OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 4 March 2004 [1]

I — Introduction

1. In these two cases, C-174 and C-175/02, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) raises a number of questions concerning the interpretation of the last sentence of Article 88(3) EC.

2. Case C-174/02 concerns a regulatory levy on waste substances the revenue from which is intended for the public coffers. However, this levy is subject to various exemptions, which are in the nature of aid measures. Case C-175/02 also concerns a regulatory levy, in this instance on the overproduction of manure. The revenue from the latter levy is intended for a package of measures to reduce regional manure surpluses. One of the measures includes an aid measure for the transport of high-quality manure to areas where there is a shortage of manure.

In both cases the main question is whether the link between the levy and the aid measure is so clearly direct and inseparable that both the levy and the aid measure are subject to the delaying provision of the last sentence of Article 88(3) EC. [2] A related question is whether it was permissible for the levies to be imposed before the Commission had declared the aid measures concerned to be compatible with the common market.

II — Facts and legislative background

A — *Case C-174/02*

3. The Streekgewest Westelijk Noord-Brabant (Regional District of Western North-Brabant — 'Streekgewest') is a body with legal personality controlled by a number of

1 — Original language: Dutch.

2 — Both cases predate the change in the numbering of the articles of the EC Treaty. The orders for reference still refer to Articles 92 and 93 of the EC Treaty. For the sake of clarity the new numbering system is consistently used in this Opinion.

cooperating municipalities in the Dutch region of Noord-Brabant. The Streekgewest is responsible for collecting domestic waste and transporting it to a processing facility, which also comes under its jurisdiction. Tax is paid for the delivery of waste to a processing facility under Article 18 of the Wet belastingen op milieugrondslag (Law on environmental taxes — 'WBM').

4. The Streekgewest paid HFL 499 914 in tax on waste for the period from 1 January 1995 to 31 January 1995. However, it objected to this amount and requested that it be refunded, that request being rejected by the tax inspector.

5. In the subsequent appeal proceedings the Streekgewest relied on the last sentence of Article 88(3) EC, since it took the view that the infringement of that delaying provision meant that it need not pay any tax under the WBM, on the ground that, since January 1995, the WBM had provided for a number of aid measures of which the Commission had been notified, but which it had not yet approved on that date.

6. The aid measures for which the WBM provides came into being in the following way.

7. The Commission was notified of the exemptions and rules on refunds included in the original proposal for the WBM and approved them by decision of 25 November 1992. [3]

8. During the parliamentary debate on that proposal amendments were made to the aid measures. The Commission was notified of these amendments and approved them on 29 March 1994. [4]

9. On 13 October 1994 a further proposal for an amendment was put before Parliament. With regard to the tax on waste, it envisaged an increase in the tax from HFL 28.50 to HFL 29.20 per 1 000 kilos of waste, together with refunds on the tax on waste to persons delivering de-inking residues for processing and to persons delivering waste from the recycling of plastic materials to a waste processing undertaking.

10. The Netherlands Government notified the Commission of these measures, which it

3 — OJ 1993 C 83, p. 3.
4 — OJ 1994 C 153, p. 20.

referred to as 'further adjustments', by letter of 27 October 1994. By letter of 25 November 1994 the Commission pointed out to the Netherlands Government that the notification was incomplete and asked it to provide additional information. In reply (on 20 December 1994) the Netherlands Government also informed the Commission that it had meanwhile included two new aid measures in the proposal. [5] The final version of the WBM was adopted by Parliament on 21 December 1994 and entered into force (as a whole) on 1 January 1995.

11. By letter of 25 January 1995 the Commission informed the Netherlands Government that the law covered a number of aid measures on which the Commission had not yet commented and that those aid measures were regarded as not having been notified. By decision of 3 July 1995 the Commission declared the aid measures covered by the WBM to be compatible with the common market.

B — *Case C-175/02*

12. Case C-175/02 concerns a surplus levy which was introduced under Article 13 of the Meststoffenwet (Law on fertilisers) on 1 May 1987.

13. This levy is intended 'to meet costs connected with:

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

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

(c) the creation of infrastructure 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.'

14. Article 9(4) of the Meststoffenwet provides that a manure bank may, in accordance with rules to be laid down by or pursuant to administrative measures, contribute towards the costs of — *inter alia* — the transport of animal manure if, in its opinion, that serves to promote efficient processing and removal in accordance with the objectives of that law. In this connection the Netherlands Government adopted the Reglement Mestbank inzake vangnetfunctie en kwaliteitspremiër-

5 — This concerns a different tax governed by the same law, groundwater tax, and not the tax on waste at issue here, and a temporary exemption from the tax on waste in respect of purifiable dredging spoil.

ingssysteem (Manure Bank (Safety Net Function and System of Quality Premiums) Regulations), which included an aid measure for the transport of high-quality manure under the system of quality premiums (the KPS).

15. The Netherlands notified the Commission of the aid measure by letters of 26 July 1988 and 16 January 1989. The Commission informed the Netherlands by letter of 10 March 1989 that it had decided to raise no objection to the aid until the end of 1989. In a subsequent letter the Commission confirmed that the aid measure was regarded as compatible with the common market from 1 January 1988.

16. F.J. Pape runs a poultry farm. In 1988 so much manure was produced on his farm that he became liable for the surplus levy. He was therefore sent an assessment notice dated 31 March 1989, i.e. after the Commission's letter of 10 March 1989. Pape claims that he did not need to pay this assessment because Article 13 of the Meststoffenwet had entered into force (on 1 May 1987) before the date of the Commission's letter (10 March 1989) and because the assessment concerned a period (1988) before the Commission's letter of 10 March 1989. He argues that the surplus levy imposed on him was intended for the financing of an aid measure which was inconsistent with the last sentence of Article 88(3) EC.

III — The questions submitted for a preliminary ruling

A — *Case 174/02*

17. The questions submitted for a preliminary ruling in Case C-174/02 read as follows:

'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 (now the last sentence of Article 88(3) EC)?

2. Where an aid measure within the meaning of the last sentence of Article 93(3) of the EC Treaty (now the last sentence of Article 88(3) EC) 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 as described in the final sentence of point 3.4.3 [6] can be identified 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 (now the last sentence of Article 88(3) EC), 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 law by relying on the direct effect of Article 93(3) of the EC 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(2) of the EC Treaty?'

B — *Case C-175/02*

18. The questions submitted for a preliminary ruling in Case C-175/02 read as follows:

6 — The last sentence in the order for reference referred to reads: 'It is established that a small proportion of the tax on waste (HFL 0.70 per tonne of waste) is used to offset the effects of the rules on refunds referred to at point 3.1.3 above ("further adjustments") which were introduced by the Amending Law ...' The adjustments referred to at point 3.1.3 of the order for reference are the '... refunds on the tax on waste for persons delivering de-inking residues for processing and for persons delivering waste from the recycling of plastic materials to a waste processing undertaking.'

'1. For so long as the implementation of an aid measure is not permitted under the last sentence of Article 93(3) of the EC Treaty (now the last sentence of Article 88(3) EC), does the prohibition laid down in that provision also apply to the introduction of a levy the revenue from which is earmarked under the relevant law 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), 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 EC 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 EC 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 EC 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?'

IV — Assessment

A — *Preliminary comments*

19. It is clear from the facts described above that both cases concern State aid measures within the meaning of Article 87(1) EC. In Case C-174/02 (Streekgewest) this aid is in

the nature of a specific exemption from the sectoral tax on waste. Case C-175/02 (Pape) concerns an aid measure for the transport of manure which is funded from the proceeds of the surplus levy on the production of manure.

20. Furthermore, although the Commission was notified in both cases of the laws and the aid measures for which they provided, they entered into force before the Commission had taken a decision on the compatibility of the aid measures concerned with the common market. Another factor which the two cases have in common is that the Commission subsequently declared the aid measures compatible with the common market.

21. Both the Streekgewest and Pape claim that they were not liable for the tax on waste or the surplus levy. In this they rely on the last sentence of Article 88(3) EC. They believe that, as the Netherlands failed to fulfil its obligations under that provision, they, as tax-payers, had an interest in compliance with that provision and that it followed from the Court's case-law [7] that the tax or levy they had paid should be refunded.

7 — They rely specifically on the judgments in Case C-354/90 *Fédération nationale du commerce extérieur (FNCE)* [1991] ECR I-5505 and Case C-17/91 *Lornoy and Others* [1992] ECR I-6523. In the national proceedings the Streekgewest has also referred to the judgment in Case 173/73 *Italy* v *Commission* [1974] ECR 709.

22. Although the questions put by the Hoge Raad in these two cases are not identical, they have a common denominator in that they concern three aspects of the interpretation of the last sentence of Article 88(3) EC and its application in the national legal order.

23. In essence, the national court's questions concern:

1. the financial aspect of the aid measure. This relates specifically to the question whether and under what conditions the levying of taxes must be regarded as an act implementing the aid measure, with the result that the delaying provision, the last sentence of Article 88(3) EC, with all the consequences associated with it, is wholly or partly applicable to the levy itself;

2. the number of parties affected at national level by the directly effective provision laid down in the last sentence of Article 88(3) EC;

3. the consequences for the previously unlawful action of a Member State of a

decision subsequently taken by the Commission on compatibility with the common market.

24. Before considering the questions in greater depth, I would like to make the following comments.

25. The substantive legal purpose of ensuring compliance with Article 88(3) EC is to prevent State aid measures from distorting competition as a result of unilateral and premature action by Member States. To this end, Article 88(3) EC requires Member States to give the Commission prior notification of and obtain its approval for proposed aid measures or proposed changes to existing aid measures. Aid which is granted without prior notification or after notification but before the Commission has commented on it is therefore granted unlawfully.

26. Consequently, if it is found that a Member State has acted unlawfully, the distortion of competition brought about by the premature and unlawful granting of aid must be eliminated *ex tunc*.

27. According to settled case-law, recently reaffirmed by the Court, [8] this is the case even if the Commission subsequently declares the aid to be compatible with the Treaty. I will revert to this in points 57 to 59.

28. In my Opinion on Case C-308/01 *GIL Insurance and Others* [9] I pointed out that the EC Treaty provides for two regimes for the distortion of competition, between which a clear distinction should be made *ratione materiae*. The procedure provided for in Articles 96 and 97 EC is aimed at distortions which result from differences between the laws, regulation or administrative provisions in the Member States. The procedure provided for in Articles 87 to 89 EC is aimed at distortions of competition that result from Member States' aid measures. Between the two procedures there are major differences, which are reflected *inter alia* in the Member States' obligations and the Commission's powers. This is a reason, needless to say, for a clear distinction to be made between the respective spheres of application of these procedures.

29. Particularly important in the case of aid measures in the form of specific exemptions

8 — Judgments in *FNCE*, cited in footnote 7, and in Joined Cases C-261/01 and C262/01 *Van Calster and Others* [2003] ECR I-12249.

9 — Opinion in Case C-308/01 *GIL Insurance and Others* [2004] judgment of 29 April 2004, ECR I-4777 points 68 to 77.

from general or sectoral taxes and levies is the definition given in the Treaty of the Community's powers with respect to aid measures and national tax measures. If the Commission finds that a specific exemption from general or sectoral taxes should be regarded as an aid measure, the action it takes to eliminate the resulting distortion of competition at Community level must be geared primarily to that specific aid measure. It should respect the powers of the national body that adopts tax laws. Only if and in so far as the substance and application of a general or sectoral national tax scheme include elements of State aid may the Commission use its powers under Articles 87 and 88 EC to take action against those specific elements.

30. The Court has considered the connection between fiscal or parafiscal levies and the granting of specific aid in a number of its judgments, [10] including some recent ones. Where the application of the last sentence of Article 88(3) EC is concerned, a more specific question that has arisen is whether and, if so, under what conditions the unlawfulness of aid granted prematurely contrary to that provision also extends to the levies from which that aid is financed. In other words, what consequences can the application of Articles 87 and 88 EC have for the powers of the national legislature in the fiscal and parafiscal sphere?

31. In answering this question, I will disregard situations where State aid is financed from fiscal or parafiscal levies which are in themselves inconsistent with other Treaty provisions, such as Articles 25 and 90 EC, [11] since in the cases here under discussion no questions arise as to the lawfulness of the levies as such.

1. The connection between a fiscal or parafiscal charge and unlawful State aid

32. The instances in which the Court has assumed such a connection between a levy and the aid measure financed from it have the following characteristics in common:

10 — Judgments in *Van Calster and Others*, cited in footnote 8, and in Case C-38/01 *Enirisorse and Others* [2003] ECR I-14243. For earlier case-law see, for example, the judgments in Case 77/72 *Capolongo* [1973] ECR 611, *FNCE*, cited in footnote 7, Joined Cases C-78/90 to C-83/90 *Compagnie commerciale de l'Ouest and Others* [1992] ECR I-1847 and Case C-72/92 *Scharbatke* [1993] ECR I-5509).

11 — On this aspect too the Court has established extensive case-law. See, for example, the judgments in *Capolongo and Scharbatke*, cited in footnote 10, *Lornoy and Others*, cited in footnote 7, Case 78/76 *Steinike & Weinlig* [1977] ECR 595 and Case C-234/99 *Nygård* [2002] ECR 3657.

— a direct and inseparable link between the levy and the aid measure financed from it.

This link is reciprocal, which is to say that, if the aid measure ceases, the levy also (partly) lapses and that, conversely, with the lapsing of the levy, the aid measure loses its specific source of funding;

— the levy is required of individuals who have an economic or competitive relationship with the recipients of the aid. In such instances, where it must always be possible to assess the combined effect of the levy and the aid measure, the assessment of the aid must not, as the Court has ruled in paragraph 49 of its judgment in Joined Cases C-261/01 and C-262/01 *Van Calster and Others*, be seen in isolation from the consequences of the method of financing.[12] After all, in such instances the economic or competitive position of those liable for the levy as compared with the recipients of the aid may be affected in two ways. Not only do they receive no aid: they must also finance the aid that benefits their competitors.

12 — Judgment cited in footnote 8. For earlier case-law see, for example, the judgment in Case 47/69 *France* v *Commission* [1970] ECR 487.

33. In instances in which the Court has assumed so close a connection it is clear that national policy-making almost always concerns earmarked levies imposed at sectoral or subsectoral level,[13] the revenue from which benefits certain undertakings or specific activities within that sector or subsector.

34. Whether there is a direct and inseparable link between the levy and the aid financed from it should be assessed in each case from the wording of the rules concerned, the system underlying them, the manner in which they are applied and the economic context in which they are applied.

35. Indicative of the existence of such a link are the following criteria:

— the extent to which the aid measure concerned is financed from the revenue of the levy and is thus dependent;

— the extent to which the revenue from the levy is intended solely for the specific aid measure;

13 — See the judgments cited in footnote 11.

— the extent, apparent from the legislation concerned, of the binding nature of the link between the revenue from the levy and its specific earmarking as an aid measure;

— the extent to which and the manner in which the combination of the levy and aid measure influences competition in the (sub)sector or business sphere concerned.

36. Where the aid measure is financed solely from the levy, where the levy is intended solely for the aid measure concerned, where there is compelling evidence of the link in the rules and where the combined effect of the levy and the aid has significant consequences for competition in the sector concerned, the existence of a direct and inseparable link can be assumed.

37. Conversely, so direct and inseparable a link will be far less obvious in situations where the purpose for which the revenue from the levy is used is subject to a more detailed appraisal in this respect by the competent national authorities, where the aid measure is only partly financed from the levy, where the revenue from the levy is intended for more purposes than the aid measure concerned and where the levy is not based specifically on the sector at which the aid measure is aimed.

38. The above is consistent with the aforementioned judgments in *Van Calster and Others* and *Enirisorse and Others*.

39. The former case concerned a statutory scheme under which a special fund was established to finance measures to combat animal diseases and to improve the hygiene, health and quality of animals. This fund was financed from compulsory contributions paid by all undertakings engaged in the production chain, i.e. primary producers of animals, transporters of animals, meat processors and meat marketers and traders. The main beneficiaries of the aid used to fund measures to promote animal hygiene and health were farmers as primary producers.

40. The case of *Enirisorse and Others* concerned port charges for the loading and unloading of goods. Although the revenue from these charges was intended for the public coffers, the statutory tax measure concerned explicitly stipulated that two thirds of the revenue were to be paid to an undertaking which also had an economic and (potentially) competitive relationship with the undertakings liable for the charges.

41. These two cases fully (judgment in *Van Calster and Others*) or predominantly (judgment in *Enirisorse and Others*) meet the criteria elaborated in points 35 to 37 above from which the existence of a direct and

inseparable link between a levy and an aid measure financed from it can be inferred. In these cases the legal consequences associated under Community law with failure to comply with the last sentence of Article 88(3) EC therefore also extend to the levy from which the aid measure is financed.

42. Such a direct and inseparable link between a levy and its use as an aid measure does not exist in cases where a specific levy has a specific purpose which cannot be regarded as an aid measure, such as levies earmarked for the draining of polluted water so that it may be decontaminated or tolls used for the construction and maintenance of roads.

43. Nor is this the case where general or sectoral levies are intended to benefit the public coffers. In practical policy terms these are ordinary general or sectoral taxes or general or sectoral regulatory levies imposed primarily under environment policy in the form of levies on emissions. Like the previous category of specific earmarked levies, earmarked for a purpose other than an aid measure, they are as such irrelevant to the application of Articles 87 and 88 EC.

44. If specific exemptions or rate reductions are applied to the levies and taxes referred to in points 42 and 43 for groups of taxable persons accurately defined in terms of (sub) sector or activity, those exemptions or rate reductions may well constitute aid measures within the meaning of Article 87 EC. In the cases referred to in point 42 certain economic activities may be exempted from earmarked levies. Such exemptions and rate reductions frequently occur in the case of the more general and sectoral taxes referred to in point 43.

45. In such cases, however, contrary to the Commission's argument in paragraphs 40 to 42 of its written observations in Case C-174/02, there can be no question of a direct and inseparable link between the levy and its earmarking for an aid measure.

Although it may happen that the amount of the levy is partly determined by the scale of the exemptions from it, whether and to what extent that will be the case will be at the discretion of the national fiscal legislature. Furthermore, even though a causal link between the amount of the levy and exemptions from it may be assumed, only a fraction of it is intended for the 'financing' of the exemption.

Conversely, the exemption may constitute an aid measure without its 'financing' requiring a higher rate of the levy to which it forms an exception. Nor, as a rule, will the (sub)

sectoral scope of the levy and that of the exceptions to it coincide: the twofold distortion of competition — by the charge and by the aid measure — does not then occur.

46. The connection between the levies referred to here and the favourable exceptions to them does not therefore satisfy the criteria described above in paragraph 35 for assuming a direct and inseparable link between the levy and the aid measure such that anything like the existence of such a link might be assumed.

47. The foregoing has the following consequences for the application of the last sentence of Article 88(3) EC:

(a) if it has to be accepted that there is a binding connection between the levy and the aid measure financed from it, the prohibition of implementation extends to the aid measure and the levy from which it is financed;

(b) if no such link exists between the levy and the aid measure, the prohibition of implementation is limited to the aid measure.

48. In the event of an infringement of this delaying provision both the premature application of the levy and the aid measure are unlawful. Both must be abolished *ex tunc*.

In the latter case only the premature application of the aid measure in the form of exemptions or reductions in the levy is unlawful. In this case the obligation on the competent national authorities is limited to withdrawing with retroactive effect the advantage which the undertakings favoured by the tax facility concerned have enjoyed. It is for them to decide how that result is achieved.

49. Unnecessarily perhaps, I would also point out the following.

50. The nature of the aid structure used does not alter the Member States' obligation to notify the Commission of both the aid measure and the associated levies or taxes whenever State aid may be mooted in the event of or in connection with the application of fiscal or parafiscal levies. The levy itself may, after all, be inconsistent with Community law, thus making the associated aid measure unlawful too. Even where this is not the case, the aid measure must, as has become clear above, always be assessed in the light of the levy scheme with which it is

associated. The notification obligation, recently defined once again by the Court in paragraph 50 of the judgment in *Van Calster and Others*, is therefore broad in its scope.

2. Those entitled to rely on the provision

51. The last sentence of Article 88(3) EC is directly effective. [14] From this it follows that individuals may rely on this provision and that national courts must apply it — if necessary, of their own motion. [15]

52. It is, however, for each Member State's national legal system to designate the competent court and to indicate the procedural rules for actions at law with a view to safeguarding the interests which individuals may derive from the direct effect of Community law, on the understanding that those rules may not be less favourable than those governing similar national actions and that in no circumstances may they be such that the exercise of the rights which the national courts have to uphold is made virtually impossible. [16]

53. In a number of rulings [17] the Court has used the standard argument that it is for the national courts to protect the rights of individuals against any failure by the national authorities to observe the directly applicable prohibition provided for in the last sentence of Article 88(3) EC of the implementation of aid measures and that, where the national courts detect such a failure, against which individuals may appeal, they must draw all the appropriate conclusions in accordance with their national legislation, as regards both the validity of the action taken to implement the aid measure concerned and the recovery of the aid.

54. From this it follows that, although it is primarily for national legislation to define who may rely on the last sentence of Article 88(3) EC, the number of such persons is partly determined by the consequences which Community law associates with failure to comply with the requirement set out in that provision.

55. For the definition of those persons it is therefore necessary to determine whether the consequences of failure to comply with the requirement set out in the last sentence

14 — Judgments in Case 6/64 *Costa* [1964] ECR 585, Case 120/73 *Lorenz* [1973] ECR 1471 and many other subsequent cases.

15 — Judgments in Case 26/62 *Van Gend & Loos* [1963] ECR 1 and Case 106/77 *Simmenthal* [1978] ECR 629.

16 — Settled case-law since the judgments in Case 33/76 *Rewe* [1976] ECR 1989 and Case 45/76 *Comet* [1976] ECR 2043, recently reaffirmed in the judgment in Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 60.

17 — Recently *Enirisorse and Others*, cited in footnote 10.

of Article 88(3) EC also extend to the levy from which the aid measure concerned is financed.

The consequences of a subsequent Commission decision

56. In its case-law the Court has made a consistent distinction between the different and complementary tasks of the Commission and the national courts in the context of the supervision of the Member States' compliance with the obligations on them under Articles 87 and 88 EC. [18]

57. While it is for the Commission to consider whether a proposed aid measure is compatible with the common market, action by the national courts is based on the direct effect of the last sentence of Article 88(3) EC. [19] This provision forms the keystone of the supervision to which national aid measures are subject. Failure to comply with it makes premature aid measures unlawful, and they must be abolished *ex tunc*.

58. To safeguard the effectiveness of the last sentence of Article 88(3) EC and the interests of the individuals protected by it, an infringement of that provision cannot be subsequently corrected by a Commission decision declaring the aid measures concerned to be compatible with the common market. [20]

B — *Case C-174/02*

59. The main proceedings in this case concerns the premature application of a number of exemptions from a general regulatory levy on waste. The revenue from the levy is intended for the public coffers. There is no question here of any direct and inseparable link between the levy and specific earmarking for an aid measure. This should be borne in mind when the questions submitted by the national court are answered.

60. The first question, in which the national court essentially seeks to establish which individuals may rely on the last sentence of Article 88(3) EC, has been discussed in points 51 to 55 above. In the more specific context of this case, the need to ensure the effectiveness of the direct effect of the last sentence of Article 88(3) EC requires at least

18 — See, for example, the judgments in Case C-301/87 *France* v *Commission* [1990] ECR I-307 and *FNCE*, cited in footnote 7.

19 — See, for example, the judgments in Joined Cases 91/83 and 127/83 *Heineken* [1984] ECR 3435 and Case C-332/98 *France* v *Commission* [2000] ECR I-4833.

20 — See, for example, the judgment in *FNCE*, cited in footnote 7, recently reaffirmed in the judgment in *Van Calster and Others*, cited in footnote 8, paragraph 63.

that that provision can be relied on by those who are parties concerned within the meaning of Article 88(2) EC. These are persons, undertakings and associations whose interests may be affected by the allocation of aid. This is without prejudice to the possibility of a larger number of parties concerned being specified under national legislation.

61. If it were to be assumed that there was so close a link between the levy on waste and the exemptions from it that not only those exemptions, as an aid measure, but also the levy itself was prohibited by the last sentence of Article 88(3) EC — which, to my mind, cannot be the case — those liable for the levy must certainly be regarded as parties concerned within the meaning of Article 88(2) EC.

62. By its second question the national court seeks to establish whether in the situation underlying the main action the prohibition for which the last sentence of Article 88(3) EC provides also extends to the general tax scheme to which the specific exemptions apply as an exception.

63. The positions of the Streekgewest, the Commission and the Netherlands Government differ widely on this question.

64. The Streekgewest takes the view that a specific exemption from a general levy as such forges a direct and inseparable link between the levy and the aid measure, and this to such an extent that there is a binding connection between the two. From this it would follow that, with the premature and unlawful application of the exemptions, the imposition of the levy on waste was unlawful in its entirety in the period concerned.

65. The Commission assumes that there is certainly a binding connection between the levy on waste and the exemptions in so far as the introduction of the exemptions resulted in the Netherlands legislature raising the rate from HFL 28.50 to HFL 29.20 per 1 000 kg of waste. It refers in this context to 'communicating vessels'. This could, in my view, be taken to mean that the premature application of the exemption made the imposition of the levy on waste unlawful as far as the application of the rate increased by HFL 0.70 is concerned.

66. The Netherlands Government denies the existence of any binding connection between the levy and the exemptions from it in general and, more specifically, between those exemptions and the HFL 0.70 increase in the levy rate. It infers from this that the premature application of the exemption cannot have any consequences for the lawfulness of the levy in the period concerned.

67. I have already explained in points 43 to 46 above why the link between a general or sectoral levy and the specific exemptions from it must not be assumed to be so direct and inseparable that there is a binding connection between them.

68. It is true that, logically, a general levy like the levy on waste must exist if there are to be specific exemptions from it which may be regarded as an aid measure. This does not alter the fact, however, that it cannot possibly be maintained that there is a direct and inseparable link between the revenue from the general levy and its use to 'finance' the exemptions. Such a link does not even exist between the HFL 0.70 increase in the rate and the financing of the revenue of which the public coffers were deprived a result of the exemptions — such revenue not being, by definition, State aid in terms of its purpose. Whether and to what extent compensation is needed for the loss of revenue incurred as a result of the specific exemptions from the levy is for the competent national fiscal legislature to decide. If it considers such compensation desirable, it is then free to derive it from an increase in the general levy rate that applies to everyone liable to pay the levy.

69. I have already explained in point 50 above that the notification obligation set out in Article 88(3) EC extends to the aid and the manner in which it is financed. For aid measures in the form of specific exemptions from general levies this means that the levies concerned must also be notified, since the Commission must be able to take all relevant circumstances of a factual or legal nature into consideration when assessing whether prohibited State aid is involved.

70. The notification obligation does not prevent the Member States from imposing the general levy concerned, on condition that they include in the scheme itself an explicit qualification concerning the application of the exemption for which it provides until the Commission has taken its decision. The last sentence of Article 88(3) EC cannot impede the Member States' power to implement general levy schemes. By definition such schemes cannot, after all, give rise to an aid measure.

71. If, however, a Member State implements a general levy scheme without an explicit qualification concerning the specific exemptions for which it provides, the result, when those exemptions are applied, is an infringement of the delaying provision, the last sentence of Article 88(3) EC. This unlawfulness must then be corrected retroactively in such a way that the outcome is materially the same as the situation which would have obtained if the general levy had been imposed without the specific exemptions concerned.

72. What must be corrected, therefore, is the exemption and not the levy itself. In its written observations the Commission draws attention to the problems associated with the possibility that the principle of legal certainty, so important in tax law, will bar the imposition of taxes and other levies with retroactive effect in national legal systems. With this in mind, it describes various options that may provide a solution. They include the 'reverse' solution, amounting to a reduction in the rate of the general levy to the level of that at which the exemption applies.

73. I would point out in this context that under Community law an infringement of the rule laid down in the last sentence of Article 88(3) EC imposes an unconditional obligation on the Member State concerned to rectify that infringement retroactively, it being left to the national courts to decide how this is to be achieved.

74. The foregoing reveals the following:

— aid measures in the form of specific exemptions from general taxes or levies should be notified with the general tax or levy scheme of which they form part;

— the Member States are authorised to impose the general tax or levy concerned on condition that they include in the scheme itself an explicit qualification concerning the application of the exemptions for which it provides until the Commission has taken its decision in this respect;

— the application of the exemptions from the general tax or levy before the Commission has decided that they are compatible with the common market constitutes an infringement of the last sentence of Article 88(3) EC;

— that infringement should be rectified with retroactive effect in such a way that the outcome is materially the same as the situation which would have obtained if the general levy had been imposed without the specific exemptions concerned;

— it is for the national courts to decide how this is to be achieved.

75. On the assumption that the general levy concerned may be introduced before the Commission has adopted a position on the exemptions from it, the national court also

wants to know if, assuming that there is a link between the — slight — increase in the general levy (by HFL 0.70) and the specific exemptions from that levy, the introduction of that increase must be regarded as the implementation, or the beginning of the implementation, of the aid measure concerned.

76. From points 43 to 47 above it follows that the answer to this question should be in the negative:

— a direct and inseparable link cannot be assumed to exist between the general levy and the financing of the specific exemptions from it;

— if the revenue from the general levy is intended for the public coffers, it is for the national legislature to decide whether or not it wishes to compensate for the loss of tax revenue due to the exemptions and, if so, how it does so.

As, therefore, a direct and inseparable link cannot be assumed to exist between the — slight — increase in the general levy and exemptions from it, the introduction of that increase cannot be regarded as the implementation, or the beginning of the implementation, of the aid measure concerned.

77. The fourth question concerns the consequences of a subsequent affirmative decision. The answer has been given in points 56 to 58 above: a subsequent decision by the Commission declaring a notified aid measure to be compatible with the common market does not result in the correction of the unlawfulness of the implementation of the measure contrary to the last sentence of Article 88(3) EC.

78. The fifth and sixth questions are based on the assumption that the prohibition of implementation in the last sentence of Article 88(3) EC also applies wholly or partly to the general levy. It follows from the proposed answers to the second and third questions that this cannot be the case. These questions are therefore hypothetical in nature and do not need to be answered.

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79. By its first question the national court essentially seeks to establish whether the prohibition provided for in the last sentence of Article 88(3) EC applies not only to the aid measure but also to the introduction of a levy the revenue from which is intended for the financing of that aid measure. If the answer to that question depends on the closeness of the link between the earmarked levy and the

aid measure or on other circumstances, the national court wants to know what circumstances are relevant in that regard.

80. The answer to this question can be deduced from what I have said in points 32 to 48 above:

— if there is a direct and inseparable link between the levy and the aid measure as the purpose for the revenue from that levy, the prohibition of implementation in the last sentence of Article 88(3) EC extends to both the aid measure and the levy;

— the following criteria are indicative of the existence of a direct and inseparable link between the levy and the aid measure:

(a) the extent to which the aid measure concerned is dependent for its financing on the revenue from the levy;

(b) the extent to which the revenue from the levy is intended in particular for the specific aid measure;

(c) the extent, apparent from the rules concerned, of the binding nature of the link between the revenue from the levy and its specific earmarking as an aid measure;

(d) the extent to which and the manner in which the combination of the levy and aid measure influences competition in the (sub)sector or business sphere concerned.

81. It is for the national court to determine on the basis of the legal and factual context of the main action whether, when examined for compatibility with the indicative criteria described here, so direct and inseparable a link exists that the delaying provision of the last sentence of Article 88(3) EC is applicable not only to the aid measure but also to the levy used to finance it.

82. I would add that in the factual and legal context of the main action the existence of a direct and inseparable link is not really plausible. After all:

— the levy from which the aid measure is financed, the 'surplus levy', has the effect of regulating conduct in that one of its aims is to limit the overproduction of

manure by those liable for the levy. From this it again follows that the existence of a binding link between the levy and the measures financed from the revenue from the levy is not so plausible. After all, those measures would then have to be financed from a levy the revenue from which is in all likelihood degressive; [21]

— it is firmly established that the revenue from the levy benefits various measures, of which aid for the transport of manure is but one;

— the allocation of the revenue to various uses, including the aid measures of relevance here, is at the discretion of the competent administrative authorities.

83. The second question concerns the — putative but, in my view, implausible — situation in which not only the aid measure but also the levy is affected by the prohibition in the last sentence of Article 88(3) EC. The direct effect of this provision is that those liable for the levy may oppose its imposition in law. The national court follows this up by asking whether the parties concerned may oppose in law the full amount levied on them or only that portion which was intended for the aid measure during the period in which it was implemented prematurely.

84. The answer to this question can similarly be deduced from points 32 to 48 above. After all, if the existence of a direct and inseparable link between the levy and aid measure must be assumed from the factual and legal context, it follows from that binding connection that the unlawfulness of the implementation of the aid measure must mean that the levy is unlawful in every respect. From this it follows that, on the assumption that such a link is established between the levy and the aid measure, the parties concerned may challenge the full amount levied on them.

85. However, the consequence of the proposed answer to the first question is that in situations where the revenue from a levy is only partly earmarked for the aid measure and that earmarking is dependent on a closer examination by the competent authority, it is difficult to accept that a direct and inseparable link actually exists between the levy and the aid measure.

86. From the answer to the second question, as proposed in paragraph 84, it again follows that the situation assumed in the third question — a prohibition of the imposition of part of the levy — cannot arise. After all, if there is a direct and inseparable link between the levy and the aid measure, it may not be introduced, not even partly.

21 — If the levy has the intended effect, manure production and thus the revenue from the levy itself will fall.

V — Conclusion

87. In view of the foregoing I propose that the Court should answer the questions submitted by the Hoge Raad as follows.

In Case C-174/02:

Question 1

— The need to ensure the effectiveness of the direct effect of the last sentence of Article 88(3) EC requires at least that that provision can be relied on by those who are parties concerned within the meaning of Article 88(2) EC.

— If it must be assumed that there is so close a connection between the levy on waste and the exemptions from it that not only those exemptions but also the levy is prohibited under the last sentence of Article 88(3) EC, those liable for the levy must be regarded as parties concerned within the meaning of Article 88(2) EC.

Question 2

— Aid measures in the form of specific exemptions from general taxes or levies should be notified with the general tax or levy scheme of which they form part.

— The Member States are authorised to impose the general tax or levy concerned on condition that they include in the scheme itself an explicit qualification concerning the application of the exemptions for which it provides until the Commission has taken its decision in this respect.

— The application of the exemptions from the general tax or levy before the Commission has decided that it is compatible with the common market constitutes an infringement of the last sentence of Article 88(3) EC.

— That infringement, consisting in the premature application of the exemptions, should be rectified with retroactive effect in such a way that the outcome is materially the same as the situation which would have obtained if the general levy concerned had been imposed without the exemptions.

— It is for the national courts to decide how this is to be achieved.

Question 3

— A direct and inseparable link cannot be assumed to exist between the general levy and the financing of the specific exemptions from it.

— If the revenue from the general levy is intended for the public coffers, it is for the national legislature to decide whether or not it wishes to compensate for the loss of tax revenue due to the exemptions and, if so, how it does so.

— As, therefore, a direct and inseparable link cannot be assumed to exist between the — slight — increase in the general levy and exemptions from it, the introduction of that increase cannot be regarded as the implementation, or the beginning of the implementation, of the aid measure concerned.

Question 4

— A subsequent decision by the Commission declaring a notified aid measure to be compatible with the common market does not result in the correction of the unlawfulness of the implementation of the measure contrary to the last sentence of Article 88(3) EC.

Questions 5 and 6

— In view of the proposed answers to Questions 2 and 3 these questions are of a hypothetical nature. They do not therefore need to be answered.

In Case C-175/02

Question 1

— If there is a direct and inseparable link between the levy and the aid measure financed from the revenue, the prohibition of implementation laid down in the last sentence of Article 88(3) EC extends to both the aid measure and the levy.

— The following criteria are indicative of the existence of a direct and inseparable link between the levy and the aid measure:

(a) the extent to which the aid measure concerned is dependent for its financing on the revenue from the levy;

(b) the extent to which the revenue from the levy is intended in particular for the specific aid measure;

(c) the extent, apparent from the rules concerned, of the binding nature of the link between the revenue from the levy and its specific earmarking as an aid measure;

(d) the extent to which and the manner in which the combination of the levy and the aid measure influences competition in the (sub)sector or business sphere concerned.

— It is for the national court to determine whether, with due regard for these criteria, there is a direct and inseparable link between the levy and the aid measure financed from it.

Question 2

— If it is inferred from an examination of the criteria referred to in the answer to Question 1 that the existence of a direct and inseparable link between the levy and the aid measure financed from it must be assumed, the parties concerned may challenge in law the full amount levied on them.

Question 3

— From the answer to Question 2 it follows that the assumption underlying this question cannot occur. If there is no inseparable link between the levy and the aid measure, the levy is not affected by the prohibition of implementation laid down in the last sentence of Article 88(3) EC. If such a link does exist, it may not be implemented, not even partly.