interested parties; such an obligation falls upon the Commission alone when it initiates the procedure provided for in Article 93 (2).

3. The obligation provided for in the first sentence of Article 93 (3) to inform the Commission of plans to grant or alter aid does not apply solely to the initial plan, but also covers subsequent alterations to that plan; such information may be supplied to the Commission in the course of the consultations which take place following the initial notification.

4. The prohibition on the putting into effect of aid measures which is laid down in the last sentence of Article 93 (3) of the Treaty applies to the proposed aid programme in its entirety and in the final version adopted by the national authorities. If the plan initially notified has in the meantime undergone alterations of which the Commission has not been informed, the prohibition applies to the plan as altered, unless the alteration in question is in actual fact a separate aid measure which should be assessed separately and which is therefore not such as 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.

In Joined Cases 91 and 127/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof [Regional Court of Appeal], Amsterdam, for a preliminary ruling in the cases pending before that court between

HEINEKEN BROUWERIJEN BV

and

INSPECTEUR DER VENNOOTSCHAPSBELASTING [Inspector of Corporation Taxes], AMSTERDAM (Case 91/83),

and between

HEINEKEN BROUWERIJEN BV

and

INSPECTEUR DER VENNOOTSCHAPSBELASTING, UTRECHT (Case 127/83),

on the interpretation of Articles 92 and 93 of the EEC Treaty,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

A — The national legislation

1. The Wet Selectieve Investeringsregeling

To alleviate the problems caused by congestion in the urban areas in the west of the Netherlands known as the *Randstad-Nederland* a bill was tabled before the Netherlands Parliament in 1972 called the "Wetsontwerp Selectieve Investeringsregeling" [Bill to enact a selective investment scheme] which introduced a levy on most new investments in that part of the country.

The bill became a law on 27 February 1974 (Staatsblad 1974, p. 95). Article 3 (1) of the Law provides that:

"A levy . . . shall be payable in respect of:

(a) the grant of planning permission for the erection of a building;

(b) the erection of plant."

Articles *5 (1)* and *10 (1)* fix the levy chargeable under Articles 3 (1) (a) and (b) at respectively 25% and 3% of the estimated costs of acquisition and construction.

However, both Articles *5 (2)* and *10 (2)* provide that those rates may be altered by a general administrative measure in which case different rates may be fixed

according to the region in which the building or plant is erected or according to their nature or intended purpose.

Before its entry into force on 1 October 1975 the Wet Selectieve Investeringsregeling was amended by a Law of 28 May 1975 (Staatsblad 1975, p. 290) which provides *inter alia* that it may be decided by general administrative measure that the levy is not to apply to buildings or plant erected in a specified region. Pursuant to that provision a general administrative measure was adopted by order of 17 June 1975 (Staatsblad 1975, p. 325). Consequently, when the Wet Selectieve Investeringsregeling came into force its ambit was very limited and pursuant to an order of 6 September 1976 (Staatsblad 1976, p. 478) the levy was suspended with retroactive effect from 9 June 1976. That suspension was subsequently revoked, however, as from 29 June 1978.

2. The Wet Investeringsrekening

On 16 February 1977 a bill was tabled before the Netherlands Parliament which became the Wet Investeringsrekening [Law setting up an investment fund] (Staatsblad 1978, p. 368).

The preamble thereto stated that in order to increase employment "it would be desirable to stimulate investment and in so doing to take account of the social and economic development of certain regions, town-and-country planning ... a healthy environment and an economical use of energy and raw materials."

The bill made provision for an investment allowance scheme consisting of basic and selective allowances reducing the amount of tax due in the year in which the investment is undertaken. In principle the basic allowances were to apply generally to all undertakings in the Netherlands irrespective of the nature or place of their business. If the investment fulfilled certain conditions, the investor was also to be entitled to one or more selective allowances. One of them was the "general regional allowance" to be granted in respect of investments outside the *Randstad.*

By letter dated 28 February 1977 the Netherlands Government notified the Commission of the bill pursuant to Article 93 (3) of the EEC Treaty.

The Commission replied by letter dated 26 May 1977 that it had initiated the procedure provided for in Article 93 (2) of the Treaty against the bill, in view, in particular, of the general regional allowance. The Commission emphasized in this regard that it had no objection against such legislation provided that the aid was "granted in the regions and within the maximum limits for which the Commission has (in 1974) allowed exception". However, as it did not know the geographical area in which the allowance was to apply, the Commission was unable to verify whether the aid might be covered by one of the exceptions in Article 92 (2) of the Treaty.

Following discussions between the Netherlands Government and the Commission the former decided not to introduce the general regional allowance and incorporated it in the basic allowance, which, being a general measure, was not, according to the Commission, caught by Article 92 (1) of the Treaty. The bill was

amended accordingly and the Commission informed of the amendment by letter dated 16 May 1978.

By letter dated 21 April 1978 the Commission informed the Netherlands Government that the procedure commenced on 26 May 1977 against the bill had been terminated and that it had been noted that the general regional allowance would not be introduced.

The Wet Investeringsrekening was passed on 29 June 1978. It came into force on 19 July 1978 with retroactive effect from 24 May 1978. It makes provision *inter alia* for the introduction of an investment allowance which is the same throughout the Netherlands and is higher than the allowance originally envisaged; for new buildings it is 23%.

During the bill's passage through the Netherlands Parliament it was announced that the levy provided for by the Wet Selectieve Investeringsregeling, which had been suspended from 9 June 1976, was to be brought back into force and as a result Articles *5 (2)* and *10 (2)* of the Wet Selectieve Investeringsregeling were amended by the Wet Investeringsrekening. In addition, the following provision was introduced by Article 36 of the Wet Investeringsrekening instead of the transitional provision originally envisaged:

"For buildings in respect of which the application for planning permission referred to in Article 3 (1) (a) of the Wet Selectieve Investeringsregeling ... is submitted before the date on which the order revoking that of 6 September 1976 (Staatsblad 1976, p. 478) comes into force ... the rate of the investment allowance shall be 11% instead of 23%."

As stated above, the order of 6 September 1976 was revoked as from 29 June 1978. The reduction of the allowance therefore applied to applications submitted between 24 May and 29 June 1978.

B — The history of the disputes and the procedure

1. In 1978 and 1979 the plaintiff in the main proceedings, Heineken Brouwerijen BV, Zouterwoude, made two investments in the *Randstad*. Both were eligible for the aid provided for by the Wet Investeringsrekening. However, for one of those investments the investment allowance was reduced pursuant to the transitional rule laid down in Article 36 of the Wet Investeringsrekening whilst the levy provided for by the Wet Selectieve Investeringsregeling was charged on the other investment.

Heineken subsequently brought two actions in the Gerechtshof [Regional Court of Appeal], Amsterdam, against the decision of the Inspector of Corporation Taxes, Amsterdam, rejecting its application for the full allowance, payable under the Wet Investeringsrekening, for its first investment and against the decision of the Inspector of Corporation Taxes, Utrecht, confirming that the levy provided for by the Wet Selectieve Investeringsregeling would be charged on the last investment.

2. Heineken's contentions before that court were that if the scheme set up by the Wet Selectieve Investeringsregeling and the Wet Investeringsrekening were considered as a whole, the measures had in fact introduced aid having the same effect as that originally envisaged by the

Wetsontwerp Investeringsrekening to which the Commission had objected and against which it had commenced the procedure under Article 93 (2) of the Treaty; in particular, the Wet Selectieve Investeringsregeling, the amendments made to Article 5 (2) and 10 (2) of that Law, the differential rate contained in Article 36 of the Wet Investeringsrekening and the actual effect of that Law together with that of the Wet Selectieve Investeringsregeling had to be considered, individually or jointly, as aid, with the meaning of Article 92 of the EEC Treaty, introduced without prior notification under Article 93 (3) of the Treaty.

3. The Tax Inspectors rejected those contentions.

4. The Gerechtshof stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

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 in the sense indicated in the grounds of this judgment?

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?

5. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted to the Court by the plaintiff in the main proceedings, Heineken Brouwerijen BV, represented by F. Salomonson, of the Amsterdam Bar, and A. E. R. Crollius, tax consultant, Rijwijk, by the Netherlands Government, represented by I. Verkade, Secretary General at the Ministry of Foreign Affairs, by the Italian Government, represented by P. G. Ferri, Avvocato dello Stato, acting as Agent, and by the Commission, represented by B. van der Esch, acting as Agent.

6. By order of 1 February 1984 the Court decided to join the two cases for the purposes of the oral procedure and judgment.

7. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure after asking the Commission the questions set out below in Part III.

8. By order of 28 May 1984 the Court decided to assign the two cases to the Fifth Chamber.

II — Written observations submitted to the Court

(i) Preliminary observations

The *Italian Government* points out that the issue raised by the Gerechtshof raises in the first place a preliminary question whether an interpretative ruling under Article 177 may be delivered on Articles 92 and 93 of the Treaty. On this point it draws the Court's attention to its previous decisions, in particular its judgment of 22 March 1977 in Case 78/76 *Steinike & Weinlig* v *Federal Republic of Germany* [1977] ECR 595 which, whilst demonstrating that the Court does not entirely exclude the possibility that a national court may obtain an interpretative ruling on the Treaty rules on aid, makes clear the limits of any normative force of Articles 92 and 93 for the purposes of resolving a dispute governed by domestic law. As long as the issue is whether or not aid is compatible with the Common Market, the Community provision has no importance in a dispute falling within the jurisdiction of a national court since the relevant judgment cannot be made by an institution other than that indicated in Article 93, that is to say otherwise than in the course of the special procedure laid down by that article and within the limits of the relevant powers of the Commission. That procedure provides the mediation necessary in order for the legal assessment of the incompatibility stated in Article 92 to be transposed in each case into a prohibition declaring the aid contrary to the EEC Treaty.

However, the questions raised by the Gerechtshof relate to a situation in which such a procedure, commenced by the Commission, was terminated following the answers received from the Netherlands Government.

(ii) The first question

1. In *Heineken*'s view, the reintroduction in June 1978 of the levies chargeable under the Wet Selectieve Investeringsregeling combined with the provisions of the Wet Investeringsrekening constitute aid within the meaning of Article 92 of the Treaty. In addition, the application of Article 36 of the Wet Investeringsrekening is in itself aid within the meaning of Article 92.

1.1. Heineken points out that, instead of the scheme originally envisaged by the Wet Investeringsrekening, consisting of a basic allowance for the whole country and a general regional allowance for investments outside the *Randstad*, the basic allowance has been increaseed to a rate equal to the total of the original basic allowance plus the general regional allowance. In order to achieve the regional differentiation sought, the levy system provided for by the Wet Selectieve Investeringsregeling was reintroduced at the same time whilst the rates of the basic allowances and levies have been fixed in such a way that the result is the same as that of the scheme rejected by the Commission. In this regard Heineken refers in particular to

the Supplementary Statement of Reply submitted by the Government to the Netherlands Parliament on 16 March 1978 in which it is explained by means of tables and rate calculations that the combined financial effect of the levy provided for by the Wet Selectieve Investeringsregeling and the new basic allowance provided for by the Wet Investeringsrekening was the same as that of the basic allowance and general regional allowance originally envisaged.

It is therefore clear that the Netherlands Government sought by means of the combined effect of the Wet Selectieve Investeringsregeling and the Wet Investeringsrekening to achieve aims that the Commission judged unacceptable when presented in the form of a general regional allowance. The intention of the Government is of little importance, however.

By way of illustration Heineken mentions the amendments made to Articles 5 (2) and 10 (2) of the Wet Selectieve Investeringsregeling by virtue of which the levy chargeable under that Law may be reduced for certain institutions or savings banks which, not being subject to corporation tax, cannot take advantage of investment allowances available under the Wet Investeringsrekening.

1.2. On the question of Article 36 of the Wet Investeringsrekening, Heineken observes in particular that by virtue of Article 3 (a) (2) of the Wet Selectieve Investeringsregeling no levy is payable on buildings as a result of the reintroduction of the levy chargeable under that Law if the application for planning permission was lodged before the date of the reintroduction of the levy. During the parliamentary debates on the two pieces of legislation the situation was examined with regard to undertakings which applied for planning permission before the date of reintroduction of the levy, were not liable to pay the levy due under the Wet Selectieve Investeringsregeling but which were eligible for the basic allowance available under the Wet Investeringsrekening, which was 23% throughout the country. Such a situation would have thwarted the aim of the combination of the Wet Investeringsrekening and Wet Selectieve Investeringsregeling, i.e. regional differentiation.

That was precisely why Article 36, which, in the case of buildings in respect of which an application for planning permission was submitted before the reintroduction of the levy chargeable under the Wet Selectieve Investeringsregeling (that is to say before 24 June 1978), reduced the allowance granted under the Wet Investeringsrekening by the amount of the levy chargeable under the Wet Selectieve Investeringsregeling, i.e. from 23% to 11%, was inserted in the Wet Investeringsrekening.

Moreover, during the parliamentary debates, the objection was raised that Article 36 applied throughout the country and therefore to regions outside the *Randstad*. To meet that objection the Netherlands Government decided to restrict the application of Article 36 to the *Randstad* (and also that the article would not apply to buildings exempt from the levy chargeable under the Wet Selectieve Investeringsregeling).

As a result of Article 36 specific distortion occurred as regards investments resulting from applications for planning permission submitted before 29 June 1978: within the *Randstad* the allowance granted under the Wet Investeringsrekening was 11% whereas elsewhere it was 23%.

2. The *Netherlands Government* observes first of all that the levy imposed by the Wet Selectieve Investeringsregeling is an instrument of broad application which by its nature cannot be considered aid within the meaning of Article 92 of the Treaty. After consulting the Commission the Netherlands Government considered, and still considers, that the Wet Selectieve Investeringsregeling raises no objections in Community law.

It defines the Wet Investeringsrekening as an instrument for stimulating investment consisting of a combination of a general basic allowance and special supplementary allowances. The basic allowance cannot be regarded as aid within the meaning of Articles 92 and 93 of the Treaty because for that to be the case the State must favour certain undertakings or the production of certain goods. The basic allowance is not selective since it benefits all undertakings and the production of all goods. On the other hand the special supplementary allowances are indeed aid within the meaning of the Treaty but in so far as they were maintained the Commission considered them compatible with the common market.

The combined effect of the Wet Selectieve Investeringsregeling and the Wet Investeringsrekening cannot be regarded as aid within the meaning of Article 92 of the Treaty either. It cannot be denied that in the course of time the attempt was made to coordinate the two laws better. Nevertheless, they are two distinct Laws each with their own distinct purpose; the Wet Investeringsrekening is meant to stimulate investment whilst the aim of the Wet Selectieve Investeringsregeling is to influence investment from the specific viewpoint of the concentration and congestion existing in a specific area and is thus a contribution towards responsible planning.

At the time of the consultations with the Commission in 1978 concerning the purpose of the draft Wet Investeringsrekening it was moreover agreed to reintroduce the West Selectieve Investeringsregeling at the same time and that plan did not cause the Commission to change its views either.

2.1. Finally, on the question of Article 36 of the Wet Investeringsrekening, the Netherlands Government points out that this article makes provision for a reduction of the basic allowance available under the Law only in a few very specific cases and applies to investments made between 23 May and 28 June 1978. It is therefore a transitional provision designed to prevent any improper use of the Wet Investeringsrekening and since it is meant to reduce a general basic allowance it cannot by its nature be treated as a measure that is contrary to Article 92 of the Treaty.

3. In its written observations the *Italian Government* does not express any opinion on the substance of the first question. In its view that question cannot be related to the interpretation of Article 92 of the Treaty. To classify State intervention as aid under that provision has no practical sense if this is done separately from the assessment of its compatibility with the common market, which is a matter falling within the exclusive jurisdiction of the Commission.

On the other hand, if the question relates to the interpretation of Article 93 of the Treaty, the classification as aid helps to establish whether in the case submitted to the Court the conditions

necessitating or making possible the action and procedures provided for by that provision were or are fulfilled. Nevertheless, from that procedural viewpoint the question appears to be superseded by the answers given to the subsequent questions which deprive it of any relevance in a dispute governed by domestic law concerning the application of provisions of domestic law in respect of which there is no final decision within the meaning of Article 93 (3) of the Treaty or any procedure pending.

4. In the *Commission's* view, it is going too far to regard a levy designed to curb development in certain areas as indirect aid to activities in other areas. The reason is clear: an undertaking which decides to remove its business entirely or partly from the *Randstad* owing to the existence of such a levy has the entire common market to choose from. It is therefore quite impossible to predict whether the undertaking will establish or extend its business elsewhere in the Netherlands. That is why the Commission has never regarded the Wet Selectieve Investeringsregeling as aid. At the time in question it moreover stated in an unofficial administrative communication that it considered Articles 92 and 93 inapplicable.

As the Wet Selectieve Investeringsregeling laid down the maximum possible levy, it follows that even if it did constitute aid, any variations not exceeding that maximum would not have constituted new measures. Similarly, national levies designed to curb certain kinds of development could not be treated differently unless they were introduced in order to circumvent Articles 92 and 93 of the Treaty. There is no question of that in the present case.

Furthermore, the nature of a town-and-country planning measure which, considered on its own, does not have the character of aid is not altered by the concurrent existence or introduction of other measures having that character. The two instruments are politically, economically and legally distinct. The fact that levies chargeable under the Wet Selectieve Investeringsregeling exist side by side with allowances available under the Wet Investeringsrekening does not fetter the freedom of undertakings established in the *Randstad* to decide whether they will move to another Member State or take advantage of the scheme introduced by the Wet Investeringsrekening. That freedom is not limited by the fact that the reintroduction of the levies provided for by the Wet Selectieve Investeringsregeling is politically related to an amendment of the provisions of the other Law.

The Commission accordingly considers that in answer to the first question of the Gerechtshof it is sufficient to state that a levy designed to curb certain economic activities, even if it is restricted to a single region, does not constitute aid to undertakings in areas in which it is not applicable, even if the levy exists concurrently with other measures undoubtedly by having the character of aid within the meaning of Article 92 (1) of the Treaty.

(iii) The second question

1. In *Heineken's* view, in a case such as this, it must be clear from the parliamentary documents or a notice in the *Staatscourant* [Official Gazette] that aid has been notified. Disclosure is of fundamental importance for undertakings since notification determines whether the implementation of aid is valid in law.

2. The *Netherlands Government* points out that the purpose of notifying aid to the Commission in accordance with Article 93 of the Treaty is to enable the Commission to supervise compliance by the Member States with the Treaty provisions on aid. It cannot therefore be inferred from Article 93 (3) of the Treaty or from the relevant previous decisions of the Court that a Member State has an obligation to give immediate notice in some form or another to every interested party of plans to introduce or amend aid notified to the Commission.

3. The *Italian Government* considers that a negative reply to the second question may be based quite simply on Article 93 (3) which does not lay down any duty to inform the public in the sense implied by the question.

That conclusion is moreover supported by weightier considerations.

First, notification to the Commission is sufficient by itself to achieve the aim of the provision which is to bring about the intervention of the sole authority which may decide, subject to later review by the Court in this regard, whether aid is compatible with the common market.

Secondly, Article 93 (1) clearly indicates that the application of the principles laid down in Article 92 is the responsibility of the Commission acting in collaboration with the Member States. It is therefore the Member States which have the right to participate in the procedures laid down for attaining the aforementioned aim of Article 93.

Finally, Article 93 (2), which requires the Commission when commencing the procedure to investigate whether the aid is compatible with the common market to give the parties concerned the opportunity to submit their comments, confirms the foregoing points.

It is therefore clear that, even if the phrase "parties concerned" is widely defined to include parties other than the Member States, that reading has legal significance only in the procedure commenced by the Commission in so for as it requires the Commission and not the State which gave the initial notification to inform all the parties concerned.

4. The *Commission* considers that its answer to the first question renders the other questions of the Gerechtshof purposeless. With that reservation it observes that Article 93 (3) of the Treaty does not require all the parties concerned to be informed about plans to introduce or alter aid. In particular, the giving of notice to the parties concerned to submit their comments, as provided for in the first subparagraph of Article 93 (2), concerns the cases in which the Commission considers that it must com-

mence the procedure provided for by that article.

(iv) The third question

1. *Heineken* observers that even if the levy scheme provided for by the Wet Selectieve Investeringsregeling was notified to the Commission during the passage of that Law through parliament in 1973 and 1974, fresh notification ought to have been given in 1978 of the reintroduction of the levy and the adaptation of the Wet Selectieve Investeringsregeling to the Wet Investeringsrekening. However, in the correspondence between the Commission and the Netherlands Government no mention is made of a reintroduction of the levy chargeable under the Wet Selectieve Investeringsregeling in conjunction with the amended draft of the Wet Investeringsrekening. Furthermore, the Commission terminated the procedure commenced under Article 93 (3) of the Treaty in April 1978 whereas Article 36 of the Wet Investeringsrekening was not discussed by the government and the Netherlands Parliament until May and June 1978. Heineken concludes from this that the aid was not duly notified to the Commission.

2. The *Netherlands Government* considers that any notification by a Member State to the Commission of plans to introduce or alter aid must also cover substantive amendments of the bill to introduce aid if these are made during the bill's passage through parliament.

3. The *Italian Government* considers that an affirmative reply to the third question, to the effect that notification by the Member State must also cover amendments made to the bill during its passage through parliament, seems to be based on a too formalistic view of the relations which ought to exist between the Member State and the Commission. Those relations ought to consist in genuine collaboration on the part of the Member State so as to guarantee through a useful dialogue the efficient performance of the duties regarding the implementation of Article 92 allocated to the Community institution. That result can actually be achieved without undue strictness or burdensome procedures which appear alien to the spirt and rationale of Article 93 of the Treaty.

In this regard it must also be borne in mind that the categories of aid envisaged in Article 92 are often State aid which must be implemented quickly owing to some unforessen or temporary need.

It would therefore be wrong in the present case to treat the amendment of the bill already notified to the Commission and made during the final reading of the bill itself in the same way as an amendment of aid that has already been introduced and implemented. In providing for the Commission to exercise preventive control over planned aid rather than instituted aid Article 93 (3) implicitly allows the original bill to be altered in accordance with a Member State's constitutional machinery, although such alterations may not escape scrutiny by the Commission. The fact is, however, that such alterations are made as part of a Member State's initiative of which the Commission has been informed by the initial notification and the Commission is thus in a position to

keep the situation under review until the final outcome is known.

4. The *Commission* states that the matters to be notified by the Member States naturally include amendments made during the parliamentary reading of a bill to introduce aid.

(v) The fourth question

1. The *Netherlands Government* considers that 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, the prohibition in the last sentence of Article 93 (3) of the Treaty against the implementation of such measures must be considered to apply in principle to the part of the measure adopted in that amendment. This does not preclude the Commission from regretting the entire measure in question if it finds that the amendment alters the measure in such a way that the aid can no longer be granted.

2. The *Italian Government* points out that Article 93 (3) of the Treaty clearly distinguishes the preliminary stage, consisting of an informal exchange of views between the Commission and the Member State, from the possible commencement thereafter of the formal procedure which is contentious in nature and ends in the adoption of a decision. It is to that procedure to which the last sentence of Article 93 (3) clearly and unequivocally refers when providing that the proposed measure is to be suspended until the Commission has reached a final decision. It follows that a duty not to implement aid cannot arise if the aforesaid procedure, which is only contingent and not necessarily the result of the notification of proposed aid, has not been formally commenced by the Commission. Moreover, the Commission may not commence the procedure unless it has good reason to believe that the proposed measure or amendment thereof, even if not notified, will be declared incompatible with the common market.

3. In the *Commission's* view, it is clear from the first sentence of Article 93 (3) that the last sentence of paragraph (3) is applicable to all planned measures to introduce or amend aid.

III — Questions put to the Commission

The Court requested the Commission to provide in writing details of the discussions which it had with the Netherlands Government and to explain the position it adopted at that time with regard to:

(a) the original draft of the Wet Selectieve Investeringsregeling:

(b) the possibility of bringing that Law back into force at the same time as the entry into force of the Wet Investeringsrekening;

(c) the transitional problems which Article 36 of the Wet Investeringsrekening was meant to resolve.

The Commission replied to the Court's questions by letter dated 29 February 1984. In this regard it stated in particular that:

(a) The draft of the Wet Selectieve Investeringsregeling itself was not

discussed with the Netherlands Government. However, official consultations took place on a specific aspect of the bill which was the application of the levy to be charged under the new Law to undertakings in the European Coal and Steel Community. During those consultations the officers of the Commission indicated that they did not consider the Wet Selectieve Investeringsregeling aid within the meaning of Article 92 of the EEC Treaty;

(b) The suspension of the Wet Selectieve Investeringsregeling concerned only the levy. The possible reintroduction of the levy chargeable under the Wet Selectieve Investeringsregeling was notified to the Commission during ministerial discussions on the Commission's objections to certain aspects of the Wet Investeringsrekening in its original form. Like the original draft measure, the reintroduction of the levy was not considered aid either.

(c) In view of the transitional nature of Article 36 of the Wet Investeringsrekening the Commission considered at the time that it did not need to adopt any specific position with regard to that provision.

IV — Oral procedure

At the sitting on 29 May 1984 the plaintiff in the main proceedings, represented by T. R. Ottervanger, of the Rotterdam Bar, the Netherlands Government, represented by D. J. Keur, acting as Agent, the Italian Government, represented, by P. G. Ferri, acting as Agent, and the Commission, represented by B. van der Esch, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the sitting on 3 July 1984.

Decision

1 By two judgments of 13 April 1983, which were received at the Court on 24 May and 7 July 1983, the Gerechtshof [Regional Court of Appeal], Amsterdam, referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty four questions concerning the interpretation of Articles 92 and 93 of the Treaty.

2 The questions were raised in the course of two disputes between Heineken Brouwerijen BV, the plaintiff in the main proceedings, and the Inspecteurs der Vennootschapsbelasting [Inspectors of Corporation Taxes] of Amsterdam and of Utrecht, concerning tax payable by Heineken for the period 1977 to 1979.

3 In 1972, in order to alleviate the problems arising from the congestion of urban regions situated in the western part of the Netherlands, known as the "Randstad-Nederland", the Netherlands Government submitted to Parliament a bill entitled the "Wet Selectieve Investeringsregeling" [Law enacting a selective investment scheme], which introduced a levy on most

new investments in those regions. The Wet Selectieve Investeringsregeling was adopted in 1974, but by the time it was brought into force its scope had been severely restricted, and it was suspended in 1976.

4 On 16 February 1977 the Netherlands Government tabled before the Parliament a bill entitled The "Wet Investeringsrekening" [Law setting up an investment fund], which provided for a system of investment allowances in the form of tax relief. In principle those allowances included a basic allowance, accorded for all investments, and selective allowances, including a "general regional allowance", to be granted only for investments made outside the Randstad.

5 By a letter of 18 February 1977 the Netherlands Government notified to the Commission the draft of the Wet Investeringsrekening pursuant to Article 93 (3) of the Treaty. By a letter of 26 May 1977 the Commission replied that it had initiated the procedure provided for in Article 93 (2) of the Treaty against that draft law, in respect of the system of selective allowances and, in particular, the general regional allowance, on the ground that it did not specify the region to which it applied. Following discussions between the Commission and the Netherlands Government, the government decided not to introduce the general regional allowance and incorporated it in the basic allowance. It informed the Commission of that decision by a letter of 16 March 1978 and, on the following 21 April, the Commission notified the Netherlands Government that the procedure initiated with regard to the Wet Investeringsrekening had been terminated.

6 In the course of the Wet Investeringsrekening's passage through parliament, it was decided to bring back into force the levy provided for by the Wet Selectieve Investeringsregeling. To that end, certain amendments to the Wet Selectieve Investeringsregeling intended to coordinate the two sets of rules were inserted in the Wet Investeringsrekening. In addition it was provided in Article 36 of the Wet Investeringsrekening that, for a transitional period pending the reintroduction of the levy imposed under the Wet Selectieve Investeringsregeling, investment allowances granted in the form of tax relief were to be reduced in respect of investments made in the Randstad. The Wet Investeringsrekening was adopted on 29 June 1978 and came into force with retroactive effect from 24 May 1978. The suspension of the Wet Selectieve Investeringsregeling was revoked as from 29 June 1978.

7 In 1978 and 1979 the plaintiff in the main proceedings made two investments in the Randstad district, both of which attracted the allowances provided for by the Wet Investeringsrekening. However, in respect of one of the investments, the allowance was reduced pursuant to the transitional rule contained in Article 36 of the Wet Investeringsrekening and, in respect of the other, the levy provided for by the Wet Selectieve Investeringsregeling was imposed.

8 Before the Gerechtshof, Heineken claimed that it was entitled to the full allowances for those two investments and that they should not be subject to the levy. It maintained that, taken together, the measures adopted had in fact introduced aid which had the same effect as that which had been envisaged initially in the Wet Investeringsrekening and in respect of which the Commission had raised objections. Consequently, in Heineken's view, the Wet Selectieve Investeringsregeling, the differential rate established under Article 36 of the Wet Investeringsrekening and the actual effects of that Law combined with those of the first must be regarded, individually or jointly, as an aid, within the meaning of Article 92 of the Treaty, put into effect without the prior notification required under Article 93 (3) of the Treaty.

9 The Gerechtshof took the view that, in order to give judgment, it required an interpretation, in that respect, of Articles 92 and 93 of the Treaty. It therefore stayed the proceedings and referred to the Court the following questions, which are the same in both cases:

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 in the sense indicated in the grounds of this judgment?

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?

10 In proceedings under Article 177 of the Treaty, the Court may not rule on the interpretation of national laws and regulations or on the conformity of such measures with Community law; it may only provide the national court wiht the criteria for interpretation based on Community law which will enable that court to solve the legal problem with which it is faced. In this instance, it is therefore necessary to provide the Gerechtshof with the criteria for interpretation which will enable it to decide whether the plaintiff in the main proceedings is justified in relying upon the Netherlands Government's failure to comply with the provisions of the Treaty on State aid in order to prevent the tax authorities from applying the laws in question to it.

11 Those provisions may be relied upon by individuals only if the national measures in question constitute aid within the meaning of Article 92 and if the procedure for review provided for in Article 93 (3) has not been complied with (judgment of 22 March 1977 in Case 78/76 *Steinike and Weinlig* [1977] ECR 595). Where it is apparent from the facts of the case that the procedural rules were followed, it is in any event unnecessary to inquire into the nature of the national measure concerned. Consequently, the Court considers it appropriate to examine in the first place the questions designed to establish whether the procedural rules laid down in Article 93 (3) of the Treaty were complied with.

The second question

12 By this question the Gerechtshof asks whether the notification to the Commission by a Member State of a plan to grant aid must be immediately and clearly made known to all the interested parties.

13 According to Article 93 (3) of the Treaty,

"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."

14 That text makes no reference to an obligation of the type mentioned in the second question and that is consistent with the objectives of the aforesaid provisions and the context within which they fall. The sole purpose of the first sentence of Article 93 (3) is to provide the Commission with the opportunity to review, in sufficient time and in the general interest of the Communities, any plan to grant or alter aid. At the same time, the interests of any individuals concerned are protected by Article 93 (2), which requires the Commission, when it initiates the procedure provided for in that paragraph, to give notice to the interested parties to submit their comments.

15 In reply to the second question it must therefore be stated that Article 93 (3) of the Treaty does not require that the notification to the Commission by a Member State of plans to grant or alter aid should be immediately made known to all the interested parties; such an obligation falls upon the Commission alone when it initiates the procedure provided for in Article 93 (2).

The third question

16 In this question the Gerechtshof asks whether the obligation to inform the Commission of plans to grant aid which is imposed on Member States by the

first sentence of Article 93 (3) also applies to alterations made to such plans in the course of parliamentary debate.

17 It is sufficient to note that Article 93 (3) is not confined solely to the grant of aid, but also covers the alteration thereof, and that the aforesaid aim of the first sentence of that provision could not be achieved if the Commission were informed only of the initial plans and not of subsequent alterations. However, it must be added that such information may be supplied to the Commission in the course of the consultations which take place between the Commission and the Member State concerned following the initial notification.

18 In reply to the third question it must therefore be stated that the obligation provided for in the first sentence of Article 93 (3) to inform the Commission of plans to grant or alter aid does not apply solely to the initial plan, but also covers subsequent alterations to that plan; such information may be supplied to the Commission in the course of the consultations which take place following the initial notification.

The fourth question

19 The fourth question concerns the prohibition, laid down by the last sentence of Article 93 (3), on the putting into effect of the proposed measures before the procedures prescribed in Article 93 (2) and (3) have resulted in a final decision. The Gerechtshof asks whether that prohibition applies to a plan for aid which has been duly notified in its initial version but subsequently altered without the Commission being informed of the alteration and whether, in such a case, the prohibition applies solely to the part of the aid which has been introduced by that alteration.

20 As the Court has already emphasized, *inter alia* in its order of 20 September 1983 (Case 171/83 R *Commission* v *France* [1983] ECR 2621), the final sentence of Article 93 (3) is the means of safeguarding the machinery for review laid down by that article, which, in turn, is essential for ensuring the

proper functioning of the common market. The prohibition laid down by that article is intended to ensure that the aid measures do not come into effect before the Commission has had a reasonable period in which to consider the plan in detail and, if necessary, to initiate the procedure provided for in Article 93 (2).

21 It follows that the prohibition applies to the aid programme in its entirety and in the final version adopted by the national authorities. If the initial plan has been altered, the last sentence of Article 93 (3) therefore applies to the plan as altered. Where the plan has been notified and the Commission has not raised any objections to it, but the Member State concerned has made alterations of which the Commission has not been informed, the provision precludes the putting into effect of the aid programme in its entirety. The position may be different only where the alteration in question is in actual fact a separate aid measure which should be assessed separately and which is therefore not such as to influence the assessment which the Commission has already made of the initial plan.

22 In reply to the fourth question it must therefore be stated that the prohibition on the putting into effect of aid measures, which is laid down in the last sentence of Article 93 (3), applies to the proposed aid programme in its entirety and in the final version adopted by the national authorities. If the plan initially notified has in the meantime undergone alterations of which the Commission has not been informed, the prohibition applies to the plan as altered, unless the alteration in question is in actual fact a separate aid measure which should be assessed separately and which is therefore not such as 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.

23 In the light of the replies given to the second, third and fourth questions, the Court takes the view that it is unnecessary to consider the first question.

Costs

24 The costs incurred by the Netherlands Government, by the Government of the Italian Republic and by the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties in the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decisions on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Gerechtshof, Amsterdam, by judgments of 13 April 1983, hereby rules:

1. **Article 93 (3) of the Treaty does not require that the notification to the Commission by a Member State of plans to grant or alter aid should be immediately made known to all the interested parties; such an obligation falls upon the Commission alone when it initiates the procedure provided for in Article 93 (2).**

2. **The obligation provided for in the first sentence of Article 93 (3) to inform the Commission of plans to grant or alter aid does not apply solely to the initial plan, but also covers subsequent alterations to that plan; such information may be supplied to the Commission in the course of the consultations which take place following the initial notification.**

3. **The prohibition on the putting into effect of aid measures, which is laid down in the last sentence of Article 93 (3), applies to the proposed aid programme in its entirety and in the final version adopted by the national authorities. If the plan initially notified has in the meantime undergone alterations of which the Commission has not been informed, the prohibition applies to the plan as altered, unless the alteration in question is in actual fact a separate aid measure which should be assessed separately and which is therefore not such as**

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.