JUDGMENT OF THE COURT
21 October 2003 *

In Joined Cases C-261/01 and C-262/01,

REFERENCE to the Court under Article 234 EC by the Hof van Beroep te Antwerpen (Belgium) for a preliminary ruling in the proceedings pending before that court between

Belgische Staat

and

Eugene Van Calster,

Felix Cleeren (C-261/01)

and between

Belgische Staat

and

Openbaar Slachthuis NV (C-262/01),

* Language of the case: Dutch.

on the interpretation of Community law, in particular of Article 93 of the EC Treaty (now Article 88 EC) and Article 173 of the EC Treaty (now, after amendment, Article 230 EC) and of the Commission Decision of 9 August 1996 relating to aid measure No N 366/96,

THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), C. Gulmann, J.N. Cunha Rodrigues and A. Rosas (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Belgische Staat, by A. Snoecx, acting as Agent, assisted by B. van de Walle de Ghelcke, A. Vastersavendts and J. Wouters, avocats,

— Messrs. Van Calster and Cleeren and Openbaar Slachthuis NV, by J. Arnauts-Smeets and J. Keustermans, avocats,

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

— the Commission of the European Communities, by H.M.H. Speyart and D. Triantafyllou, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgische Staat, represented by B. van de Walle de Ghelcke and J. Wouters, Messrs. Van Calster and Cleeren, represented by J. Keustermans, Openbaar Slachthuis NV, represented by J. Arnauts-Smeets, and the Commission, represented by H. van Vliet, acting as Agent, at the hearing on 10 December 2002,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1 By orders of 28 June 2001, received at the Court of Justice on 5 July 2001, the Hof van Beroep (Court of Appeal) te Antwerpen referred to the Court for a preliminary ruling under Article 234 EC several questions on the interpretation of Community law, in particular of Article 93 of the EC Treaty (now Article 88 EC) and Article 173 of the EC Treaty (now, after amendment, Article 230 EC) and of the Commission Decision of 9 August 1996 relating to aid measure No N 366/96 ('the 1996 Decision').

2 Those questions were raised in proceedings between the Belgische Staat ('the Belgian State') and, on the one hand, Messers Van Calster and Cleeren, cattle dealers, and, on the other, Openbaar Slachthuis NV ('Openbaar Slachthuis'), a slaughterhouse. Messers Van Calster and Cleeren and Openbaar Slachthuis are seeking repayment by the Belgian State of charges which they have paid to the animal health and production fund ('the 1987 Fund'), on the ground that they were levied contrary to Community law.

Legal background

National legislation

3 The Law of 24 March 1987 on animal health (*Moniteur belge* of 17 April 1987, p. 5788, 'the 1987 Law') establishes a system to finance services to combat animal diseases and improve animal hygiene and the health and quality of animals and animal products ('the 1987 regime'). According to Article 2 of the 1987 Law, its purpose is 'to combat animal disease in order to promote public health and the economic welfare of livestock farmers'.

4 Article 32(2) of the 1987 Law provides:

'[The 1987 Fund] shall be set up in the Ministry of Agriculture. The purpose of the Fund shall be to contribute towards the financing of compensation,

allowances and other benefits for combating animal disease and improving the hygiene, health and quality of animals and animal products. The Fund shall be financed by:

1. Compulsory contributions from natural and legal persons who raise, process, transport, handle, sell or trade in animals;

...

If the compulsory contribution is collected from persons who process, transport, handle, sell or trade in animals or animal products, it shall, on every transaction, be passed back up to the stage of the producer...'

5 The 1987 Law authorises the Crown to determine by Decree the amount of the compulsory charges and the rules for collecting them. By Royal Decree of 11 December 1987 on the compulsory contributions to the animal health and production fund (*Moniteur belge* of 23 December 1987, p. 19317, 'the 1987 Decree'), a charge of BEF 105 per head of calf, cattle or pig slaughtered or exported alive was levied on slaughterhouses and exporters with effect from 1 January 1988. The 1987 Law and Decree were subsequently amended on several occasions. None of those documents was notified to the Commission pursuant to Article 93(3) of the Treaty.

6 Pursuant to the Law of 23 March 1998 on the establishment of a budgetary fund for the health and quality of animals and animal products (*Moniteur belge* of 30 April 1998, p. 13469, 'the 1998 Law'), the 1987 regime and Fund were

cancelled retroactively and replaced by a new scheme ('the 1998 regime') containing a new system of compulsory charges that apply retroactively with effect from 1 January 1988 and by a new fund, the Budgetary fund for the health and quality of animals and animal products ('the 1998 Fund'). The 1998 regime essentially differs from the 1987 regime in that it does not provide for a charge in respect of imported animals and the charges for exported animals are no longer due with effect from 1 January 1997.

7 Article 5 of the 1998 Law provides that the 1998 Fund is to be financed, inter alia, by charges levied by the Crown on natural and legal persons who produce, process, transport, handle, sell or trade in animals or animal products.

8 Article 14 of the 1998 Law levies charges on slaughterhouses and exporters. The amounts of those charges differ according to the period over which they are owed. According to that article:

'The following compulsory contributions to the fund shall be imposed on slaughterhouses and exporters:

...

Those compulsory contributions shall be passed on to the producer.

They are owed only in respect of national animals. They are not owed in respect of imported animals. They cease to be owed in respect of exported animals with effect from 1 January 1997.

With regard to imported animals, the compulsory contributions that were paid with effect from 1 January 1988 in application of the Royal Decree of 11 December 1987 on the compulsory contributions to the animal health and production fund, as amended by the Royal Decrees of 8 April 1989, 23 November 1990, 19 April 1993, 15 May 1995, 25 February 1996 and 13 March 1997, shall be repaid to persons who prove that the compulsory contributions paid by them related to imported animals, that those contributions were not passed on by them to the producer or that the passing on was annulled and that they have paid the contributions in full for the national animals, including the exported slaughtered animals and the exported stud and working animals.'

9 Articles 15 and 16 of the 1998 Law impose charges on the persons responsible for the holdings in which pigs are kept and on the dairies or the holders of licences to sell dairy products.

10 The second paragraph of Article 17 of the 1998 Law provides for automatic equalisation between amounts owed in respect of charges paid under the 1987 regime and charges due under the 1998 regime.

Procedure before the Commission

11 In accordance with the procedure provided for in Article 93(2) of the Treaty, the Commission, by Decision 91/538/EEC of 7 May 1991 on the animal health and

production fund in Belgium (OJ 1991 L 294, p. 43, 'the 1991 Decision') found that the 1987 regime was incompatible with the common market within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and could therefore not be implemented in so far as the compulsory charges were also imposed, at the stage of slaughter, on animals and products from other Member States.

12 By letters of 7 December 1995 and 20 May 1996 the Kingdom of Belgium notified, in accordance with Article 93(3) of the Treaty, draft legislative measures for the abolition of the 1987 regime and its replacement by a new scheme.

13 This draft provided in particular for a solution to the problem of the imposition of a charge on imported animals which had led the Commission, in its 1991 Decision, to declare the 1987 regime incompatible with the common market.

14 The draft legislation, which was to become the 1998 Law, was declared compatible with the common market by the 1996 Decision.

The main proceedings

15 Mr Van Calster and Mr Cleeren buy and sell cattle, some of which is exported. They have paid charges to the 1987 Fund on the basis of the 1987 Law and Decree. Openbaar Slachthuis buys, slaughters and sells cattle and markets meat.

It has also paid charges to the 1987 Fund. In the disputes in the main proceedings Mr Van Calster, Mr Cleeren and Openbaar Slachthuis are seeking reimbursement of part of the charges on the ground that they were levied contrary to Community law.

16 Those charges were levied both in respect of national animals and animal products and in respect of imported animals and animal products.

17 Since the last sentence of Article 14 of the 1998 Law establishes a reimbursement scheme for charges levied on imported animals and animal products, the disputes in the main proceedings relate only to the charges levied on national animals or animal products.

18 The decisions handed down by the national courts at first instance upheld the actions of Mr Van Calster and Mr Cleeren and of Openbaar Slachthuis. However, the Belgian State has appealed against those decisions to the referring court.

19 In answer to Mr Van Calster, Mr Cleeren and Openbaar Slachthuis, the Belgian State has relied on the second paragraph of Article 17 of the 1998 Law. It has submitted that, pursuant to that provision, sums owed in respect of the repayment of charges paid under the 1987 regime are offset against charges due retroactively under the 1998 regime.

20 However, Mr Van Calster, Mr Cleeren and Openbaar Slachthuis argue that the 1998 Law cannot constitute the basis for a retroactive charge. They rely, inter alia, on the argument that Community law precludes such a charge from being imposed retroactively.

21 The referring court observes that the Commission did not take the view, either in its 1991 Decision or when examining the 1998 regime, that the charges levied on live exported animals up to 1 January 1997 were contrary to the Treaty. Furthermore, it states that the Commission declared in its 1996 Decision that it had no objection to the measures contained in the draft legislation that was to become the 1998 Law. According to the referring court, the 1996 Decision implies that the rules imposing a charge on the export of animals up to 1 January 1997 were not contrary to Community law.

22 As regards the export charges, the referring court observes that it is settled case-law that such charges cannot fall under the prohibition on charges having equivalent effect if they are applied in the same amount to the same products intended for the national market (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* [1981] ECR 735). In the main proceedings the charges apply, according to that court, to the animals systematically and according to the same criteria, irrespective of whether they are intended for export or for slaughter. Furthermore, the referring court takes the view that the export charges in question in the main proceedings cannot fall within the sphere of application of Article 95 of the EC Treaty (now, after amendment, Article 90 EC), since the latter prohibits only discriminatory taxation which places imported products at a disadvantage.

23 Moreover, in the referring court's view, the Treaty does not preclude the Belgian State, notwithstanding its obligation to make full reimbursement of the charges unlawfully levied, from providing for a new scheme of aid measures which can be implemented after their notification to and approval by the Commission. However, according to that court, this raises the question whether the Treaty precludes the new State aid scheme from having retroactive effect in such a way that charges are levied on transactions which took place several years before such notification.

24 The referring court takes the view that, as the Commission approved the aid provided for in the 1998 regime, it also decided that the method of financing that aid, namely the levying of a charge in favour of the 1998 Fund, is compatible with the common market.

25 However, it observes that Mr Van Calster, Mr Cleeren and Openbaar Slachthuis have disputed the Commission's competence in that regard.

26 The referring court points out that under Article 173 of the Treaty only the Court of Justice has competence to review the legality of the acts adopted by the Commission. It observes that it is common ground in the main proceedings that Mr Van Calster, Mr Cleeren and Openbaar Slachthuis are directly and individually concerned by the 1996 Decision. It states that it is necessary, nevertheless, to consider whether the Commission's decision is to be regarded as an authorisation granted to the Member State concerned and whether, therefore, those parties to the main proceedings are directly and individually concerned by the decision of the Member State implementing that authorisation, but not by an act of the Commission. It considers that the answer to that question determines the admissibility of the claim that the Commission lacked competence.

The questions referred for a preliminary ruling

27 In those circumstances, the referring court, taking the view that the outcome of the disputes pending before it requires an interpretation of certain Community rules, decided to stay proceedings and to refer several questions to the Court for a preliminary ruling.

28 The questions referred in the two cases in the main proceedings are worded identically and are in the same order, except that the order for reference in Case C-262/01 contains a second question which is not put in Case C-261/01. The Hof van Beroep te Antwerpen has asked the following questions in Case C-262/01:

'1. In the circumstances outlined above is a system of aid measures compatible with Community law, in particular with Article 93(3) of the EC Treaty..., which, after its notification, is considered by the Commission on 30 July 1996 to be compatible with the common market and under which the Member State imposes in the general interest, with retroactive effect, contributions or charges:

— to finance an animal health and production fund,

— on natural and legal persons whose characteristics are set out in Articles 14, 15 and 16 of the... Law of 23 March 1998, as amended by the Arbitragehof in its judgment of 9 February 2000 in Cases Nos 1414, 1450, 1452, 1453, and 1454,

— because of the activities described in those articles which took place in the period from 1988 until 21 May 1996 in which those aid measures had not yet been approved?

2. Has the Commission, by approving the aid measures established by the Law of 23 March 1998, also approved the retroactive effect of that law?

3. Is the Commission Decision of 30 July 1996 merely in the nature of an individual authorisation to a Member State to implement the planned aid measures?

4. Are the persons owing the contributions directly and individually concerned by the Commission's act within the meaning of Article 173 of the EC Treaty ...?

5. If the answer to question 4 is in the negative, does Article 230 EC then permit the persons owing the contributions, as the beneficiaries of the aid, to raise a plea of lack of competence with regard to the Commission's act whereby authorisation was given to implement the aid measures from which they benefit?

6. If it is accepted that the [applicants], as persons owing the contributions and/or as beneficiaries of the aid, are directly and individually concerned by the Commission's decision and may therefore lawfully raise a plea of lack of competence, has the Commission exceeded the limits of its competence in adopting its decision of 30 July 1996 and infringed Article 93(3) of the EC Treaty...?'

29 By order of the President of the Court of 4 October 2001, Cases C-261/01 and C-262/01 were joined for the purposes of the written and oral procedures and of judgment.

The first question in Cases C-261/01 and C-262/01

30 By its first question in Cases C-261/01 and C-262/01 the national court is asking essentially whether Article 93(3) of the Treaty must be interpreted as precluding, in circumstances such as those in the main proceedings, the levying of charges which finance an aid scheme that has been declared compatible with the common market by a Commission decision, where those charges are imposed retroactively.

Observations submitted to the Court

31 As a preliminary point, the Belgian State submits that the facts of the case giving rise to the judgment in Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505 are fundamentally different from those of the cases in the main proceedings. That judgment concerns cases in which the national authorities have implemented aid measures without previously notifying them to the Commission or without awaiting the Commission's final decision, contrary to the last sentence of Article 93(3) of the Treaty. However, the cases in the main proceedings relate to an aid measure which was correctly notified to the Commission and in respect of which the Commission decided not to raise any objection.

32 First of all, the 1998 Law is in conformity with the draft measures evaluated by the Commission in the 1996 Decision. Consequently, there is no longer any incompatibility between the aid measures in question in the main proceedings and the common market. Moreover, the Commission has already expressly taken the view in the 1991 Decision that 'the aid is compatible [with Community law] as regards both its form and its objectives'. Only the part of the financing of the 1987 Fund by parafiscal charges that were also levied on imported Community

products raised a problem of Community law. The Belgian State does not dispute that the 1991 Decision could not have the effect of annulling the irregularity of the non-notified aid, as is clear from the judgment in *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon*. However, the cases in the main proceedings relate to another point, namely the effect of the 1996 Decision, which was adopted after notification of a new, lawful scheme.

33 Next, the Belgian State submits that, in providing for the retroactive effect only of the compulsory contributions which were held, in the Commission's 1991 Decision, not to pose any problem, the Belgian legislature in no way intended to remedy past procedural defects. On the contrary, it sought to ensure the quality and continuity of the operation of the 1987 Fund in the general interest, in particular in the interest of public health, and in total harmony with the objectives and principles of the common agricultural policy.

34 Furthermore, the Belgian State submits that the Court ought to take account of Article 90(2) of the EC Treaty (now Article 86(2) EC). It is evident that the 1987 Fund, and then the 1998 Fund, were entrusted with tasks of general economic interest within the meaning of that provision. The Belgian State does not submit that retroactive measures which seek to ensure that entities such as the 1987 Fund and the 1998 Fund can perform their tasks of general interest are exempt from the notification obligation laid down in Article 93(3) of the Treaty. On the other hand, it submits that Article 90(2) of the Treaty plays an important role when the Commission takes account of the provision of services of general economic interest in the course of its assessment whether, and to what extent, a scheme such as that established by the 1998 Law may partially have retroactive effect.

35 Lastly, the Belgian State maintains that the retroactive effect of the 1998 Law in respect of the compulsory contributions scheme corresponds, in any event, to a general interest ground and that, without such an effect, the foundations of the scheme underlying the operation and the financial and economic equilibrium of the 1998 Fund would be shaken.

36 Mr Van Calster, Mr Cleeren and Openbaar Slachthuis contend that, pursuant to the second paragraph of Article 5 of the EC Treaty (now the second paragraph of Article 10 EC), the national court is required, in the exercise of its powers, to ensure the full effect of Community law and to protect the rights which it confers on individuals. In the present case, the national court must therefore ensure the direct effect of Article 93(3) of the Treaty.

37 Referring to the Opinion of Advocate General Tesauro in Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, they submit that it is impossible to make a distinction between the charges and the aid measures, because, first, the charges constitute the means by which those measures may have a beneficial effect and, second, they may disturb the market. Consequently, Article 93(3) of the Treaty applies in the cases in the main proceedings, both to the charges and to the aid measures.

38 Moreover, they conclude from paragraphs 15 and 17 of *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon* that even if the Commission decides that aid is compatible with the common market, the effect of its decision is not to regularise the charges which have been wrongfully levied. The Commission and the national court are given two separate tasks in that regard.

39 Mr Van Calster, Mr Cleeren and Openbaar Slachthuis submit, moreover, that the rule, which aims to prevent Member States from being induced to infringe Article 93(3) of the Treaty and which follows from the same judgment, applies equally to aid with retroactive effect, that is to say, to aid which a Member State wishes to grant in respect of a period which has already expired when the aid was notified. That rule applies *a fortiori* to retroactive measures whose object and effect are to prevent the reimbursement of charges that have been unlawfully levied. In such a case, the prohibition of putting aid into effect, laid down in Article 93(3) of the Treaty, would be circumvented by the attribution of retroactive effect to the planned measures. If such a manœuvre were regarded as permissible, that article would be a dead letter. It would suffice to reintroduce, retroactively, the charges unlawfully levied or the aid unlawfully granted.

40 The Netherlands Government submits that there is no link between the retroactive effect of the charges in question in the main proceedings and the prohibition, in Article 93(3) of the Treaty, on the putting into effect of planned measures. The cases in the main proceedings do not relate to the putting into effect by a Member State of aid contrary to the prohibition in that provision. The legal basis for the charges is to be found in the 1998 Law, which was notified to the Commission at the draft stage and entered into force only after approval by it.

41 Moreover, the Netherlands Government observes that the national court appears to base its questions on an assumption that in decisions relating to State aid the Commission must always rule separately on the temporal effect of the charges imposed. The Netherlands Government submits that is, however, not the case. The Commission will do so only if the retroactive effect of the charges constitutes an infringement of the Treaty. Where the Commission has not ruled to that effect, the aid measure, including the mechanism for the charges and any retroactive effect, should be considered to be compatible with the common market.

42 The Commission submits that it is common ground that the 1998 regime was notified to it in accordance with Article 93(3) of the Treaty and that it was declared compatible with the common market by the 1996 Decision. It points out that the decision states that the Commission 'has noted that the system of compulsory charges on slaughterhouses will no longer provide for a charge on imported or exported animals'.

43 The Commission observes that, inasmuch as it applies to the period after 9 August 1996, the 1998 regime was properly notified and is therefore lawful. On the other hand, the Commission submits that the application of that scheme to the period prior to that date amounts in reality to the grant of aid that has not been approved by the Commission and infringes Article 93(3) of the Treaty. The contrary conclusion would allow a Member State, by means of retroactive legislation, to render ineffective the prohibition on the implementation of unapproved State aid.

Reply of the Court

44 In order to reply to the first question, it is necessary first to determine whether the obligation to notify State aid pursuant to Article 93(3) of the Treaty, and the consequences of a failure to comply with that obligation, apply also to the method of financing such aid. That question is posed in relation to an aid measure which provides for a scheme of charges that forms an integral part of that measure and is intended specifically and exclusively to finance it.

45 Under Article 93 of the Treaty the Commission has sole competence, subject to review by the Court of Justice, to assess the compatibility with the common market of a State aid measure.

46 The Court has already held that Article 92 of the Treaty does not allow the Commission to isolate the aid as such from the method by which it is financed and to disregard this method if, in conjunction with the aid in its narrow sense, it renders the whole incompatible with the common market (Case 47/69 *France* v *Commission* [1970] ECR 487, paragraph 4).

47 Even though the method of financing satisfies the other requirements of the Treaty, and in particular those flowing from Article 95, that does not mean that the measure in question is valid in relation to Articles 92 and 93 of the Treaty (see, to that effect, *France* v *Commission*, paragraph 13). It may be that aid in the narrow sense does not substantially affect trade between Member States and may thus be acknowledged as permissible but that the disturbance which it creates is increased by a method of financing it which would render the scheme as a whole incompatible with a single market and the common interest (see *France* v *Commission*, paragraph 16).

48 Furthermore, where a charge specifically intended to finance aid proves to be contrary to other provisions of the Treaty, for example Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) or to Article 95 of the Treaty, the Commission cannot declare the aid scheme of which the charge forms part to be compatible with the common market (see, to that effect, Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 11).

49 Consequently, the method by which an aid is financed may render the entire aid scheme incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing (*France* v *Commission*, paragraph 8). Quite to the contrary, consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid in a case where that method forms an integral part of the measure.

50 In such a case, the notification of the aid provided for in Article 93(3) of the Treaty must also cover the method of financing, so that the Commission may consider it on the basis of all the facts. If this requirement is not satisfied, it is possible that the Commission may declare that an aid measure is compatible, when, if the Commission had been aware of its method of financing, it could not have been so declared.

51 Accordingly, in order to ensure the effectiveness of the obligation to notify and the Commission's full and appropriate consideration of an aid, the Member State is required, in order to comply with that obligation, to notify not only the planned aid in the narrow sense, but also the method of financing the aid inasmuch as that method is an integral part of the planned measure.

52 Since the obligation to notify also covers the method of financing the aid, the consequences of a failure by the national authorities to comply with the last sentence of Article 93(3) of the Treaty must apply also to that aspect of the aid.

53 In that regard it must be observed, first, that it is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by national authorities of the prohibition of putting aid into effect, to which the last sentence of Article 93(3) of the Treaty refers and which has direct effect (*Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon*, paragraph 12, and *Lornoy and*

Others, paragraph 30) and, second, that the Member State is in principle required to repay charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20).

54 It follows that where an aid measure of which the method of financing is an integral part has been implemented in breach of the obligation to notify, national courts must in principle order reimbursement of charges or contributions levied specifically for the purpose of financing that aid.

55 In the present case, the charges levied under Articles 14, 15 and 16 of the 1998 Law finance the 1998 Fund. Those charges are therefore levied specifically and solely for the purpose of financing the aid at issue in the main proceedings.

56 The 1998 Law was notified to the Commission and declared compatible with the common market by the 1996 Decision. Inasmuch as they relate to the period commencing on the exact date of that decision, 9 August 1996, both the aid in the narrow sense and the charges imposed in order to finance it are therefore lawful.

57 However, the 1998 Law imposes charges with effect retroactively to 1 January 1988. Part of the charges provided for by the 1998 Law is therefore imposed in respect of a period which predates the 1996 Decision.

58 Accordingly, inasmuch as the 1998 Law imposes charges with retroactive effect in regard to the period from 1 January 1988 to 8 August 1996, it is illegal owing to the failure to observe the requirement for notification prior to putting the aid scheme into effect. Those charges are therefore levied in breach of the last sentence of Article 93(3) of the Treaty.

59 Furthermore, the 1998 Law abolished the 1987 Law, which had not been notified to the Commission, and replaced the scheme of aid and charges established by the 1987 Law by a new, essentially identical, scheme with retroactive effect to 1 January 1988, the date of entry into force of the 1987 Law. As the Advocate General has observed in paragraph 14 of his Opinion, the aim of the Belgian legislature was thereby to remedy the consequences of the breach of the obligation to make prior notification of the aid established by the 1987 Law.

60 That legislative method cannot be considered compatible with the obligation to notify under Article 93(3) of the Treaty. If it were upheld, the Member States could immediately put a plan for State aid into effect without notifying it to the Commission and the consequences of a failure to notify could be avoided by abolishing the measure and reintroducing it simultaneously with retroactive effect.

61 That conclusion cannot be invalidated by the Belgian State's argument based on Article 90(2) of the Treaty. Even if that provision could apply to the 1998 Fund, it must be observed that, as the Belgian State itself accepted, the 1998 Law ought in any event to have been notified in accordance with Article 93(3) of the Treaty (see Case C-332/98 *France* v *Commission* [2000] ECR I-4833, paragraphs 31 to 33).

That law too was necessarily subject to the prohibition on implementation under Article 93(3).

62 Moreover, the illegality of an aid measure, or of part of that measure, owing to infringement of the obligation to notify prior to its implementation is not affected by the fact that the measure has been held to be compatible with the common market by a final decision of the Commission.

63 The Court has already held that the Commission's final decision does not have the effect of regularising *ex post facto* implementing measures which were invalid because they had been taken in breach of the prohibition laid down by the last sentence of Article 93(3) of the Treaty, since otherwise the direct effect of that prohibition would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness (see *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon*, paragraph 12, and *Lornoy and Others*, paragraph 16).

64 Furthermore, it is for the national courts to uphold the rights of the persons concerned in the event of any breach by the national authorities of the prohibition on putting aid into effect, which is referred to in the last sentence of Article 93(3) of the Treaty and has direct effect. Where such a breach is invoked by individuals entitled to rely on it and is established by the national courts, the latter must take all the consequential measures under national law as regards both the validity of decisions giving effect to the aid measures concerned and the recovery of the financial support granted (see *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon*, paragraph 12, and *Lornoy and Others*, paragraph 30).

65 Having regard to the foregoing, the answer to the first question in Cases C-261/01 and C-262/01 must be that Article 93(3) of the EC Treaty must be interpreted as precluding, in circumstances such as those in the main proceedings, the levying of charges which finance specifically an aid scheme that has been declared compatible with the common market by a Commission decision, in so far as those charges are imposed retroactively in respect of a period prior to the date of that decision.

The second question in Case C-262/01

66 By its second question in Case C-262/01 the national court asks essentially whether the 1996 Decision must be interpreted as approving the retroactive effect of the 1998 Law.

Observations submitted to the Court

67 The Belgian State submits that this question must be answered in the affirmative. The entire text of the draft which was to become the 1998 Law was sent to the Commission. The 1998 regime presented difficulties solely as regards the compatibility with the common market of the method of financing that regime. The provisions relating to the charges imposed under that draft legislation therefore inevitably received the full attention of the Commission, also as regards their temporal effect. Moreover, the Commission carried out a detailed analysis of that draft, as is shown by its requests for additional information.

68 The Belgian State therefore concludes that the Commission, following its in-depth examination of that draft and in particular Article 14 thereof, was undoubtedly aware of the fact that Article 14 imposed compulsory charges for the benefit of the 1998 Fund with effect from 1 January 1988. By not raising any objection to the entirety of the measures notified, it approved that provision.

69 Mr Van Calster, Mr Cleeren and Openbaar Slachthuis submit that the 1998 Law had the object and effect of establishing retroactive charges. Furthermore, they submit that it is in no way apparent from the wording of the 1996 Decision that the Commission approved the retroactive implementation of aid measures. It merely stated that the aid measures established for the future by the 1998 Law were compatible with the common market. That implies that, to the extent that the 1998 Law imposes retroactive charges, it is illegal. That law was implemented with effect from 1988, that is to say eight years before the Commission adopted the 1996 Decision. The infringement of Article 93(3) of the Treaty thus committed by the Belgian authorities was therefore in no way covered or approved by the 1996 Decision.

70 In any event, Mr Van Calster, Mr Cleeren and Openbaar Slachthuis submit that the Commission is not competent to rule on the legality of measures put into effect before its decision or to restore the legality of such measures. Consequently, if the Court were to hold that the 1996 Decision does in fact approve the putting into effect of the measures provided for by the 1998 Law before the adoption of that decision, it would be necessary to find that the decision is invalid.

71 The Commission contends that the 1996 Decision does not address the retroactive aspect of the 1998 regime. Unlike the national court, the Commission does not draw any substantive inferences from the legality of an aid scheme.

Reply of the Court

72 It must be observed, first of all, that the 1996 Decision does not refer to the fact that the 1998 Law imposes charges with retroactive effect.

73 In any event, even if the Commission did examine the compatibility with the common market of the charges imposed with retroactive effect, it does not have competence to decide that an aid scheme put into effect contrary to Article 93(3) of the Treaty is legal.

74 In supervising the Member States' compliance with their obligations under Articles 92 and 93 of the Treaty, the national courts and the Commission fulfil complementary and separate roles (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 41).

75 Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Court, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aids to the Commission pursuant to Article 93(3) of the Treaty is infringed (Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 31).

76 Unlike the national courts, the Commission cannot therefore order the return of a State aid on the sole ground that it was not notified in accordance with Article 93(3) of the Treaty (see *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon*, paragraph 13, and *SFEI and Others*, paragraph 43).

77 It follows from the foregoing that the answer to the second question in Case C-262/01 is that the 1996 Decision does not approve the retroactive effect of the 1998 Law.

The second to fifth questions in Case C-261/01 and the third to sixth questions in Case C-262/01

78 It is apparent from the orders for reference that the Hof van Beroep te Antwerpen referred the second to fifth questions in Case C-261/01 and the third to sixth questions in Case C-262/01 only in the event that the Court were to conclude that the Commission, by the 1996 Decision, approved the retroactive effect of the 1998 Law.

79 Having regard to the fact that the Court has reached the contrary conclusion in its reply to the second question in Case C-262/01, it is unnecessary to reply to those questions.

Costs

80 The costs incurred by the Netherlands Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hof van Beroep te Antwerpen by orders of 28 June 2001, hereby rules:

1. Article 93(3) of the EC Treaty (now Article 88(3) EC) must be interpreted as precluding, in circumstances such as those in the main proceedings, the levying of charges which finance specifically an aid scheme that has been declared compatible with the common market by a Commission decision, in so far as those charges are imposed retroactively in respect of a period prior to the date of that decision.

2 **The Commission Decision of 9 August 1996 relating to aid measure No N 366/96 does not approve the retroactive effect of the Law of 23 March 1998 on the establishment of a budgetary fund for the health and quality of animals and animal products.**

Skouris	Jann	Timmermans
Gulmann	Cunha Rodrigues	Rosas
Edward	La Pergola	Puissochet
Schintgen	Macken	Colneric
	von Bahr	

Delivered in open court in Luxembourg on 21 October 2003.

R. Grass — Registrar

V. Skouris — President