been upheld and the fine imposed on it is to be reduced by the Court, the Commission must be ordered to pay all costs relating to the present proceedings. In addition, in the light of the pleas in law put forward by Ballast Nedam before the General Court, some of which have been definitively rejected, it is appropriate for each of the parties to bear its own costs in relation to the proceedings at first instance.

On those grounds, the Court (Fifth Chamber) hereby:

- 1. Sets aside the judgment in Case T-361/06 *Ballast Nedam v Commission* to the extent that it rejects the plea in law raised by Ballast Nedam NV relating to the infringement of Article 27(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] and of the rights of the defence during the administrative procedure which led to Commission Decision C(2006) 4090 final of 13 September 2006 relating to a proceeding under Article [81 EC] (Case COMP/F/38.456 — Bitumen (Netherlands));**
- 2. Annuls Article 1(a) of Decision C(2006) 4090 final to the extent that it concerns Ballast Nedam NV's infringement of Article 81 EC during the period from 21 June 1996 to 30 September 2000;**
- 3. Annuls Article 2(a) of Decision C(2006) 4090 final to the extent that it sets the amount of the fine payable by Ballast Nedam NV at EUR 4.65 million;**

4. **Sets the amount of the fine imposed jointly and severally on Ballast Nedam NV under Article 2(a) of Decision C(2006) 4090 final at EUR 3.45 million;**
5. **Orders the European Commission to pay all costs relating to the present appeal;**
6. **Orders each of the parties to bear its own costs in relation to the proceedings at first instance.**

[Signatures]