JUDGMENT OF THE COURT (First Chamber)

13 January 2005 *

In Case C-175/02,

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

F.J. Pape

v

Minister van Landbouw, Natuurbeheer en Visserij,

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:

— 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, like that in Case C-174/02 *Streekgewest Westelijk Noord-Brabant* (judgment in which is also delivered today, not get published in the ECR, 'the judgment in *SWNB*'), concerns the interpretation of Article 93(3) of the EC Treaty (now Article 88(3) EC).

2 The question arose in proceedings between Mr Pape, who is a farmer, and the Minister van Landbouw, Natuurbeheer en Visserij (Minister for Agriculture, Nature Management and Fisheries) concerning a levy on surplus manure imposed on Mr Pape under Article 13 of the Meststoffenwet of 27 November 1986 (Law on Fertilisers, *Staatsblad* 1986, 598), which were brought on the ground that the levy was imposed in breach of the prohibition on the implementation of planned aid measures laid down in the last sentence of Article 93(3) of the Treaty.

Legal framework

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 the Netherlands, Article 13 of the Meststoffenwet, which entered into force on 1 May 1987 by virtue of an order of 22 April 1987 (*Staatsblad* 1987, 189), introduced a levy on surplus manure 'to meet costs connected with:

(a) the administrative machinery of the manure banks as referred to in Article 9;

(b) the contributions as referred to in the fourth paragraph of Article 9;

(c) the creation of infrastructural facilities for the efficient removal, delivery, treatment, processing or destruction of manure surpluses;

(d) supervision in connection with the implementation of Chapters III and IV'.

5 The levy becomes payable when the manure is produced. A levy which has become payable over a certain period (generally, a calendar year) must be paid on filing the declaration (in principle, within one month of expiry of the period).

6 The fourth paragraph of Article 9 of the Meststoffenwet, to which Article 13(b) of that law refers, provides that a manure bank may contribute to the costs of, inter alia, the transport of animal manure if it takes the view that this will promote efficient processing and removal in accordance with the objectives of the Meststoffenwet. To that end, the Reglement Mestbank inzake vangnetfunctie en Kwaliteitspremiëringssysteem of 25 April 1989 (manure bank regulations on the safety-net function and system of quality premiums, *Staatscourant* 1989, 86) was adopted. Those regulations entered into force on 1 April 1989. They provide for aid measures for the transport of high-quality manure under the system of quality premiums.

7 The Kingdom of the Netherlands informed the Commission of the adoption of those regulations by letters of 26 July 1988 and 16 January 1989. By letter of 10 March 1989, the Commission notified that State of its decision not to raise any objection to those regulations until the end of 1989. In a subsequent letter, the Commission confirmed that it considered the aid measure to be compatible with the common market from 1 January 1988.

The main action and the questions referred for a preliminary ruling

8 Manure having been produced on his farm in 1988, Mr Pape was liable to pay the levy on surplus manure for the 1988 financial year. However, he failed to file his declaration within the prescribed period of one month. As a result, by a tax notice served on 31 March 1989, he was required to pay in respect of that financial year a levy on surplus manure of NLG 10 283.50 and a surcharge of the same amount.

9 Mr Pape lodged an objection to that assessment with the inspecteur van het Bureau Heffingen van het Ministerie van Landbouw, Natuurbeheer en Visserij (inspector of the Levies Office of the Ministry of Agriculture, Nature Management and Fisheries). The inspector reduced the levy on surplus manure charged in the tax notice to NLG 1 779.60 plus a surcharge of NLG 177.96. Mr Pape brought an appeal against that decision before the Gerechtshof te Leeuwarden (Regional Court of Appeal of Leeuwarden, Netherlands), whereupon the inspector withdrew the surcharge. The Gerechtshof upheld the inspector's decision apart from the surcharge. Mr Pape then brought an appeal before the Hoge Raad (Supreme Court).

10 The appeal is partly based on the premiss that a portion of the revenue from the levy on surplus manure for 1988 was earmarked, and was used, for implementation of the aid measure in 1989.

11 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. For so long as the implementation of an aid measure is not permitted under the last sentence of Article 93(3) of the ... Treaty ..., does the prohibition laid down in that provision also apply to the introduction of a levy the revenue from which is, under the relevant law, earmarked in part for the financing of that measure, regardless of whether there has been any disturbance of trade between Member States which can (partly) be attributed to the levy as the method of financing the aid measure? If the answer to this question depends on the closeness of the connection between the levy and the aid measure, or on the time when the revenue from the levy is actually used for the aid measure, or on other circumstances, what circumstances are relevant in that regard?

2. If the prohibition on implementing the aid measure also applies to the earmarked levy, can the person on whom the levy is imposed then, by relying on the direct effect of Article 93(3) [of the Treaty], oppose in legal proceedings the full amount levied on him or only that portion which corresponds to the part of the revenue which is expected to be spent or has actually been spent during the period in which the implementation of the aid measure is or was prohibited under that provision?

3. Do specific requirements arise from Community law with regard to the method of determining what portion of a levy falls under the prohibition laid down in the last sentence of Article 93(3) of the ... Treaty in the case of a levy the revenue from which is earmarked for various purposes for which there are also other sources of financing in addition to the levy and which are not all covered by Article 93 of the ... Treaty, where no apportionment formula is specified in the national provision instituting the levy? In such a case, must the portion of the levy which can be allocated to financing the aid measure falling under

Article 93 of the ... Treaty be determined on an estimated basis according to the time when the levy was imposed or must it be based on subsequently available data relating to the total revenue from the levy and to the actual expenditure for each of the various purposes?'

The first question

12 The first question consists of three distinct parts. Essentially, the national court is asking whether the prohibition on implementation laid down in the last sentence of Article 93(3) of the Treaty:

— can preclude the imposition of a tax intended to finance an aid measure,

— applies even if the tax has no effect on trade between the Member States,

— applies regardless of the closeness of the connection between the financing tax and the aid measure in question.

13 It is appropriate to answer the third part of the question before addressing the other parts.

14 It is apparent from the Court's case-law that taxes do not fall within the scope of the Treaty provisions on State aid unless they constitute the means of financing an aid measure and are thus an integral part of that measure (the judgment in *SWNB*, cited above, paragraph 25).

15 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 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] 487, paragraphs 17, 20 and 21, and the judgment in *SWNB*, paragraph 26).

16 The documents in the file submitted to the Court do not suggest that the levy imposed by the Meststoffenwet is hypothecated to the aid for the transport of manure introduced on the basis of Article 9(4) of that law. Under the Meststoffenwet, the competent authorities may exercise discretion in allocating the revenue from the levy to the various purposes, including that provided for in Article 9(4). The revenue from the levy therefore has no direct impact on the amount of aid as it may be used to finance other measures provided for in that law which do not have all the features of aid within the meaning of Article 92(1) of the Treaty (now Article 87(1) EC).

17 The answer to the third part of the first question must therefore be that the prohibition on implementation laid down in the last sentence of Article 93(3) of the Treaty cannot apply to a tax if that tax, or a certain part of the revenue from it, is not hypothecated to the financing of an aid measure.

18 In the light of the answer to the third part of the first question, there is no need to answer the other parts of the first question or the second or third question.

Costs

19 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:

The prohibition on implementation laid down in the last sentence of Article 93 (3) of the EC Treaty (now the last sentence of Article 88(3) EC) cannot apply to a tax if that tax, or a certain part of the revenue from it, is not hypothecated to the financing of an aid measure.

[Signatures]