

— order the Commission to pay a part of KWS's procedural costs at first instance and in this appeal, to be determined more precisely by the Court of Justice.

### Pleas in law and main arguments

The appellant puts forward two pleas in support of its appeal.

#### First plea

In its first plea, the appellant claims that the General Court infringed the principle of equal treatment and fundamental requirements relating to the consistency of judicial decisions in that, in the judgment under appeal, it used the same evidence, without stating any reasons, let alone any convincing reasons, in a contradictory manner against the different applicants, KWS and Shell Nederland Verkoop Maatschappij B.V. ('SNV', whose action was the subject of the judgment of the General Court of 27 September 2012 in Case T-343/06), whereas, according to the contested decision, KWS and SNV together had the same role in the context of the cartel arrangements.

— The General Court's assessment of the alleged instigating and leadership roles of KWS and of SNV should be seen in conjunction with one another: the Commission found in the decision that KWS and SNV were jointly the driving force behind the cartel.

— The probative value of a number of items of evidence relied upon by the Commission against KWS and SNV was assessed by the Court in a contradictory manner which is legally unacceptable.

— On the basis of the foregoing, the finding that KWS was alone in having a leadership role in the cartel established between bitumen suppliers and road builders is untenable.

#### Second plea

By its second plea, the appellant claims that the General Court infringed the prohibition on taking arbitrary measures, the principle of equal treatment and the principle of proportionality by considering in the judgment under appeal that the 50 % increase in the fine imposed on KWS on the basis of the existence of an instigating and leadership role could be maintained, even though the General Court had established that there were insufficient grounds for finding that KWS had an instigating role.

— If the finding that KWS alone can be attributed a leadership role cannot be upheld, that also applies in respect of the increase in the fine.

— By maintaining the increase in the fine set by the Commission, even though the Commission did not put forward sufficient evidence in respect of one of the two

circumstances justifying an increase in the fine, the General Court 'rewards' the Commission for its careless assessment in the contested decision.

— The principle of equal treatment and of proportionality preclude the General Court from maintaining the 50 % increase in KWS's fine (in full moreover), whereas it annulled that increase in full in the parallel proceedings in Case T-343/06 as regards SNV and Others.

— On the basis of the foregoing, the increase in fine as determined for KWS cannot be maintained.

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(<sup>1</sup>) 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)).

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### Reference for a preliminary ruling from Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) made on 14 December 2012 — The Commissioners for Her Majesty's Revenue & Customs v GMAC UK PLC

(Case C-589/12)

(2013/C 71/12)

*Language of the case: English*

#### Referring court

Upper Tribunal (Tax and Chancery Chamber)

#### Parties to the main proceedings

*Applicant:* The Commissioners for Her Majesty's Revenue & Customs

*Defendant:* GMAC UK PLC

#### Questions referred

1. To what extent is a taxable person, in relation to two transactions concerning the same goods, entitled both (i) to invoke the direct effect of one provision of EC Council Directive 77/388 (<sup>1</sup>) ('the Sixth VAT Directive') in respect of one transaction and (ii) to rely on the provisions of national law in relation to the other transaction, when to do so would produce an overall fiscal result in relation to the two transactions which neither national law nor the Sixth VAT Directive applied separately to those two transactions produces or is intended to produce?

2. If the answer to Question 1 is that there are circumstances in which the taxable person would not be entitled to do so (or would not be entitled to do so to a particular extent), what are the circumstances in which this would be so and in particular what is the relationship between the two transactions which would give rise to such circumstances?
3. Do the answers to Questions 1 and 2 differ according to whether or not the national treatment of one transaction is in conformity with the Sixth VAT Directive?

<sup>(1)</sup> Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment OJ L 145, p. 1

**Action brought on 20 December 2012 — European Commission v Italian Republic**

(Case C-596/12)

(2013/C 71/13)

*Language of the case: Italian*

**Parties**

*Applicant:* European Commission (represented by: J. Enegren and C. Cattabriga, Agents)

*Defendant:* Italian Republic

**Form of order sought**

— Declare that, by excluding the category of managers from the scope of the redundancy process laid down in Article 4 of Law No 223/1991, in conjunction with Article 24 of that Law, the Italian Republic has failed to fulfil its obligations under Article 1(1) and (2) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies; <sup>(1)</sup>

— order the Italian Republic to pay the costs.

**Pleas in law and main arguments**

The Commission submits that, by excluding the category of managers from the scope of the redundancy process (*procedura di mobilità*) laid down in Article 4 of Law No 223/1991, in conjunction with Article 24 of that Law, the Italian Republic has failed to fulfil its obligations under Article 1(1) and (2) of Directive 98/59/EC.

That directive regulates the procedure for informing and consulting with the workers' representatives which must be followed by an employer where he is contemplating collective redundancies, as well as the procedure for collective redundancies itself.

Pursuant to Article 1(1) and (2) of the directive, such procedures apply to dismissals effected by an employer for one or more reasons not related to the individual workers concerned, where the number of redundancies is above a certain threshold set by reference to the number of workers in the undertaking. In calculating the number of workers employed by the undertaking and also the number of redundancies effected, all workers are included, regardless of their qualifications or duties, the only exceptions being those with contracts of employment concluded for limited periods of time, public employees and the crews of seagoing vessels.

In implementing Directive 98/59/EC, the Italian legislature excluded from the scope of the information and consultation procedures established by it in the case of collective redundancies the category of managers, which, according to the Italian Civil Code, is included within the concept of a worker. Such an exclusion is not only contrary to the general scope of the directive, but is also wholly unjustified. The category of managers in Italian law is, indeed, very broad and even includes workers not entrusted with particular management powers in the context of the undertaking and defined as managers only in that they possess a high level of professional qualifications.

<sup>(1)</sup> OJ 1998 L 225, p. 16.

**Appeal brought on 20 December 2012 by Ningbo Yonghong Fasteners Co. Ltd against the judgment of the General Court (Seventh Chamber) delivered on 10 October 2012 in Case T-150/09: Ningbo Yonghong Fasteners Co. Ltd v Council of the European Union**

(Case C-601/12 P)

(2013/C 71/14)

*Language of the case: English*

**Parties**

*Appellant:* Ningbo Yonghong Fasteners Co. Ltd (represented by: F. Graafsma, J. Cornelis, advocaten)

*Other parties to the proceedings:* Council of the European Union, European Commission, European Industrial Fasteners Institute AISBL (EIFI)