JUDGMENT OF THE COURT (Second Chamber)

7 September 2006 *

In Case C-526/04,

REFERENCE for a preliminary ruling under Article 234 EC by the Cour de cassation (France), made by decision of 14 December 2004, received at the Court on 29 December 2004, in the proceedings

Laboratoires Boiron SA

v

Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon, assuming the rights and obligations of the **Agence centrale des organismes de sécurité sociale (ACOSS)**,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. Makarczyk, R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

* Language of the case: French.

Advocate General: A. Tizzano,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 13 October 2005,

after considering the observations submitted on behalf of:

— Laboratoires Boiron SA, by A. Lyon-Caen, J. Philippe, C.-M. Dorémus and O. Cavézian, avocats,

— the Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon, assuming the rights and obligations of the Agence centrale des organismes de sécurité sociale (ACOSS), by H. Calvet and O. Billard, avocats,

— the French Government, by G. de Bergues and S. Ramet, acting as Agents,

— the Commission of the European Communities, by V. Di Bucci, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of provisions of the EC Treaty relating to State aid, and in particular Articles 87 EC and 88(3) EC.

2 The reference was submitted in the course of an action brought by Laboratoires Boiron SA ('Boiron') seeking repayment of the sum which it had paid to the Agence centrale des organismes de sécurité sociale (Central Agency for Social Security Bodies) ('ACOSS') by way of a tax on direct sales of medicines. The Union de recouvrement des cotisations de la sécurité sociale et d'allocations familiales de Lyon (Union for recovery of social security and family allowance contributions of Lyons) ('Urssaf') subsequently assumed the rights and obligations of ACOSS.

National law

3 Article R. 5106-5 of the Code de la santé publique (Public Health Code) defines a wholesale distributor as 'any undertaking that purchases and stocks medicines other than those intended for testing on humans, for the purpose of their wholesale distribution in their unaltered state'.

4 The Ministerial Decree of 3 October 1962 on the duties of wholesale distributors in relation to the supply of medicines to pharmacies (*Journal officiel de la République*

française ('JORF') of 12 October 1962, p. 9999), which was in force until February 1998, included the following provisions:

'Article 1 — Every pharmaceuticals wholesaler covered by the fourth subparagraph of Article R. 5115-6 of the Public Health Code and any branches it may have must keep a permanent stock of medicinal products sufficient to ensure a month's supply to the pharmacies in its distribution area which it regularly serves as customers.

The stock of medicines must amount to a "range" of medicines, including at least two thirds of all forms of medicines currently sold, and must represent in value the equivalent of the average monthly turnover for the preceding year.

Article 2 — Every pharmaceuticals wholesaler and any branches it may have must be able to guarantee delivery of every medicine sold on the market to the pharmacies in its distribution area which it regularly serves as customers and, in the case of medicines in their "range", within 24 hours of receipt of the relevant order.

They must manage their stock of medicines so as to ensure availability at all times.'

5 Those rules were changed, inter alia, by Decree No 98-79 of 11 February 1998 on pharmaceuticals companies amending the Public Health Code (JORF of 13 February 1998, p. 2287).

6 Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 (JORF of 23 December 1997, p. 18635), which inserted inter alia Article

L. 245-6-1 into the Social Security Code, introduced a tax contribution of 2.5% of pre-tax turnover achieved in France by pharmaceutical laboratories from wholesale sales of medicinal products to dispensing pharmacies, mutual pharmacies and pharmacies belonging to mining friendly societies. The contribution is called the 'tax on direct sales'.

7 Article L. 245-6-4 of the Social Security Code provides that the tax on direct sales is levied for the Caisse nationale d'assurance maladie des travailleurs salariés (National Sickness Insurance Fund for Employees).

8 The French Conseil Constitutionnel pointed out in Decision No 97-393 of 18 December 1997 (JORF of 23 December 1997, p. 18649), which it handed down in an action challenging Article 12 of Law No 97-1164, that the tax on direct sales, which is not levied on sales of medicines by wholesale distributors, was introduced to help finance the National Sickness Insurance Fund and to restore the balance of competition between the various distribution channels for medicines, considered to be distorted by the fact that wholesale distributors are under a duty of public service which is not imposed on pharmaceutical laboratories.

9 Article L. 245-6-1 of the Social Security Code was repealed, with effect from 1 January 2003, by Article 16 of Law No 2002-1487 of 20 December 2002 on social security financing for 2003 (JORF of 24 December 2002, p. 21482).

The main proceedings and the questions referred for a preliminary ruling

10 Boiron is a company incorporated under French law which produces homeopathic medicines which it distributes in France exclusively to pharmacies through a system of direct sales or through wholesale distributors.

11 In relation to the tax on direct sales for 1998 and 1999, Boiron declared to ACOSS only the turnover from direct sales to pharmacies, excluding that corresponding to sales through wholesale distributors.

12 ACOSS took the view that the latter turnover should be included in the total of direct sales on which the tax is based, and thus made an adjustment to reflect the inclusion of that amount.

13 Boiron paid the amount claimed but at the same disputed it. In the absence of a response from the board of ACOSS, to which it had submitted an administrative appeal, Boiron brought proceedings before the Tribunal des affaires de sécurité sociale de Lyon (Social Security Tribunal, Lyons) to obtain repayment of the amount paid.

14 In support of its action, Boiron essentially argued that exempting wholesale distributors from the disputed tax amounted to unlawful State aid within the meaning of Article 87 EC.

15 By decision of 3 June 2000, the Tribunal des affaires de sécurité sociale de Lyon granted Boiron's application and ordered ACOSS to repay Boiron the amount paid.

16 The Cour d'appel de Lyon (Court of Appeal, Lyons), to which ACOSS appealed, first stayed the proceedings until judgment was given by the Court of Justice in Case C-53/00 *Ferring* [2001] ECR I-9067, and then by judgment of 29 October 2002 set aside the judgment given at first instance.

17 Boiron entered an appeal in law, raising four pleas of which the first, relating to the interpretation of provisions of the Treaty on State aid, is the subject of the questions referred for a preliminary ruling.

18 The Cour de cassation (Court of Cassation) points out, first, that the Cour d'appel de Lyon dismissed Boiron's appeal, holding, on the basis of the judgment of the Court of Justice in Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 80 and the case-law cited therein, that persons liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that contribution. That case-law was confirmed by the judgment in Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 47.

19 The referring court observes that in other judgments the Court of Justice has not declared inadmissible actions for reimbursement of taxes or of contributions levied in breach of the obligation of prior notification laid down in Article 88(3) EC.

20 The Cour de cassation is of the view that those judgments either rule on the point only implicitly, even if a plea of inadmissibility was raised (see *Ferring*), or relate to aid schemes in respect of which the charges or contributions for which reimbursement was sought had been levied specifically for the purpose of financing the contested aid (See Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249 and Case C-126/01 *GEMO* [2003] ECR I-13769).

21 The national court recalls, secondly, that in the judgment in *Ferring*, the Court held that the tax on direct sales, because it is charged only on direct sales of medicines by pharmaceutical laboratories, amounts to State aid to wholesale distributors only to

the extent that the advantage in not being assessed to that tax exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law.

22 The Cour de cassation observes that, in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, the Court of Justice stated that in order for public subsidies to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, it is for the national court to ascertain that the following conditions are satisfied ('the so-called "Altmark" conditions'):

— first, the recipient undertaking must actually be required to discharge public service obligations and those obligations have to be clearly defined;

— second, the parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner;

— third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

— fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation

needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided for so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

23 In that respect, the national court points out first that the so-called 'Altmark' conditions relate to data to which an economic operator, which alleges that the aid is unlawful and which is not involved in the legal relations linking the recipient of the subsidy or exemption to the State or the body which the State has set up or appointed to manage that aid, does not necessarily have access if it is not involved in proceedings challenging the recipient itself.

24 The Cour de cassation goes on to observe that, according to the settled case-law of the Court, any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law (see, in particular, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14, and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 48).

25 The national court observes, finally, that under provisions of national law on the burden of proof, an economic operator which alleges in support of its claim for repayment that the measure at issue amounts to State aid can be required to show that the so-called 'Altmark' conditions are not met. It adds that the failure to produce the evidence necessary for that operator's claim to succeed may be the only impediment to proving that that measure amounts to State aid.

26 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Community law be interpreted as meaning that a pharmaceutical laboratory liable to pay a contribution such as that under Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 is, in order to obtain its repayment, entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid?

(2) If the answer to Question 1 is in the affirmative and since the success of the claim for repayment may depend solely on evidence produced by the claimant, must Community law be interpreted as meaning that rules of national law which make that repayment subject to proof by the claimant that the advantage received by the wholesale distributors exceeds the costs which they bear in discharging the public service obligations imposed on them by the national legislation or that the conditions laid down by the Court of Justice in [*Altmark Trans and Regierungspräsidium Magdeburg*] are not satisfied constitute rules of evidence which have the effect of making it practically impossible or excessively difficult to secure repayment of a mandatory contribution, such as that under Article 245-6-1 of the Social Security Code, which has been claimed before the competent authority, on the ground that the exemption from the contribution to which those wholesale distributors are entitled constitutes State aid which has not been notified to the Commission of the European Communities?'

The questions

The first question

27 It is clear from the judgment in *Ferring* that Article 87 EC is to be interpreted as meaning that, because it is charged only on direct sales of medicines by

pharmaceutical laboratories, a measure such as the direct tax on sales amounts to State aid to wholesale distributors only to the extent that it overcompensates the latter, that is to say, in so far as the advantage for those economic operators in not being liable to that charge exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law.

28 In the present case, Boiron, a pharmaceutical laboratory liable to the tax on direct sales, argues that the fact that the wholesale distributors are not liable for that charge overcompensates them and, as such, thus amounts to unlawful aid in their favour. On that basis, the operator has claimed reimbursement of the amounts paid in respect of that tax for the financial years 1998 and 1999.

29 In that respect, it should be pointed out that an aid measure within the meaning of Article 87(1) EC which is put into effect in infringement of the obligations arising from Article 88(3) EC is unlawful. It is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by the national authorities of the prohibition on putting aid into effect, drawing all the necessary consequences under national law as regards both the validity of decisions giving effect to aid measures and the recovery of the financial support granted (see, in particular, Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France and Others* [2005] ECR I-9481, paragraph 30 and the case-law cited therein).

30 It is true that in a number of cases brought before it the Court of Justice has held that those liable to pay a charge cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that charge or to obtain reimbursement (see, in particular, *Banks*, paragraph 80, and

Distribution Casino France, paragraphs 42 and 44, and Joined Cases C-393/04 and C-41/05 *Air Liquide* [2006] ECR I-5293, paragraph 43).

31 However, the nature of the national measures at issue in the cases giving rise to the judgments referred to in the preceding paragraph differs essentially from that of the tax on direct sales.

32 Each of those cases concerns an exemption for certain operators from a tax of general application and in which it is alleged that that exemption itself amounted to an aid measure.

33 The case in the main proceedings here, by contrast, does not involve such a taxation scheme, but rather a charge for which only one of the two categories of competing operators, namely pharmaceutical laboratories, is liable.

34 In such a case of unequal liability for a charge, the supposed aid derives from the fact that another category of economic operators with which the category subject to the charge is in direct competition, in this case wholesale distributors, is not liable for that charge.

35 In the present case, it is common ground that that absence of liability is, moreover, a deliberate objective, if not the principal objective, of the tax on direct sales.

36 In this respect, it should be noted that the Court observed in paragraph 19 of *Ferring* that there are two directly competing distribution channels for medicines in France, that of the wholesale distributors and that of the pharmaceutical laboratories which sell directly to pharmacies. The Court further stated in that paragraph that a particular objective of the tax on direct sales is to restore the balance of competition between the two distribution channels for medicines, which, according to the French legislature, is distorted by the imposition of public service obligations on wholesale distributors alone. Finally, the Court added that, following the introduction of Law No 97-1164 and the direct sales tax, not only did the growth of direct sales recorded in the immediately preceding years cease, but the trend was even reversed, with wholesale distributors recovering market share.

37 If it were shown that the absence of liability to the tax on direct sales leads to an overcompensation of the wholesale distributors, to the extent that the advantage in not being liable exceeds the additional costs that they bear in discharging the public service obligations imposed on them, the liability of a pharmaceutical laboratory such as Boiron to such a charge would constitute an act giving effect to an aid measure.

38 If this were the case, as pointed out in paragraph 29 of the present judgment, it would be for the national courts to draw all the necessary consequences under national law as regards the validity of such an act.

39 In this case, the measure alleged to constitute an aid is the tax on direct sales itself and not some exemption which is separable from that tax.

40 In such a case, it should be accepted that an economic operator such as Boiron may plead that the charge on direct sales is unlawful, for the purposes of applying for reimbursement, on the ground that it amounts to an aid measure.

41 The result of this would not, in any case, be to allow the national court to increase the number of recipients of the aid. On the contrary, such reimbursement, to the extent that it is payable, is a very appropriate way of reducing the number of economic operators harmed by the measure deemed to constitute aid, and thus, of limiting the anti-competitive effects of that measure.

42 The referring court and the parties which submitted observations before the Court raised the question as to whether such a right to plead that the tax on direct sales deemed to be State aid is unlawful in order to obtain reimbursement is consistent with the principles underlying the case-law of the Court in relation to parafiscal charges first set down in the judgment in *Van Calster*, and developed in subsequent judgments.

43 It is clear from that case-law that, where an aid measure of which the method of financing is an integral part has been implemented in breach of the obligation to notify, national courts must in principle order reimbursement of charges or contributions levied specifically for the purpose of financing that aid (*Van Calster*, paragraph 54).

44 In that regard, the Court has stated that, for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid (see, in particular, *Air Liquide*, paragraph 46 and the case-law cited therein).

45 In the case of the tax on direct sales, a special feature is that that charge and the alleged aid measure constitute two elements of one and the same fiscal measure which are inseparable. In such a case, the charge and the aid are more closely linked than in the case of a parafiscal charge such as that forming the subject-matter of the judgment in *Van Calster.*

46 In those circumstances, to grant an economic operator such as Boiron the right to plead that the tax on direct sales is unlawful in order to obtain reimbursement of the sums paid by way of that tax is consistent with the principles underlying the case-law of the Court in relation to parafiscal charges first set down in the judgment of *Van Calster,* and developed in subsequent judgments.

47 It should be added that, in any event, such reimbursement can be granted only if it is shown that those sums or, at the very least, the part of those sums for which reimbursement is claimed, amount to an overcompensation of wholesale distributors and thus, by this measure, confer an economic advantage on the latter, if, in addition, the other conditions referred to in Article 87(1) EC for a measure to be classed as State aid are also fulfilled.

48 Having regard to the foregoing, the answer to the first question must be that Community law must be interpreted as meaning that a pharmaceutical laboratory liable to pay a contribution such as that provided for by Article 12 of Law No 97-1164 is entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid, in order to obtain reimbursement of the part of the sums paid which corresponds to the economic advantage unfairly obtained by wholesale distributors.

The second question

49 In the case in the main proceedings, a pharmaceutical laboratory liable to pay the tax on direct sales, where it is common ground that that charge was not notified under Article 88(3) EC, pleads, in order to obtain its reimbursement, that that charge is unlawful on the ground that the fact that wholesale distributors, which are the laboratory's direct competitors, are not liable to pay that contribution constitutes State aid.

50 In that context, the national court is asking essentially whether compliance with the principle of effectiveness is ensured where, in order to be able to obtain reimbursement of the sums paid by way of the tax on direct sales in accordance with the applicable national law on the burden of proof, it is for the economic operator seeking reimbursement of those sums to establish that the absence of liability of wholesale distributors amounts to an overcompensation of the latter, inasmuch as at least one of the so-called 'Altmark' conditions is not met, and thus, as such, constitutes an economic advantage referred to in Article 87(1) EC.

51 In the absence of Community rules governing the matter, as is the case in the main proceedings, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effects of Community law, provided that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, inter alia, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 60 and the case-law cited therein).

52 In that respect, the national court observes, first, that if in principle the burden of proof in respect of overcompensation of wholesale distributors, requiring it to be

shown that at least one of the four so-called 'Altmark' conditions is not met, falls, in accordance with the applicable national law, on the economic operator alleging that such overcompensation constitutes aid in order to obtain reimbursement of the charge at issue, that national law also confers on the national court a wide power to order of its own motion all measures of inquiry permissible in law.

53 The national court points out, secondly, that that power is purely discretionary and that the failure of that operator to produce the evidence necessary for its claim to succeed may be the only obstacle to showing that the tax on direct sales amounts to State aid within the meaning of Article 88(3) EC, inasmuch as the so-called 'Altmark' conditions relate to data to which that operator does not necessarily have access if it is not involved in proceedings challenging the recipient of the alleged aid.

54 The Union de Recouvrement des cotisations de la Sécurité Sociale et d'Allocations Familiales (Urssaf) de Lyon also stated that the national court has, in particular, the power to order a party to the proceedings or a third party to produce a particular document.

55 In those circumstances, in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

56 Having regard to the foregoing, the answer to the second question must be that Community law does not preclude the application of rules of national law which

make reimbursement of an obligatory contribution, such as that provided for in Article 12 of Law No 97-1164, subject to proof by the claimant seeking reimbursement that the advantage derived by wholesale distributors from their not being liable to pay that contribution exceeds the costs which they bear in discharging the public service obligations imposed on them by the national rules and, in particular, that at least one of the so-called 'Altmark' conditions is not satisfied.

57 However, in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

1. **Community law must be interpreted as meaning that a pharmaceutical laboratory liable to pay a contribution such as that provided for by Article**

12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 is entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid in order to obtain reimbursement of the part of the sums paid which corresponds to the economic advantage unfairly obtained by wholesale distributors.

2. **Community law does not preclude the application of rules of national law which make reimbursement of a mandatory contribution such as that provided for in Article 12 of Law No 97-1164 subject to proof by the claimant seeking reimbursement that the advantage derived by wholesale distributors from their not being liable to pay that contribution exceeds the costs which they bear in discharging the public service obligations imposed on them by the national rules and, in particular, that at least one of the conditions laid down in the judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 is not satisfied.**

However, in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

[Signatures]