



EUROPEAN COMMISSION

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**TO THE PRESIDENTS AND JUDGES OF THE  
CONSTITUTIONAL COURT**

**WRITTEN OBSERVATIONS**

submitted in accordance with 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 by the

**EUROPEAN COMMISSION**

represented by Piet Van Nuffel and Felix Ronkes Agerbeek, members of its Legal Service, acting as agents,

in case No 5285

**Tessenderlo Chemie NV**

versus

**the Belgian State,**

concerning the questions referred for a preliminary ruling by the Court of First Instance in Brussels, in its judgment of 20 December 2011, on the possible breach of Articles 10 and 11 of the Belgian Constitution by Article 53(6) of the Income Tax Code of 1992.

## 1. COMMISSION'S RIGHT TO SUBMIT OBSERVATIONS

1. 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 [now Articles 101 and 102 TFEU]<sup>1</sup> states that, where the coherent application of Article 81 or Article 82 of the Treaty [now Articles 101 and 102 TFEU] so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States and, with the permission of the court in question, may also submit oral observations.
2. In its judgment of 20 December 2011 in the case of *Tessenderlo Chemie NV versus the Belgian State*, the Court of First Instance in Brussels referred two questions to the Constitutional Court for a preliminary ruling<sup>2</sup>.
3. The Court of First Instance wishes to know whether it was a breach of Articles 10 and 11 of the Belgian Constitution to interpret Article 53(6) of the Income Tax Code of 1992 ('WIB 1992') as meaning that the fine imposed by the Commission on *Tessenderlo Chemie NV* by Decision C(2010) 5004 of 20 July 2010 relating to a case brought under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38866 - animal feed phosphates) constitutes a deductible business expense.
4. More specifically, the Court of First Instance asks whether it is compatible with Articles 10 and 11 of the Belgian Constitution to interpret the provision in Article 53(6) WIB 1992 in such a way that:
  - it applies to fines imposed under criminal law, but not to fines originating in provisions of an administrative nature, and in particular fines imposed by the Commission under Regulation (EC) No 1/2003, with the result that the former cannot be deducted from professional revenue but the latter can;
  - it applies to sanctions within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') without distinction according to whether they have their origin in provisions of Belgian criminal law or in administrative provisions, in particular fines imposed by the European Commission under Regulation No 1/2003.
5. In the observations below the Commission explains why it believes that the questions referred to the Constitutional Court are of immediate interest to the effectiveness of the sanctions which the Commission imposes under Article 103(2)(a) TFEU and Regulation No 1/2003 for infringements of Articles 101 and 102 TFEU. As the Court of Justice stated in Case C-429/07 *Inspecteur van de Belastingdienst v X BV*, a court judgment which impairs the effectiveness of those penalties might compromise the coherent application of Articles 101 and 102 TFEU<sup>3</sup>.

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<sup>1</sup> OJ L 1, 4.1.2003, p. 1.

<sup>2</sup> Case No 5285, *Moniteur belge/Belgisch Staatsblad* 10 February 2012.

<sup>3</sup> Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-4833, paragraphs 37 and 38.

6. For this reason, the Commission has the right under the first subparagraph of Article 15(3) of Regulation No 1/2003 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 a fine imposed for infringing Articles 101 or 102 TFEU<sup>4</sup>. The Commission refers to the written observations which it submitted in a similar case to the Gerechtshof te Amsterdam (Amsterdam Court of Appeal)<sup>5</sup> and the Hoge Raad der Nederlanden (Supreme Court of the Netherlands)<sup>6</sup> (after the Court of Justice had pronounced on a question referred to it for a preliminary ruling concerning the Commission's right to submit written observations).
7. The Commission therefore has a justifiable interest in submitting observations to the Constitutional Court within the meaning of Article 87(1) of the Special Act of 6 January 1989 on the Constitutional Court.

## 2. LEGAL FRAMEWORK

8. Article 103 TFEU states that:

‘1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

...’

9. Article 23 of Regulation 1/2003 provides that:

‘1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently:

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<sup>4</sup> Ibid, paragraph 40.

<sup>5</sup> Written observations of the European Commission of 24 September 2009, published on the website of the European Commission's DG Competition: [http://ec.europa.eu/competition/court/antitrust\\_requests.html](http://ec.europa.eu/competition/court/antitrust_requests.html). Dutch tax legislation (Section 3.14(1)(c) of the 2001 Income Tax Act) states that, for the purpose of determining profit, costs and charges relating to the following items are not deductible: ‘... fines imposed by a Dutch criminal court and sums paid to the State to avoid criminal prosecution in the Netherlands or in fulfilment of a condition attached to a decision granting a pardon, administrative fines, fines imposed on the basis of a statutory disciplinary code, fines imposed by an institution of the European Union ...’. In Case X the District Court of Haarlem, in its judgment of 22 May 2006, allowed the deduction of a fine imposed by the Commission in so far as it was deemed to be ‘enrichment deprivation’. In the appeal, the Amsterdam Court of Appeal ruled on 11 March 2010 that the fine imposed by the Commission was not deductible, even if it served an ‘enrichment deprivation’ purpose.

<sup>6</sup> European Commission's written observations of 16 December 2010, published on the same website: [http://ec.europa.eu/competition/court/antitrust\\_requests.html](http://ec.europa.eu/competition/court/antitrust_requests.html). By judgment of 12 August 2011, the Supreme Court rejected the appeal in cassation lodged by the taxpayer in Case X against the Court of Appeal's judgment of 11 March 2010.

- a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
- b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
- c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
- d) in response to a question asked in accordance with Article 20(2)(e),
  - they give an incorrect or misleading answer,
  - they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
  - they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);
- e) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 20(2)(d) have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

- a) they infringe Article 81 or Article 82 of the Treaty; or
- b) they contravene a decision ordering interim measures under Article 8; or
- c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

...

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.'

10. Article 53 of the WIB 1992 provides that:

'Business expenses shall not include:

...

6) fines, including out of court fines, confiscations of assets and all forms of sanctions, even if the fines or sanctions are incurred by a person who receives remuneration from the taxpayer as referred to in Section 30;

...’

### **3. QUESTIONS REFERRED TO THE CONSTITUTIONAL COURT**

11. In the judgment referring the matter, the Court of First Instance establishes that Article 53(6) WIB 1992 can be interpreted in different ways, because the terms ‘fines’ and ‘sanctions’ are unclear and can mean different things depending on the branch of law in which they are used (referring judgment, point 9).
12. The Court also noted that Belgian legislation on tax deductibility did not distinguish between fines imposed by the national competition authority and fines imposed by the Commission for infringements of competition law (referring judgment, point 10).
13. However, the Court wonders whether there is a breach of the principle of equal treatment if Article 53(6) WIB 1992 is to be interpreted, as maintained by the plaintiff, as meaning that only fines imposed by criminal law are excluded from deductibility, not administrative fines, such as those imposed by the Commission for infringing competition law. According to the Court, these fines are comparable, in that fines imposed by the Commission for infringements of competition law are in the nature of a criminal sanction, within the meaning of Article 6 ECHR (referring judgment, point 11).
14. Consequently, the Court of First Instance asks the Constitutional Court whether it is compatible with the principle of non-discrimination laid down in Articles 10 and 11 of the Constitution to interpret Article 53(6) WIB 1992 as meaning that fines imposed under criminal law are not tax deductible, but fines of an administrative nature, such as those imposed under Regulation No 1/2003, are.
15. The Court also asks whether it is compatible with the principle of non-discrimination to interpret Article 53(6) WIB 1992 as meaning that all fines having the nature of criminal sanctions within the meaning of Article 6 ECHR (whether imposed under criminal law or not), are tax deductible.

### **4. COMMISSION'S OBSERVATIONS**

16. The Commission points out that it is submitting observations under Article 15(3) of Regulation No 1/2003 only to the extent that the coherent application of Articles 101 and 102 TFEU so requires.
17. It appears from the questions referred for a preliminary ruling that the Court of First Instance does not exclude the possibility of interpreting Article 53(6) WIB 1992 as meaning that the exclusion of deductibility does not apply to fines imposed by the Commission under Regulation No 1/2003, with the result that such fines would be tax deductible.
18. Without wishing to pronounce on the question whether such a situation is contrary to the principle of equal treatment laid down in the Belgian Constitution, the Commission would like in these observations to set out its view that an interpretation of Article 53(6) WIB 1992 according to which fines imposed by the

Commission under Regulation No 1/2003 are tax deductible is incompatible with EU law.

19. The fines which the Commission imposes pursuant to Regulation No 1/2003 have their basis in Article 103 TFEU, which states that the regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU may make provision for fines and periodic penalty payments to ensure compliance with the prohibitions laid down in those Articles. These penalties are designed to ensure the effective supervision of anti-competitive agreements and abuses of dominant positions<sup>7</sup>.
20. According to Article 23(2)(a) of Regulation No 1/2003, the Commission may impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 or Article 102 TFEU. When imposing the fine, the Commission must take into account the gravity and the duration of the infringement (Article 23(3) of Regulation No 1/2003). Moreover, the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003. In order to ensure the transparency and impartiality of its decisions, the Commission has published guidelines on the method of setting fines<sup>8</sup>.
21. The Commission's power to impose fines on undertakings and associations of undertakings which intentionally or negligently commit an infringement of Article 101 or Article 102 TFEU 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<sup>9</sup>. That task not only includes the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles<sup>10</sup>.
22. To this end, the Commission must ensure that its action has the necessary deterrent effect<sup>11</sup>. When the Commission identifies an infringement of Article 101 or 102 TFEU it may, therefore, be necessary to fine those who have acted in breach of the law. According to the Court of Justice, there is an intrinsic link between the fines provided for in Article 103(2)(a) TFEU and the application of Articles 101 and 102 TFEU, in that the latter articles would be ineffective if they were not accompanied by the fines provided for in Article 103<sup>12</sup>.

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<sup>7</sup> Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-4833, paragraph 34.

<sup>8</sup> Guidelines on the method of setting fines pursuant to Article 8(2)(a) of Regulation (EC) No 1/2003, OJ C 210, 1.9.2006, p. 2. These Guidelines replace the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, 14.1.1998, p. 3).

<sup>9</sup> Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-4833, paragraph 35.

<sup>10</sup> Joined Cases 100 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 105; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rorindustri and others v Commission* [2005] ECR I-5425, paragraph 170.

<sup>11</sup> Joined Cases 100 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 106.

<sup>12</sup> Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-4833, paragraph 36.

23. It also follows from the Court of Justice case law that the amount of the fine must be set at such a level that it has a sufficiently deterrent effect, not only to punish the undertakings concerned, but also to deter other undertakings from engaging in or continuing behaviour that is contrary to Articles 101 and 102 TFEU<sup>13</sup>. The fines imposed by the Commission thus serve both a punitive and a deterrent purpose<sup>14</sup>.
24. The Commission emphasises that the fines imposed under Regulation No 1/2003 serve a punitive and deterrent purpose and are thus not primarily intended to deprive the party which breached the competition rules of the advantages which it would have obtained from this infringement. As the Commission stated in its observations to the Amsterdam Court of Appeal and the Supreme Court of the Netherlands, referred to above, a fine can indeed have the effect of fully or partially removing the advantages derived from the infringement. If the scale of the advantage derived can be objectively established – in most cases it will be difficult to give a reliable estimate of this – the Commission can take this into account<sup>15</sup> and ensure that the fine is at least higher than the amount of the gains improperly made<sup>16</sup>. The advantage an undertaking has derived from an infringement may thus play a part in the calculation of the amount of a fine, in the sense that the fine will not have a deterrent effect if it is less than the advantage unlawfully obtained. This does not mean, however, that when setting a fine one amount is calculated that corresponds to the advantage unlawfully obtained and another that corresponds to the punitive element. On the contrary, the fine as a whole serves a punitive and deterrent purpose, not an ‘enrichment deprivation’ purpose<sup>17</sup>.
25. In the Commission’s view, the punitive and deterrent purpose of the fines imposed pursuant to Regulation No 1/2003 will be undermined if Member States accept that the undertakings concerned can deduct these fines from their taxable profits. The result of this is, after all, that the undertakings' taxable income is reduced by the

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<sup>13</sup> See point 4 of the Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, OJ C 210, 1.9.2006, p. 2.

<sup>14</sup> See for example: Joined Cases 100 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 105; Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 22; Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, paragraph 16.

<sup>15</sup> Joined Cases 100 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 129; Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689, paragraph 127; Case T-213/00 *CMA CGM and others v Commission* [2003] ECR 11-913, paragraphs 340-343. In the same vein, see point 5(b) of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, 14.1.1998, p. 3).

<sup>16</sup> See point 31 of the Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, OJ C 210, 1.9.2006, p. 2.

<sup>17</sup> In the same vein, see also judgment No 10/01358 of the Supreme Court of the Netherlands of 12 August 2011, paragraph 4.5: ‘The fine in question is a fine imposed by an institution of the European Union pursuant to Article 81 EC in conjunction with Article 15(2) of Regulation No 17, and as such is aimed at punishing the person to whom an infringement referred to in these provisions can be attributed. The fact that the turnover involved in the infringement may be taken into account when imposing the fine is immaterial. It is perfectly reasonable that this turnover should be taken into account when establishing the gravity of the infringement being punished by the fine. It is not the case that the fine is based on a calculation of the advantage derived from the infringement by the person sanctioned.’

amount of the fine and the undertakings pay less tax to the tax administration, so that ultimately part of the fine imposed by the Commission is offset by the national government.

26. The Court of Justice has ruled on this question in Case C-429/07 *X*, referred to above, in which the issue at stake was whether a dispute concerning the tax deductibility of fines imposed pursuant to Regulation No 1/2003 affected the coherent application of Articles 101 and 102 TFEU and the Commission had the right, under Article 15(3) of Regulation No 1/2003, to submit observations to the national court in such a dispute. In that context the Court of Justice held that the full or partial tax deductibility of a fine imposed by the Commission did impair the effectiveness of the penalty imposed by the EU competition authority. In the Court's words, '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'<sup>18</sup>.
27. As Advocate General Mengozzi stated in his Opinion in Case C-429/07<sup>19</sup>, the Court of First Instance had already ruled in Case T-10/89 *Hoechst v Commission* that it could not be deemed acceptable to the Commission that a fine would be paid in part by the government as a result of its being tax deductible<sup>20</sup>. Similarly, the Supreme Court of the Netherlands ruled that it followed from the Court of Justice's judgment in Case C-429/07 *X* that 'in connection with the effectiveness of sanctions imposed by the competition authorities of the European Union, the Netherlands is required to refuse to allow the party concerned to deduct the amount of the fine imposed upon it from its taxable profits'<sup>21</sup>.
28. It is clear to the Commission that tax deductibility undermines the deterrent effect of fines imposed in order to enforce compliance with the prohibitions laid down in the EU competition rules<sup>22</sup>. In that context, it is irrelevant that any profit which may have been made as a result of the infringement of the competition rule will already have been subject to income tax<sup>23</sup>. This might equally be the case for

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<sup>18</sup> Case C.429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-4833, paragraph 39.

<sup>19</sup> Opinion of Advocate General Mengozzi of 5 March 2009 in Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-4833, paragraph 34, footnote 7.

<sup>20</sup> See Case T-10/89 *Deutsche Bahn v Commission* [1997] ECR II-629, paragraph 369: 'The Court finds that in order to fix the amount of the fine to be imposed on the applicant the Commission must have taken into account the fact that it would be paid from profits after tax. If the fine was charged on taxable profits the result would be that the fine was paid in part by the State to which the undertaking pays tax, since it would reduce the taxable income of the undertaking. The Commission could not proceed on such a basis in calculating the amount of the fine to be imposed on Hoechst.'

<sup>21</sup> Judgment No 10/01358 of the Supreme Court of the Netherlands of 12 August 2011, paragraph 4.4.

<sup>22</sup> The fact that according to case law the Commission is not required to reduce a fine in order to take into account tax differences (see the judgment in Case 44/69 *Buchler v Commission* [1970] ECR 733, paragraph 51) does not invalidate this point. That judgment did not concern the compatibility of the tax deductibility of fines with EU law.

<sup>23</sup> The fact that the profit derived from the infringement may limit any loss incurred by the taxpayer and thus produce a tax disadvantage is equally irrelevant.



profits derived from an activity prohibited under criminal law. In such a situation Article 53(6) WIB 1992 appears to exclude deduction of the fine imposed for this type of criminal activity, regardless of whether the criminal activity has produced a taxable profit.

29. The Commission accordingly believes that national measures allowing fines imposed by the Commission to be tax deductible jeopardise the objectives of the Union (in this case the application of the EU competition rules) and thus go against the principle of sincere cooperation laid down in Article 4(3) TEU. Member States must refrain from such measures<sup>24</sup>. The fact that the EU legislator has not harmonised tax deductions for income tax does not detract from this general obligation, which derives directly from the Treaties.
30. In the Commission's view, a Member State would breach the principle of sincere cooperation if it allowed fines imposed by the Commission for infringements of the EU competition rules to be fully or partially deductible from taxable profits. Tax deductibility, after all, gives a significant advantage to the taxpayer in the sense that part of the fine is 'refunded' by the government. Given that fines imposed pursuant to Regulation No 1/2003 are of a punitive and deterrent nature, full or partial tax deductibility undermines their deterrent effect.
31. For this reason, the Commission believes that to interpret Article 53(6) WIB 1992 as allowing a fine imposed under Regulation No 1/2003 to be tax deductible would be incompatible with EU law.
32. The Commission notes that the Court of First Instance considers Article 53(6) WIB 1992 to be open to different interpretations. On the basis of Article 4(3) TEU, Member State authorities, including the courts, are required in such cases to choose an interpretation of the national law which is compatible with EU law<sup>25</sup>.

## 5. CONCLUSION

33. For the reasons set out above, the Commission believes that an interpretation of national law that would allow fines imposed by the Commission under Regulation No 1/2003 to be tax deductible is incompatible with EU law. The Commission is submitting its observations to the Constitutional Court to enable the Court to take this position into account when answering the questions referred to it for a preliminary ruling by the Court of First Instance.
34. The observations submitted by the Commission under Article 15(3) of Regulation No 1/2003 are not binding on national courts. Only the Court of Justice can issue a binding interpretation of the provisions of EU law via the preliminary ruling procedure. Article 267 TFEU states that, where a question of the interpretation of EU law is raised before any court or tribunal of a Member State, that court or

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<sup>24</sup> We would refer, by way of analogy, to the Court of Justice case law which confirmed that taxation by the Member States of the salaries of the teaching staff of the European Schools (which are paid partly from the Union budget) infringed Article 4(3) TEU (formerly Article 10 EC): Case 44/84 *Hurd* [1986] ECR 29; Case C-6/89 *Commission v Belgium* [1990] ECR I-1595.

<sup>25</sup> See Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39; Case C-60/02 *X* [2004] ECR I-651, paragraph 59. A Member State may also impose on individuals an interpretation of national law in keeping with EU law: judgment of the Court of Justice of 15 September 2011 in Case C-53/10 *Mücksch*, not yet reported, paragraph 34.

tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. If such a question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court, unless the Court has already ruled on this question or there cannot reasonably be any doubt about the correct interpretation.

35. The Commission believes that EU law is clearly opposed to national measures that provide for the tax deductibility of fines imposed under Regulation No 1/2003. The Court of Justice has not yet been asked to rule on this question, but has already expressed a view on the matter indirectly, in Case C-429/07, referred to above.
36. In most European Union Member States fines imposed for infringement of the competition rules are not tax deductible. They are usually covered by a general rule excluding administrative fines from tax deductibility. This is the case, for example, in France and Luxembourg<sup>26</sup>. In 2010 the Italian Court of Cassation confirmed that fines imposed by the Commission or by the national competition authority are not tax deductible in Italy either<sup>27</sup>. Since the judgment of the Supreme Court of the Netherlands (referred to above) this has clearly been the correct interpretation of Dutch tax law too. In Germany and Austria, however, the tax deductibility of fines imposed by the Commission under Regulation No 1/2003 cannot be ruled out. In these Member States, tax deductibility of fines imposed for infringements of the competition rules is allowed for that part of the fine that serves as 'enrichment deprivation'<sup>28</sup>.
37. The issue of deductibility remains unclear in the Belgian legal system. The Tax Administration takes the view that fines imposed for infringement of EU competition rules – like fines imposed for infringement of Belgian competition rules – are not deductible as business expenses<sup>29</sup>. However, this position is not universally adopted by the courts, as is apparent from the judgment of the Antwerp Court of Appeal of 23 June 2009 which accepted the tax deduction of a fine imposed by the Belgian Competition Council.
38. If the Constitutional Court has doubts about the interpretation of EU law advocated by the Commission, the Commission would urge it to refer the question of the compatibility with EU law of national measures allowing the tax deductibility of fines imposed under Regulation No 1/2003 to the Court of Justice.

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<sup>26</sup> See Article 39-2 of the Code général des impôts (France) and Article 12(4) of the Loi modifiée concernant l'impôt sur le revenu (Luxembourg).

<sup>27</sup> Judgment No 5050/2010 of the Supreme Court of Cassation of 5 March 2010.

<sup>28</sup> See Section 4 para. 5 No 8 of the Einkommensteuergesetz. See also the judgment of the Federal Finance Court of 24 March 2004, I B 203/03 (according to which Austrian law also allows fines to be deductible in so far as they serve to deprive the party of the benefits derived from the infringement).

<sup>29</sup> Circular No Ci.RH.243/588.588 (AOIF 25/2008) of 13 August 2008.

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