JUDGMENT OF THE COURT (First Chamber)

13 January 2005 *

In Case C-174/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 8 March 2002, received at the Court on 13 May 2002, in the proceedings

Streekgewest Westelijk Noord-Brabant

v

Staatssecretaris van Financiën,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas, K. Lenaerts, S. von Bahr and K. Schiemann (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: L.A. Geelhoed,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 January 2004,

after considering the observations submitted on behalf of:

— Streekgewest Westelijk Noord-Brabant, by H. Gilliams and P.H.L.M Kuypers, advocaten,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by J. Flett and H. van Vliet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 93(3) of the EC Treaty (now Article 88(3) EC), in order, in particular, to determine who may

rely on the prohibition on implementation referred to in the last sentence of that provision and to clarify the circumstances in which there is a sufficient link between an aid and a tax financing that aid for the prohibition laid down by the last sentence of Article 93(3) to extend to that tax.

2 The reference was made in the course of proceedings brought by Streekgewest Westelijk Noord-Brabant (a local body responsible for collecting domestic waste, 'Streekgewest') and the Staatssecretaris van Financiën ('the Staatssecretaris'). Streekgewest seeks the reimbursement by the Statssecretaris of levies on waste paid in accordance with Article 18 of the Wet belastingen op milieugrondslag of 23 December 1994 (Law introducing taxes for the protection of the environment, *Staatsblad* 1994, pp. 923, 924 and 925, 'the WBM'), on the ground that they were levied in breach of the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty.

Legal background

Community legislation

3 Article 93(3) of the Treaty provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

National legislation

4 In accordance with Article 93(3) of the Treaty, the Netherlands Government, by letter of 7 August 1992, notified the Commission of the draft Wet op de verbruiksbelastingen op milieugrondslag (Law introducing taxes on consumption for the protection of the environment) which, in an amended version, subsequently gave rise to the WBM. By letter of 3 December 1992, the Commission informed the Netherlands Government that on 25 November 1992 it had taken the decision not to raise any objections to the aid measures included in the draft law. That decision was published in the *Official Journal of the European Communities* of 24 March 1993 (OJ 1993 C 83, p. 3).

5 During the parliamentary examination of the draft law, several amendments were introduced. After the Netherlands Government had notified those amendments to the Commission by letter of 6 December 1993, the latter indicated, by letter of 13 April 1994, that it had taken a decision on 29 March 1994 not to raise any objections to the proposed amendments. That decision was published in the *Official Journal of the European Communities* of 4 June 1994 (OJ 1994 C 153, p. 20).

6 On 13 October 1994, a draft law intended to amend the WBM by the introduction of one permanent and two temporary amendments was put before the Netherlands Parliament. As regards the levy on waste, that draft law provided for an increase in its amount from NLG 28.50 to NLG 29.20 per 1 000 kg of waste, and for the possibility of reimbursement of that levy to persons delivering de-inking residues for processing and to persons delivering waste from the recycling of plastic materials to a waste processing undertaking. The Netherlands Government notified those measures, referred to as 'refinements', to the Commission by letter of 27 October 1994.

7 By letter of 25 November 1994, the Commission drew the attention of the Netherlands Government to the fact that the notification was incomplete, and it raised a number of questions in that regard. The Netherlands Government replied to those questions by letter of 20 December 1994. In that letter it went on to state that the draft law also concerned two new aid measures. One of those measures consisted of a temporary exemption from the levy on waste with respect to purifiable dredging spoil.

8 The WBM, the law implementing that legislative proposal, and the amending law were adopted by the First Chamber of the Staten-Generaal on 21 December 1994. By Royal Decree of 23 December 1994, the date of entry into force of the amended WBM was fixed for 1 January 1995.

9 Taking the view that the WBM, as amended, entered into force on 1 January 1995, the Commission informed the Netherlands Government, by letter of 25 January 1995, that it considered that the aid measures at issue had not been notified, since they had been adopted before it had defined its position in respect of them and it asked the Netherlands Government to send it, inter alia, the full text of the WBM. The Commission did not give its decision until the end of the tax period in question. By fax of 23 May 1995, supplemented by letter of 3 July 1995, it stated that in its view there were no aid elements incompatible with the common market.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Streekgewest is a body with legal personality initially composed of and controlled by 18 municipalities in the region of Westelijk Noord-Brabant in the Netherlands. Since 1 January 1997, it has been composed of seven municipalities. Streekgewest is responsible for collecting domestic waste and transporting it to a processing facility

for which it is also responsible. Each time waste is delivered to a processing facility the levy is payable in accordance with Article 18 of the WBM.

11 For the period from 1 to 31 January 1995, Streekgewest paid NLG 499 914.00 in tax on waste. However, it lodged a complaint and requested a refund of the amount paid. That request was rejected by decision of the tax inspector. Streekgewest brought an action against that decision before the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, 's-Gravenhage, Netherlands), which ordered the refund of NLG 80 796.40.

12 The Staatssecretaris brought an appeal against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). Streekgewest also challenged the Gerechtshof's refusal to award it a refund of the whole amount.

13 Taking the view that the outcome of the dispute in the main proceedings depends on the interpretation of Article 93(3) of the Treaty, the Hoge Raad der Nederlanden decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. May only an individual who is affected by a distortion of cross-border competition as a result of an aid measure rely on the last sentence of Article 93(3) of the EC Treaty ...?

2. Where an aid measure within the meaning of the last sentence of Article 93(3) of the EC Treaty ... consists of an exemption from a tax (which is to be construed as also meaning a reduction in or relief on such tax) whose proceeds

are paid into the public coffers, and no provision in that respect is made for suspending the exemption pending the notification procedure, must that tax be regarded as part of that aid measure, by virtue of the very fact that the levying of the tax on persons who do not enjoy an exemption is the means whereby a favourable effect is produced, so that as long as the implementation of that aid measure is not permitted under the abovementioned provision, the prohibition laid down therein is also applicable to (the levying of) that tax?

3. In the event that the answer to the previous question is in the negative: Where a connection [such as the fact that a small part of the tax (NLG 0.70 per tonne of waste) serves to compensate for the reimbursement schemes referred to in paragraph 6 of this judgment] must be established between the increase in a particular tax whose proceeds are paid into the public coffers and a proposed aid measure within the meaning of the last sentence of Article 93(3) of the EC Treaty ..., must the introduction of that increase be regarded as a (start on the) putting into effect of that aid measure within the meaning of this provision? If the answer to this question turns on the intensity of that connection, what circumstances are of relevance in this respect?

4. If the prohibition on implementation of the aid measure also relates to the tax, does a final decision by the Commission declaring the aid measure compatible with the common market not mean that the unlawfulness of the tax is retroactively corrected?

5. If the prohibition on implementation also relates to the tax, can persons on whom the tax is levied oppose such tax in legal proceedings by relying on the direct effect of Article 93(3) of the Treaty in respect of the total amount of the tax or only in respect of part thereof?

6. In the latter case, do specific requirements stem from Community law as regards the manner in which it must be determined which part of the tax is covered by the prohibition in the last sentence of Article 93[3] of the Treaty?'

The first question

14 By its first question the national court asks, essentially, whether the provisions of the last sentence of Article 93(3) of the Treaty may be relied on by a litigant who is not affected by distortion of cross-border competition arising from an aid measure.

15 It is settled case-law of the Court of Justice that, as a result of the direct effect which the last sentence of Article 93(3) of the Treaty has been held to have, the immediate enforceability of the prohibition on implementation referred to in that article extends to all aid which has been implemented without being notified (Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraph 11 (*'FNCE'*)).

16 Furthermore, the Court has held that where a method of financing aid by means of a tax forms an integral part of the aid measure, the consequences of a failure by the national authorities to comply with the last sentence of Article 93(3) of the Treaty must also apply to that aspect of the aid (Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 52). In those circumstances, it follows that the national authorities are therefore required in principle to repay

charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20, and *Van Calster and Others*, paragraph 53).

17 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. Where such a breach is invoked by individuals who may rely on it and is established by the national courts, the latter must take all the consequential measures under national law (see, in particular, the judgments in *FNCE*, paragraph 12, and in Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 30).

18 As regards the national rules relating to the determination of an individual's standing and legal interest in bringing proceedings, the Court has held that Community law requires that such rules do not undermine the right to effective judicial protection when exercising the rights conferred by Community law (judgments in Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 24, and Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 50).

19 An individual may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty not only in order to erase the negative effects of the distortion of competition created by the grant of unlawful aid, but also in order to obtain a refund of a tax levied in breach of that provision. In the latter case, the question whether an individual has been affected by the distortion of competition arising from the aid measure is irrelevant to the assessment of his interest in bringing proceedings. The only fact to be taken into consideration is that the individual is subject to a tax which is an integral part of a measure implemented in breach of the prohibition referred to in that provision.

20 That conclusion is justified, moreover, by the objective of ensuring the effectiveness of the prohibition on implementation of aid referred to in the last sentence of Article 93(3) of the Treaty (see, inter alia, the judgment in *FNCE*, paragraph 16).

21 The answer to the first question must therefore be that the last sentence of Article 93(3) of the Treaty must be interpreted as meaning that it may be relied on by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, whether or not the person is affected by the distortion of competition resulting from that aid measure.

The second and third questions

22 The second and third questions concern the circumstances in which there is a sufficient link between a tax and an aid measure which consists of an exemption from that tax with the result that the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty applies not only to the aid measure but also to the tax. It is appropriate to deal with those two questions together.

23 By its second question, the national court asks, essentially, whether the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty applies to a tax where an aid measure consists of an exemption from that tax. By its third question, the national court wishes to know in what circumstances an increase in the tax as compensation for the loss of revenue due to the exemption creates a sufficient link between the aid and the tax, so that the prohibition on implementation referred to in that provision extends to the tax.

24 It must be observed, at the outset, as the Advocate General pointed out in points 28 and 29 of his Opinion, that the Treaty makes a clear distinction between, on the one hand, the regime in Articles 92 of the EC Treaty (now, after amendment, Article 87 EC) 93 of the Treaty and 94 of the EC Treaty (now Article 89 EC), concerning State aid and, on the other, that in Articles 101 of the EC Treaty (now, after amendment, Article 96 EC) and 102 of the EC Treaty (now Article 97 EC) concerning the distortions which arise from differences between the laws, regulations or administrative provisions of the Member States and, in particular, their tax provisions.

25 Taxes do not fall within the scope of the provisions of the Treaty concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure.

26 For a tax, or part of 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. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of the aid with the common market (see, to that effect, Case 47/69 *France* v *Commission* [1970] ECR 487, paragraphs 17, 20 and 21). The Court thus held that, where there is such a link between the aid measure and its financing, the notification of the aid provided for in Article 93(3) of the Treaty must also cover the method of financing, so that the Commission may consider it on the basis of all the facts. If this requirement is not satisfied, it is possible that the Commission may declare that an aid measure is compatible when, if the Commission had been aware of its method of financing, it could not have been so declared (*Van Calster and Others*, paragraphs 49 and 50, and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 30).

27 In the case of the main proceedings, the aid measure takes the form of an exemption from tax on waste. Even if, for the purposes of the budget estimates of the Member State in question, the tax advantage was compensated for by the increase in the amount of the tax on waste from NLG 28.50 to NLG 29.20 per 1 000 kg of waste, that fact is not sufficient in itself to show that the tax was hypothecated to the tax exemption.

28 First, it is clear from the order for reference that the provisions of the WBM do not hypothecate the tax on waste to the financing of the tax exemption. Second, the tax revenue has no impact on the amount of the aid. The application of the tax exemption and its extent do not depend on the tax revenue.

29 The answer to the second and third questions must therefore be that the last sentence of Article 93(3) of the Treaty must be interpreted as meaning that the prohibition in it applies to a tax only if the revenue from it is hypothecated to the aid measure at issue. The fact that the aid is granted in the form of a tax exemption or that the loss of revenue due to that exemption is, for the purposes of the budget estimates of the Member State in question, offset by an increase in the tax are not in themselves sufficient to amount to such hypothecation.

30 Having regard to the answer to the second and third questions, there is no need to answer the fourth, fifth and sixth questions.

Costs

31 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 (First Chamber) rules as follows:

1. **The last sentence of Article 93(3) of the EC Treaty (now the last sentence of Article 88(3) EC) must be interpreted as meaning that it may be relied on by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, whether or not the person is affected by the distortion of competition resulting from that aid measure.**

2. **The last sentence of Article 93(3) of the Treaty must be interpreted as meaning that the prohibition in it applies to a tax only if the revenue from it is hypothecated to the aid measure at issue. The fact that the aid is granted in the form of a tax exemption or that the loss of revenue due to that exemption is, for the purposes of the budget estimates of the Member State in question, offset by an increase in the tax are not in themselves sufficient to amount to such hypothecation.**

[Signatures]