**to influence the assessment which the Commission has already made of the initial plan; in that case, the prohibition applies only to the aid measure introduced by the alteration.**

Due Kakouris

Everling Galmot Joliet

Deliverd in open court in Luxembourg on 9 October 1984.

P. Heim
Registrar

O. Due
President of the Fifth Chamber

# OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 3 JULY 1984 [1]

*Mr President,*
*Members of the Court,*

1. This preliminary reference deals with the interpretation of Articles 92 and 93 of the EEC Treaty, concerning State aid to undertakings. The case is principally concerned with the definition of certain aspects of the *ad hoc* procedure which, in accordance with those provisions, the Commission, the Member States and the undertakings concerned are required to follow in order to exercise or permit adequate preventive control over national intervention measures.

The facts of Case 91/83 are as follows. On 30 January 1981 the Inspector for Corporation Taxes, Amsterdam, assessed at HFL 44 240 451 the amount owed in taxes for the period 1977 to 1978 by Heineken Brouwerijen BV, whose registered office is at Zoeterwoude (The Netherlands). Heineken lodged an appeal against that assessment at the Gerechtshof [Regional Court], Amsterdam, on 25 March 1981. It claimed that the assessment did not take into account the fact that, in the period to which it related, Heineken had invested HFL 32 287 582 in new buildings. That

1 — Translated from the Italian.

entitled it to an allowance, in the form of tax relief, of HFL 9 617 994, correponding to 25% of the total amount of the new investments, rather than the lesser relief accorded by the Inspector (11% of the total amount). The Gerechtshof considered that a preliminary ruling within the meaning of Article 177 of the EEC Treaty was necessary and, by order of 13 April 1983, stayed the proceedings and referred the following questions to the Court of Justice:

1. Should the Wet Selectieve Investeringsregeling, the amendments made to the Law in view of its combined effect with the Wet Investeringsrekening, the differential rate adopted in Article 36 of the Wet Investeringsrekening or the actual combined effect of those Laws be regarded, individually or jointly, as aid within the meaning of Article 92 et seq. of the EEC Treaty?

2. Must Article 93 (3) of the Treaty be interpreted as meaning that notification to the Commission by a Member State of plans to grant or alter aid must be immediately and plainly made known to each interested party?

3. Must such notification also take place in respect of amendments made to the bill introducing the aid during its passage through parliament?

4. If an amendment to a measure granting aid which is about to be introduced is not notified to the Commission, whereas the draft measure to which the amendment is made has been notified to the Commission, must the prohibition in the last sentence of Article 93 (3) of the Treaty against the implementation of such measures be considered to apply and, if so, does it cover the whole of the measure eventually adopted or only the part of the measure adopted in that amendment?

Let us now examine Case 127/83. On 3 June 1981 the Inspector of Corporation Taxes, Utrecht, assessed at HFL 165 000 the amount owed in taxes by the same company, Heineken Brouwerijen BV. Heineken appealed against that assessment to the Gerechtshof, Amsterdam. It claimed that its invesments (the extension of three plants for the treatment of water) had been taxed more heavily than other similar investments, because of the area in which the building in question was situated, and that therefore the taxation was incompatible with Articles 92 and 93 of the EEC Treaty. As in Case 91/83, the Gerechtshof stayed the proceedings and, by order of 13 April 1983, referred the questions which I have cited above to the Court of Justice.

By order of 1 February 1984 the Court decided to join the two cases for the purposes of the oral procedure and the judgment, in view of the fact that the two actions involved the same parties and concerned the same subject-matter.

2. In order to understand correctly the scope and the logical order of the four questions, it is necessary to refer to the

relevant national legislation, which must be taken into consideration in interpreting the Community rules to which the national court refers.

The urban areas in the west of the Netherlands, known as the "Randstad-Nederland", are over-populated and over-industrialized. In order to alleviate that problem, in 1972 the Netherlands Government presented a bill (Wet Selectieve Investeringsregeling [Law enacting a selective investment scheme]) introducing a levy on most new investments in those areas. The provisions of the bill were approved in 1974, but after two years their operation was suspended. Then, in 1977, the same government presented a second bill (Wet Investeringsrekening [Law setting up an investment fund]), which provided for State investment allowances in the form of tax relief. Such allowances consisted of a basic allowance accorded to all types of investment and selective allowances, including a "general regional allowance" granted solely in respect of investments outside the Randstad.

The Commission (which had been informed by the Netherlands Government of the Wet Investeringsrekening in accordance with Article 93 of the EEC Treaty) considered that the selective allowances and, in particular, the general regional allowance were incompatible with Article 92. The Commission based its view, *inter alia*, on the ground that such allowances amounted to regional aid which, as such, should have been limited to the areas determined by the Commission within the scope of its own policy. In the light of those considerations, the government amended the provisions of the Wet Investeringsrekening to include in the basic allowance the relief accorded as selective allowances. In that way the aid was generalized and thus the obstacle represented by Article 92 was removed.

In the course of the parliamentary debate leading to the enactment of the Wet Investeringsrekening, the levy adopted in 1974 (Wet Selectieve Investeringsregeling) and subsequently suspended in 1976 was re-examined. In consequence, certain amendments to the Wet Selectieve Investeringsregeling were incorporated in the Wet Investeringsrekening in order to coordinate the two intervention measures. In particular, although only on a temporary basis, a differential rate was introduced for the aid granted in the form of tax relief inasmuch as the allowance for investments in the Randstad was to be lower than that for investments made in other areas (Article 36).

Thus it was the combined effect of the two measures, the Wet Selectieve Investeringsregeling and the Wet Investeringsrekening, which gave rise to the disputes in the main proceedings. According to Heineken, the difference in tax relief granted amounted to aid for the undertakings which invested outside the Randstad. Such relief was no different to the aid provided for in the draft of the Wet Investeringsrekening, which the Commission had found to be incompatible with Article 92.

3. The four questions are intended to obtain a preliminary ruling on the interpretation of Articles 92 and 93 of the EEC Treaty. In particular the first question seeks to establish whether a number of industrial development measures adopted in the Netherlands constitute "aid" within the meaning of Article 92. The other three, on the other

hand, concern the special procedure which Article 93 lays down for assessing the compatibility of the State aid with the common market.

I must say immediately that, in my view, the order of the questions should be reversed. The value of a ruling on the question concerning the definition of aid depends on the solution which the Court provides for the interpretative problems relating to the procedure laid down in Article 93. It is in the light of the Court's previous decisions that I adopt that approach. The Court has often dealt with the question of the extent to which individuals may contest the legality of State aid before their national courts. I consider to be of particular significance the views which the Court expressed in the judgments of 27 March 1977 in Case 78/76 (*Steinike and Weinlig* v *Germania* [1977] ECR 595) and in Case 74/76 (*Iannelli* v *Meroni* [1977] ECR 557). Under a Law of the Federal Republic of Germany, citrus fruit importers, who used the fruit to manufacture soft drinks, were required to pay to the appropriate body a contribution intended to promote the sale and export of German agricultural products. The Court was asked to decide whether a German administrative court was entitled to assess the compatibility of such a measure with the common market.

The Court's reply is well known. It stated that "in judging ... whether State aid is compatible ... complex economic factors subject to rapid change must be taken into account and assessed". It was precisely for that reason that Article 93 of the Treaty provided "for a special procedure whereby the Commission shall keep aid under constant review". It followed that the responsibility for establishing that aid was incompatible lay with the Commission, subject of course to review by the Court. It also followed that, as a general rule, individuals could not raise the question of compatibility before national courts on the basis of Article 92 alone (paragraphs 9 and 10 of the decision in *Steinike*). The Court concluded that, accordingly, where a national court was asked to assess the compatibility of aid, it was entitled to make a ruling only in exceptional and strictly limited cases: for example if the aid had been "the subject of a decision by the Commission requiring the Member State ... to abolish or alter it ...", or if it had not been introduced in compliance with the procedure under Article 93 (3) (paragraph 15).

That is clearly a sensible solution. In terms of experience and resources, the Commission is much better equipped than the national courts to undertake the difficult inquiry required to establish whether aid is incompatible. On the other hand, a national court is quite capable of determining whether the aid continues to exist despite the Commission's expressed will to the contrary or whether it has been introduced in compliance with the procedural requirements. The implications for the case before the Court are clear. It is helpful to reply to the first question only of it is established that the Netherlands failed to comply with the requirements imposed by Article 93 and, in particular, those of Article 93 (3). According to that provision, "any plans

to grant or alter aid" must be notified to the Commission in sufficient time to enable it to submit its comments and, if it considers the plan incompatible with the common market, to initiate the procedure provided for under Article 93 (2).

4. We may therefore begin with the second question. The national court asks whether the aid programme which the State notifies to the Commission must be immediately and plainly made known to each interested party. In that respect it may be observed that the State's duty to notify is an essential part of the procedure laid down by Article 93 (2). It accords with the Commission's need to have available in sufficient time all the necessary information so that it may assess the compatibility of the aid measures which are in the process of being adopted and, if it considers that they are incompatible, order their abolition or their alteration. Under that procedure the parties concerned by such measures are protected. That is ensured by the first subparagraph of Article 93 (2), which requires the Commission, before reviewing the aid, to invite the parties concerned to submit their observations. In undertaking that review and for the purposes of the decision which follows it, therefore, proper consideration is to be given to their interests.

In those circumstances it is impossible to infer from Article 93 an obligation on States to inform not only the Commission but also all the parties concerned of the aid which they plan to introduce. The remarks which I have just made concerning the adequate protection which such persons enjoy militate against that proposition, as does, with even greater force, the absurdity of its practical consequences. Indeed, how could a State make provision for the widespread diffusion of information which that presupposes, without compromising the timing of legislation in general and of economic measures in particular? In my view, that is enough to show that the second question should be answered in the negative.

5. The third question is intended to establish whether the duty to notify the Commission of plans to grant or alter aid, imposed on States by Article 93 (3), also includes amendments made to such plans in the course of their passage through parliament. The Court can but reply in the affirmative. However, in my view, its answer must be given subject to a reservation dictated by the fundamental aim of that provision. The Court itself has said that the provision was drafted to enable the Commission to assess the compatibility of such plans with the common market. That objective does not require the imposition on States of an absolute obligation to notify the Commission of every aspect. In other words the States must notify the Commission of alterations which, because of the effect which they have on undertakings or their competitive relationship, may influence the Commission's decision. It is not on the other hand necessary to communicate alterations which are merely formal and which do not pose a threat to the freedom of competition.

It is clear from its judgment that, in raising this question, the national court

assumed that the Netherlands did not inform the Commission of the alterations made to the Wet Investeringsrekening during its passage through parliament; in particular, it assumed that the Netherlands did not disclose the restoration of the tax mechanism provided for by the Selectieve Investeringsregeling and the difference in the amounts of aid granted for new buildings. However, the Commission itself rejects that version of the events. In replying to the questions put by the Court, it stated that the Netherlands authorities notified it of the reintroduction of the Selectieve Investeringsregeling and the different rates of tax relief for new buildings. Since those were the only alterations to have a bearing on the Commission's decision as to compatibility, I do not consider that in this instance there is evidence that the Netherlands failed to discharge its duty to notify.

6. The fourth question is closely linked to the preceding question and is formulated in two parts. The first concerns the prohibition against the implementation of the planned measures before the Commission has completed the procedure under Article 93 (2). The national court asks whether that prohibition also applies where plans which have been duly notified in their original version are subsequently altered and those alterations are not notified to the Commission.

To answer that question it is necessary to determine the scope of Article 93 (3). As I have already stated, that provision requires States to inform the Commission of aid programmes in order to enable it to formulate observations on the compatibility of such aid with the functioning of the common market. In my view, it is clear that the prohibition against putting into effect the planned measures already operates in that preliminary phase and continues to operate for all the time which the Commission reasonably requires in order either to submit its observations or — once it has submitted them — to decide whether to initiate the procedure under Article 93 (2). If that period has elapsed and the Commission has not raised any objections, the prohibition ceases to apply and the Member State must be considered free to implement its plan.

What then is the position if the same State has made amendments to the original plan without informing the Commission? I consider that the prohibition in question also applies in that situation. If that were not the case, a State which failed to fulfil its obligation would find itself in an advantageous position, a result which is too paradoxical to be acceptable.

As regards the contentious phase of the procedure, it is sufficient to point out that the duty not to implement the plan is expressly provided for in the last part of Article 93 (3). It is indeed possible to suggest that the provision links the notification to the beginning of the procedure and to infer from that — as I imagine the Netherlands court has done — that, where there is no notification, the obligation to refrain from implementing the measures does not arise. However, that argument is weak. It is

clear that the Commission may initiate the contentious phase of the procedure even if the plan has not been notified to it, acting on the basis of information obtained by other means. In my view that is enought to conclude that the failure to notify can have no effect on the prohibition against putting into effect the planned measures.

The second part of the fourth question develops those points. The national court asks whether the prohibition — if it applies also where the alterations have not been notified — concerns the entire measure or only that part introduced by the alteration. I doubt whether it is possible to give an uniquivocal reply to that question. The facts of the case and in particular the effect which the combination of the original measure and the alteration may have on the functioning of the common market play a decisive role. If that combination is potentially incompatible with the Treaty, it is in my view clear that the implementation of the entire aid programme should remain suspended. It may be however that there is no such incompatibility, for example because the measure initially planned has no effect on the common market and the provision which introduces the alteration is independent from it. In that case only the alteration which has not been notified is subject to the suspension.

7. Finally let us consider the first question. The Gerechtshof asks whether, in view of the combined effect on the common market of certain Netherlands provisions, those provisions should be regarded as "aid" within the meaning of Article 92 of the EEC Treaty.

As I pointed out at the beginning of this opinion, the Court has held that national courts may not decide whether a measure introducing aid is compatible with the Treaty unless it has been adopted without complying with the special procedure provided for by Article 93. Moreover, it follows from the reply which I have given to questions 2, 3 and 4 that, in adopting the rules in question, the Netherlands did not infringe procedural requirements. Consequently the conditions under which the national court may assess the compatibility of those rules are not satisfied. It is therefore unnecessary for the Court to rule on the question referred to it.

8. In the light of all the foregoing considerations, I propose that the Court reply as follows to three of the four questions submitted by the Gerechtshof, Amsterdam, by two parallel orders, both of 13 April 1983, in the proceedings between Heineken Brouwerijen BV and the Inspectors of Corporation Taxes for Amsterdam and Utrecht:

(a) *The second question:* Article 93 (3) of the EEC Treaty must be interpreted as meaning that, where a Member State informs the Commission of plans to grant or alter aid, that fact does not have to be made known to all the

parties concerned. That obligation is the responsibility of the Commission and arises when that institution initiates the procedure provided for in Article 93 (2).

(b) *The third question:* Article 93 (3) of the EEC Treaty must be interpreted as meaning that the Member States' duty to inform the Commission of plans to grant or alter aid also covers alterations made to plans in their passage through parliament.

(c) *The fourth question:* Article 93 (3) of the EEC Treaty must be interpreted as meaning that the prohibition against putting into effect proposed measures also operates with regard to alterations of plans initially notified to the Commission, irrespective of whether those alterations have in their turn been communicated to the Commission. The prohibition covers the entire measure if the combination of the original plan and the subsequent alterations is such as to affect the functioning of the common market.

Finally I suggest that it is not necessary to reply to the first question. The solution provided for the interpretative problems raised by the other questions make it unnecessary to give a ruling on that question.