OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 11 March 2004 [1]

I — Introduction

1. This reference for a preliminary ruling made by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) raises issues which affect many aspects of the Community rules on State aid: the definition of aid, the relationship between the advantage conferred and the means of financing it, the scope of the obligation to notify, the role of the *de minimis* rule, and the consequences of failure to notify in national law, inter alia.

2. Paradoxically, the facts of this case do not, at first sight, correspond to any of the sets of circumstances which the legislature was able to envisage when providing the Community with the means to protect itself against disproportionate State interventionism capable of distorting intra-Community competition: the subject-matter of the main proceedings is an action for a declaration that measures which made possible the launch of a collective advertising campaign to promote the services of opticians, which was organised by a trade association, are invalid, and for repayment of the levies paid by the affiliated undertakings to finance that campaign.

The appellants in the main proceedings are not competitors who have been adversely affected by the alleged system of aid, but its theoretical beneficiaries. They are using the remedies available for guaranteeing the effectiveness of Community law in order to challenge before the courts a measure which they do not consider favourable to their financial interests.

II — Applicable law

A — *Community law*

3. Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) provides:

1 — Original language: Spanish.

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

4. Article 93 of the EC Treaty (now, after amendment, Article 88 EC) provides that:

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. ...

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

5. According to the first paragraph of Commission Notice 96/C 68/06 on the *de minimis* rule for State aid: [2]

'Clearly, any financial assistance given by the State to one firm distorts or threatens to distort, to a greater or lesser extent, competition between that firm and its competitors which have received no such aid; but not all aid has an appreciable effect on trade and competition between Member States. This is particularly true where the amount of aid involved is small ....'

6. According to the second paragraph of the Notice, Article 92(1) of the EC Treaty may be deemed not to apply to grants of aid up to a maximum amount of ECU 100 000 (now EUR 100 000) over a three-year period beginning when the first *de minimis* aid is

2 — OJ 1996 C 68, p. 9 (hereinafter: 'the Notice' or 'the *de minimis* Notice').

granted. That threshold applies to all kinds of non-excluded aid, irrespective of its form or the objective pursued, with the exception of export aid.

B — *Netherlands law*

7. The *Wet op de bedrijfsorganisatie* (Law on the Organisation of Business; hereinafter, 'WBO') of 27 February 1950 governs the tasks, composition, working methods, financial affairs and supervision of trade associations which are given personal responsibility for the organisation and development of their respective sectors of activity.

8. Under Article 71 of the WBO, such trade associations, as public bodies, must take into account not only the common interest of the affiliated undertakings, but also the public interest.

9. Under Article 73 of the WBO, the governing bodies of the trade associations are to be composed of an equal number of representatives from employers' and workers' organisations respectively.

10. The legislature has conferred on the trade associations the powers relevant to the performance of the tasks entrusted to them. Accordingly, Article 93 of the WBO allows their governing bodies to make the bye-laws which they deem necessary to perform their task, both in the interests of the undertakings in the economic sector concerned, and in matters relating to the working conditions of employees. Such bye-laws are approved by the *Sociaal-Economische Raad* (economic and social council), provided that they do not impose restrictions on competition (Article 93(5) of the WBO).

11. Article 126 of the WBO allows the associations, in order to meet their costs, to adopt bye-laws imposing levies on their members. General levies finance the everyday operation of the organisation, whereas 'compulsory earmarked levies' serve specific purposes. Under Article 127, such levies may be collected by way of an enforcement order.

12. Moreover, the *Wet houdende administratieve rechtspraak bedrijfsorganisatie* (Law on administrative proceedings concerning

the organisation of business), of 16 September 1954, as amended, lays down rules governing contentious administrative proceedings concerning trade associations.

III — The main proceedings

13. Pearle B.V., Hans Prijs Optiek franchise B.V. and Rinck Opticiëns B.V. (hereinafter: 'Pearle and the other appellants' or simply 'Pearle') are companies established in the Netherlands which trade in the optical sector. In that capacity, they are affiliated, in accordance with the WBO, [3] to the *Hoofdbedrijfschap Ambachten* (Central Industry Board for Skilled Trades; hereinafter: 'the HBA'), a trade association governed by public law.

14. At the request of a private opticians' association, the *Nederlandse Unie van Opticiens* (hereinafter: 'NUVO'), of which Pearle and the other appellants were then members, the HBA imposed on its members, for the first time in 1988, a 'compulsory earmarked levy' [4] to finance a collective advertising campaign for the undertakings in the sector. That levy was also to be used to finance the creation of an advisory committee attached to the governing body of the HBA, the *Commissie Optiekbedrijf* (Optical Trade Committee).

3 — See point 7 above.

4 — See point 11 above.

15. The total payable by Pearle and the other appellants amounted to NLG 850 per establishment. The bye-laws which introduced the charge at issue, renewed annually until 1998, were never challenged by the affiliated undertakings.

16. Pearle and the other appellants none the less took the view that the collective advertising campaigns organised by the HBA were of benefit primarily to their competitors, as a result of which they had to bear an unnecessary burden on their own advertising budgets.

17. On 29 March 1995, Pearle and the other appellants brought an action against the HBA before the Rechtbank te' s-Gravenhage (District Court, The Hague) seeking annulment of the bye-laws which introduced the levies in question and consequential reimbursement of the amounts paid.

18. According to the then plaintiffs, the services provided by means of the advertising campaigns constituted State aid within the meaning of Article 92(1) of the EC Treaty, so that the bye-laws which provided for their financing ought to have been notified to the Commission under Article 93(3). In the absence of such notification, the aid measures had no legal basis.

19. The court of first instance dismissed the plaintiffs' arguments, which judgment was upheld on appeal. The plaintiffs therefore lodged an appeal in cassation before the Hoge Raad der Nederlanden.

IV — Questions referred

20. In the course of that appeal, the Hoge Raad decided, on 27 September 2002, to stay proceedings and refer to the Court of Justice for a preliminary ruling the following questions:

'1) Is a scheme such as that under consideration, in which levies are imposed to finance collective advertising campaigns, to be regarded as (part of a measure of) aid within the meaning of Article 92(1) of the EC Treaty, and must the plans to implement it be notified to the Commission under Article 93(3) of the EC Treaty? Does that apply only to the benefit derived from the scheme, in the form of the organisation and provision of collective advertising campaigns, or does it also apply to the method of financing it, such as a bye-law instituting levies and/or the decisions imposing levies based thereon? Does it make any difference whether the collective advertising campaigns are offered to (undertakings in) the same business sector as that on which the levy decisions in question are imposed? If so, what difference does it make? Is it relevant in that connection whether the costs incurred by the public body are offset in full by the earmarked levies payable by the undertakings benefiting from the service, so that the benefit derived costs the public authorities, on balance, nothing? Is it relevant in that connection whether the benefit from the collective advertising campaigns is distributed more or less evenly across the field of activity concerned and whether the individual establishments within the branch are also deemed, on balance, to have derived a more or less equal benefit or profit from those campaigns?

2) Does the obligation to notify under Article 93(3) apply to any aid or only to aid which satisfies the definition in Article 92(1)? In order to avoid its obligation to notify, does a Member State have free discretion to determine whether aid satisfies the definition in Article 92(1)? If so, how much discretion? And to what extent can such free discretion affect the obligation to notify under Article 93(3)? Or is it the case that the obligation to notify ceases to apply only if it is beyond reasonable doubt that no aid is involved?

3) If the national court concludes that aid within the meaning of Article 92(1) is involved, must it then consider the *"de minimis"* rule, as formulated by the Commission in a notice published in

OJ 1992 C 213 (and subsequently in OJ 1996 C 68), when assessing whether the measure in question is to be regarded as aid which ought to have been notified to the Commission under Article 93(3)? If so, must that *"de minimis"* rule also be applied with retroactive effect to aid which was granted before the publication of the rule, and how must that *"de minimis"* rule be applied to aid such as annual collective advertising campaigns which benefit an entire branch of industry?

4) Does it follow from the grounds of the judgment in Case C-39/94 *SFEI* v *La Poste* [1996] ECR I-3547, for the purposes of the practical effect of Article 93 (3), that the national court must annul both the bye-laws and the levy decisions imposed under those bye-laws and that that court must order the public body to repay the levies, even if that is precluded by the rule developed in the Netherlands case-law concerning the formal legal force of the levy decisions? Is it relevant in that regard that repayment of the levies does not in practice eliminate the advantage which the field of activity and the individual undertakings in the branch obtained through the collective advertising campaigns? Does Community law allow repayment of the earmarked levy not to take place, either wholly or in part, if, in the opinion of the national court, the field of activity or the individual undertakings would be placed at an unfair advantage in connection with the circumstance that the advantage obtained as a result of the advertising campaigns cannot be returned in kind?

5) In case of failure to notify an aid as laid down in Article 93(3), can a public body rely, in order to avoid an obligation to refund the aid, on the abovementioned rule of formal legal force of the levy decision if the person to whom that decision was addressed was not aware, at the time of the adoption of that decision and during the period within which it could have been challenged in administrative proceedings, that the aid of which the levy forms part had not been notified? May an individual assume in this connection that the authorities have fulfilled their obligations to notify aid under Article 93(3) of the EC Treaty?'

V — Procedure before the Court of Justice

21. The reference for a preliminary ruling was lodged at the Court Registry on 30 September 2002.

22. In addition to the parties to the main proceedings, the Netherlands Government and the Commission of the European Communities took part in the written procedure.

23. A hearing held on 29 February 2004 was attended by the representatives of the Netherlands Government and of the Commission.

VI — Legal analysis

24. This case requires both the national court and the Court of Justice to examine issues which have a bearing on essential elements of the Community rules on State aid. In view of the complexity of the assessments which this will necessitate, it seems preferable to begin — as the Commission did — with the last two questions, which are concerned with the notion of the unchallengeable nature of acts of the administration which have not been challenged in good time. For, if the national court were to take the view that the appellants in the main proceedings could have pursued the remedies available under national law for securing effective protection for their rights under conditions equivalent to those governing claims based on Community law, there would be no need to resolve the other issues raised.

Concerning the fourth and fifth questions referred: the effects of the failure to notify

25. By these two questions, the national court seeks to ascertain the effects of the failure to fulfil the obligation to notify aid such as that at issue in these proceedings. Of particular interest to the Hoge Raad is the impact of the national rule concerning the formal legal force of acts which have not been challenged within the prescribed period on the possibility of annulling the contested bye-laws or claiming repayment of the levies collected under them.

26. None the less, as a preliminary step, it asks whether such a failure to fulfil an obligation invalidates not only the act by which the aid was granted but also the act by which its financing was organised. In that regard, it refers to the judgment in *SFEI and Others*. [5]

27. I must point out that, in that judgment, [6] the Court draws attention to the fact that even the obligation to repay the aid may, in exceptional circumstances, be inappropriate. The inferences which the national court is to

5 — Case C-39/94 [1996] ECR I-3547.

6 — Ibid., paragraph 71.

draw from the fact that an aid plan has not been notified are not therefore automatic, but depend on the need to safeguard the effectiveness of Community law.

28. The primary objective of the role assigned to the Commission to review planned aid is to protect free competition in the Community. The prohibition contained in the final sentence of Article 93(3) is designed to achieve that very objective by involving the Commission in the assessment of complex economic situations.

29. As the Court of Justice has held more specifically, the final sentence of Article 93 (3) of the EC Treaty constitutes the means of safeguarding the machinery for review laid down by that article, which, in turn, is essential for ensuring the proper functioning of the common market. [7]

30. Consequently, the measures which may be adopted under national law where an aid scheme fails to comply with that prohibition include re-establishing the situation which existed before the unlawful State intervention. For that to happen, the advantages received must be repaid and, if appropriate, the scheme declared invalid so that the unlawful acts may be removed from the legal system. Nevertheless, a measure suitable for safeguarding the effectiveness of the final sentence of Article 93(3) must not aggravate the disadvantage suffered by competitors, in the course of intra-Community trade, in relation to the recipients of the aid. That, however, would be the result if the national court allowed the levies to be repaid but did not at the same time order that the aid granted be reimbursed, since the benefit received would then increase by virtue of removal of the financial charges, which would further distort competition in a manner contrary to the provisions of the Treaty.

31. Consequently, in circumstances such as those at issue, a national court may dismiss a claim for repayment of contributions to finance an advertising campaign only where there is no simultaneous recovery of the benefit received, since, otherwise, the ultimate objective of the Community legislation would be frustrated.

32. In spite of the arguments advanced by the Commission before the Court, I do not think there is any case-law which runs counter to the approach I am advocating.

7 — Judgments in Joined Cases 91/83 and 127/83 *Heuiken Brouwerijen* [1984] ECR 3435, paragraph 20; and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 17.

33. It is true that, according to the judgment in *FNCE*, the '*Salmonjudgment*',[8] the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 93(3) of the Treaty. National courts must therefore offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, both as regards the validity of measures giving effect to the aid, and the recovery of financial support granted, with a view to ensuring that the measures which they adopt are always necessary to counter the effects of the breach of a prohibition which has the ultimate objective of guaranteeing free competition undistorted by State intervention.

34. In *Ferring*,[9] the French Government questioned the relevance of the reference for a preliminary ruling which had been made on the ground that the national court could, at most, order the recovery of the non-notified aid, but never the reimbursement of the tax financing it. Advocate General Tizzano argued that, above all, the illegality of the aid would lead to the illegality of any national measures putting it into effect, such as receiving payment of the tax financing the aid. Moreover, reimbursement of the sums paid on that basis would be an effective way of re-establishing the *status quo ante*, thereby eliminating the distortions of competition allegedly arising from asymmetrical imposition of the tax.[10]

35. The judgment is silent on the matter. In any event, it must be pointed out, by way of an explanation of the Advocate General's position, that, unlike in this case, Ferring was required to pay a charge intended to provide aid which benefited undertakings competing *in intra-Community trade*.[11] Reimbursement of the tax helped to re-establish free competition.

36. The *Van Calster* case[12] concerned a very specific set of facts. The Belgian Government had amended an aid scheme financed by charges levied on national and imported products, which the Commission had declared incompatible with the common market, by re-establishing the charges payable on national products with retroactive effect from the date of entry into force of the first scheme, which had been declared unlawful.

8 — Case C-354/90 [1991] ECR I-5505, paragraph 12.

9 — Case C-53/00 [2001] ECR I-9067.

10 — With reference to the judgments in Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 23; and Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26.

11 — Judgment in *Ferring*, paragraph 21.

12 — Judgment in Case C-261/01 *van Calster* [2003] ECR I-12249.

37. The Court took into account in particular the questionable legislative method employed, which, if it had been upheld, would have allowed the Member States immediately to put a plan for aid into effect without notifying it to the Commission, and the consequences of a failure to notify could have been avoided by abolishing the aid and reintroducing it simultaneously with retroactive effect. [13]

38. In the judgment, the Court pointed out that, generally, the consequences of failure to comply with the obligation to notify aid plans apply also to their method of financing. [14]

It also held that Article 92 of the Treaty does not allow the Commission to isolate the aid as such from that other element, [15] for even if, when considered on its own, the aid is compatible with the Treaty, the disturbance which it creates may be increased by a method of financing it which would *render the scheme as a whole incompatible with a single market and the common interest.* [16]

39. The aid must not therefore be considered separately from its financing, [17] although the Member State is required only *in principle* to repay charges levied in breach of Community law. [18]

40. This case-law seems to indicate that such an obligation does not exist where the consequences of compliance with it would be more damaging to free competition than the consequences resulting from the non-notified aid scheme itself.

41. Finally, *GEMO* [19] concerned the question whether a scheme which, upon payment of a tax, provided French farmers and slaughterhouses with both the free collection and the free destruction of animal carcasses and slaughterhouse waste was in the nature of State aid.

42. GEMO, the plaintiff in the main proceedings, was a meat trader liable to the tax and a beneficiary of the aid. Before the national courts it claimed that the scheme

13 — Ibid., paragraph 60.

14 — Ibid., paragraph 44.

15 — Ibid., paragraph 46.

16 — Ibid., paragraph 47.

17 — Ibid., paragraph 49. With extensive reference to the judgment in Case 47/69 *France* v *Commission* [1970] ECR 487, paragraph 8.

18 — Ibid., paragraph 53.

19 — Case C-126/01 [2003] ECR I-13769.

was invalid because it had not been notified, and sought reimbursement of the sums paid by way of tax.

The Court of Justice analysed the various elements of the scheme, and held that it constituted aid within the meaning of Article 92(1) of the Treaty.

43. That judgment cannot, however, serve as a precedent in this case since:

— firstly, the amounts collected were administered directly by the State, which delegated delivery of the service to private undertakings; the French Government itself did not dispute that those amounts were in the nature of 'State resources';

— secondly, the measure sought to achieve an objective in the general interest, the protection of public health and the environment in view of the risk of uncontrolled disposal of animal carcasses and remains; there was no doubt therefore that the Administration was acting *as the State*;

— thirdly and finally, the Court was required to rule only on the classification to be given to the scheme. It said nothing as to whether repayment of the tax was the appropriate way of safeguarding the effectiveness of the notification obligation under Article 93(3).

44. In the light of all the foregoing considerations, it can be concluded that mere repayment of the charges earmarked for financing the aid, without recovery of the benefit received by the beneficiaries of that aid, does not operate in favour of the Community objective of fair competition.

45. Notwithstanding all the foregoing, that question would not need to be addressed if it were found that, in any event, the appellants had been unable to exercise their rights at the appropriate time and through the appropriate channels.

46. The order for reference explains that the legal concept of the formal legal force of unchallenged acts has been developed in case-law. It means that, when hearing a claim for recovery of a sum paid but not due, such as that in this case, by which the claimant seeks reimbursement of the amount paid on the ground that the decision forming the

basis of the payment is not valid in law, the civil court must — in all but exceptional cases — assume that, as regards both the manner in which it was adopted and its content, the decision is in accordance with the law, where the party concerned could have challenged that decision in administrative proceedings but allowed the time-limit for doing so to pass without taking such action.

47. The prohibition contained in Article 92 (1) is not in itself automatic. [20] In such circumstances, the primary function of the courts in protecting the effectiveness of the Community legislation on State aid is to ensure that aid is not put into effect unless the prior procedure of notifying the Commission has been followed first.

48. As the Court of Justice held in the judgment in *Rewe*, [21] under the principle of cooperation laid down in Article 5 of the EC Treaty, and in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions nor render practically impossible the exercise of those rights. [22]

49. National courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, and the recovery of financial support granted in disregard of the obligation to notify under Article 93(3) of the EC Treaty. [23]

50. It is for the national courts to provide the protection afforded by Community law, in accordance with the procedural rules laid down by their respective national legal systems, and subject to what have come to be known as the principles of 'equivalence' and 'effectiveness'.

20 — See, in this regard, the judgment in Case 77/72 *Capolongo* [1973] ECR 611, paragraph 6.

21 — Case 33/76 [1976] ECR 1989, paragraph 5.

22 — See, to the same effect, the judgments in Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraph 12; Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 7; Joined Cases 123/87 and 330/87 *Jeunehomme and Others* [1988] ECR 4517, paragraph 17; Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 12; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 42 and 43; and Case C-312/93 *Peterbroeck and Others* [1995] ECR I-4599, paragraph 12.

23 — Judgment in *FNCE*, cited above in footnote 8, paragraph 12.

51. The observations submitted to the Court seem to indicate that Netherlands law offers the possibility of challenging the bye-laws introducing the contested scheme of aid within a period of 30 days, according to the Commission, or one month, according to the Netherlands Government, which means that the appellants could have complained that the plan had not been notified beforehand by way of the appropriate ordinary procedure. There is therefore no doubt that the principle of equivalence has been observed.

52. Moreover, as the Commission points out, the time-limit for bringing an action is not too short, especially given that Pearle and the other appellants were presumably aware that the bye-laws had been drawn up, since they were at that time members of the association which promoted them. [24] In any event, as the Commission has also explained at length in its written observations, the legal force of acts not challenged in good time is not absolute; the national court may take into account any exceptional circumstances which suggest in a particular case that such force should be removed.

53. It is therefore for the national court to establish whether the remedies available to the appellants at the material time for the purposes of challenging the validity of the bye-laws relating to the alleged State aid, in practice, made it possible to safeguard the effectiveness of the relevant Community legislation.

24 — See point 14 above.

Concerning the first question referred: the definition of State aid

54. By its first question, the national court wishes to ascertain, in essence, whether a scheme such as that described in the main proceedings, under which a body governed by public law launches a sector-specific advertising campaign using resources collected from its members by way of a contribution, is to be regarded as State aid for the purposes of Article 92(1).

55. My instinctive response is that the Community legislature did not have in mind initiatives launched by an incorporated trade body and financed from the contributions of its members when it laid down the prohibition contained in Article 92(1).

56. It is necessary, in any event, to review the legal definition of 'State aid'.

57. Article 92(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertak-

ings or the production of certain goods is, in so far as it affects trade between Member States, to be incompatible with the common market.

58. There has been much debate as to the meaning of the distinction between aid granted 'by States' and that obtained 'through State resources'. A purely literal interpretation might suggest that the first expression prohibited any type of measure, attributable to the State, which resulted in a benefit for a particular economic sector.

59. Advocate General Jacobs, in the Opinion delivered on 26 October 2000 in *Preussen-Elektra*, [25] showed that, according to the law in force, [26] that distinction does not signify that all advantages granted by a State constitute aid, irrespective of whether they are financed through State or private resources. Rather, the distinction serves to bring within the definition of aid, in addition to benefits granted directly by the State, those granted by a public or private body designated or established by the State. [27]

25 — Case C-379/98 [2001] ECR I-2099, points 114 to 133 of the conclusion.

26 — Which incorporates the line of case-law which began with the judgment in Case 82/77 *Van Tiggele* [1978] ECR 25, paragraphs 24 and 25.

27 — See the judgments in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 19; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 16; Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 35; and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 35.

60. Consequently, only advantages conferred directly or indirectly through State resources are regarded as aid for the purposes of Article 92(1).

61. It is necessary, therefore, to ascertain whether the advertising campaign at issue here can be regarded as being financed from public resources.

62. In the Commission's view, it can. As it has pointed out in its observations, the important issue now is whether the State raised revenue, by whatever means, and then made it immediately available to certain undertakings. The Commission contends that, in paragraph 58 of the *PreussenElektra* judgment, referred to above, the Court of Justice extended the meaning of aid to include all the advantages granted by a public or private body designated or established by the State.

The Commission also refers to the judgment in *France* v *Commission*, [28] in which the Court held that the mere fact that a system of subsidies is financed by a parafiscal charge levied on every supply of national goods in that sector is not sufficient to divest the

28 — Case 259/85 [1987] ECR 4393, paragraph 23.

system of its character as State aid. The Court reached a similar finding in the judgment in *Steinike & Weinlig.*[29]

In support of its inference, the Commission relies, finally, on the judgment in *France* v *Ladbroke and Commission*[30] in order to explain that aid includes all the financial means by which the public sector may support undertakings, irrespective of whether they are permanent assets of the public sector.

63. In keeping with the Commission's observations, Pearle adds that, according to the judgment in *Apple and Pear Development Council,*[31] a body which is set up by the Government of a Member State and is financed by a charge imposed on growers, cannot under Community law enjoy the same freedom as regards the methods of advertising used as that enjoyed by producers themselves or producers' associations of a voluntary character.

64. In my view, none of the judgments cited requires an affirmative answer to be given to the question whether the resources used to finance the advertising campaign at issue are in the nature of State resources.

The judgments in *France* v *Commission* and *Steinike & Weinlig*, cited above, suggest rather that the fact that the advantages do not come from the public purse but from charges imposed on the undertakings themselves is insufficient to divest them of their classification as public aid; this does not mean, however, that they *necessarily constitute* such aid.

65. In *PreussenElektra*, the Court of Justice considered it important to draw attention to the fact that not all the advantages granted by the State, irrespective of how they are financed, are aid within the meaning of Article 92(1). It seems to follow from this finding that aid may exist where it is financed from non-State resources.

66. In short, the judgments cited suggest that the decisive factor in defining the meaning of aid is the classification of the resources. Moreover, the judgment in *Apple and Pear Development Council*, the subject-matter of which was the free movement of goods, does not, so far as concerns the wording actually relied on by the appellant in the main proceedings, call for a different solution.

29 — Case 78/76 [1977] ECR 595, paragraph 22.

30 — Case C-83/98 P [2000] ECR I-3271, paragraph 50.

31 — Case 222/82 [1983] ECR 4083, paragraph 17.

67. Any attempt to list the conditions which have to be fulfilled in order for resources to be regarded as 'State' resources must refer, firstly, to the requirement that such resources should be linked to the State, or to a body which forms part of the structure of the State or exercises any of the powers characteristically vested in it.

Secondly, those resources must be attributable to the State or to the relevant public body in such a way that it is able to exercise a sufficient degree of control over them.

68. On the basis of the information in the documents before the Court, it is not possible to take the view right away that the HBA is a State body. It is true that it has public law status, but it is equally true that it is governed exclusively by representatives of its members. Moreover, it has not been shown that the State is in any way able to intervene in its affairs, other than in that it has the right to veto decisions which it judges to be contrary to the general interest.

More specifically, the HBA is intended to be a multi-sector association responsible for organising and developing the activities of its members which the Netherlands legislature, in the interests of efficiency, has allowed to enjoy some of the privileges traditionally associated with the exercise of public authority, such as compulsory membership and the binding nature of the decisions of its governing bodies.

69. In any event, without making a general pronouncement, I am inclined to think that the HBA possesses, at most, a hybrid nature and that, in working to finance and conduct a collective advertising campaign, it does not act *qua* State, but as the promoter of its members' interests.

70. The Court of Justice adopted a similar functional approach when assessing whether a professional association was public in nature for the purposes of Article 85 of the EC Treaty (now Article 81 EC), having held in the judgment in *Wouters and Others*, [32] in response to submissions that that association constituted a body governed by public law on which the State had conferred regulatory powers in order to perform a task in the general interest, that the professional association in question had not exercised any social function or any powers which are typically those of a public authority, but had only acted as the regulatory body. [33]

32 — Case C-309/99 [2002] ECR I-1577.

33 — Ibid., paragraph 58. The Court also took into account the fact that the organisation was governed by representatives co-opted from among its members, without any intervention by the authorities (paragraph 61).

71. I am aware that that judgment was given in a different legal context; I believe, none the less, that it is capable of illustrating the fact that a more circumstantial and more realistic criterion involving an assessment, in each case, of the capacity in which the body in question is acting may be preferable to an absolute criterion based on the essential nature of the body.

72. Under Article 71 of the WBO,[34] the HBA, as a public body, must take into account not only the mutual advantage of the member undertakings but also the public interest. Nevertheless, that obligation, albeit rather generic and imprecise, does not alter the classification that must be given, in this instance, to the initiative to undertake and finance a sector-specific advertising campaign, since such an activity is, in essence, intended to promote the economic interests of the members.

73. It would therefore be appropriate to take the view that the HBA has not acted as an emanation of the State, and that the capital which it used could not have been public in nature either.

74. Moreover, irrespective of any finding as to the essential nature of the HBA or the classification to be given to the advertising campaign at issue, the HBA does not appear to have exercised over the resources from which the campaign was financed a degree of control sufficient for them to be attributable to it.

75. It follows from the order for reference that those resources had been obtained by means of a compulsory contribution linked exclusively to the organisation of the advertising venture at issue. In those circumstances, I concur with the Netherlands Government's submission, in its written observations, to the effect that the crucial issue is whether the scheme introduced to pay for the advertising is more than a mere mechanism for distributing financial costs among the various companies benefiting from the campaign.

76. The fact is that the bye-law imposing the contributions required to meet the costs involved was adopted by the HBA on a proposal from a private professional opticians' association (NUVO). That association also proposed the amount of the contribution which would have to be levied. The HBA therefore serves only as a vehicle for levying and allocating resources collected for a purpose determined previously by operators in the professional sector in question.

34 — See point 8 above.

77. Nevertheless, it is important to point out that the order for reference does not provide all the information necessary to undertake an accurate assessment as to the classification that should be given to the measure at issue in the main proceedings. It is for the national court, once again, to carry out that exercise, in accordance with the guidelines for interpretation provided by the Court.

78. In view of the foregoing, it must be concluded that, when assessing whether a scheme constitutes State aid, the national court must satisfy itself that the corporate professional body entrusted with the task of granting such aid has acted within the framework of its public law duties. It must also establish, to that end, whether that body had sufficient control over the resources from which the measure was financed.

Concerning the second question referred: scope of the obligation to notify

79. By its second question, the Hoge Raad seeks to ascertain whether the obligation to notify State aid, laid down in Article 93(3) of the Treaty, is applicable to any aid scheme or only to those subject to the prohibition contained in Article 92(1).

80. It follows from Article 93(3) of the Treaty that the Commission must be informed of any plans to grant or alter 'aid'. If it considers that they are not compatible with the common market having regard to Article 92(1), it must without delay initiate the procedure provided for that purpose, the Member State concerned being unable to put its proposed measures into effect until the procedure has resulted in a final decision.

81. If the term 'aid' is given its commonly accepted meaning, each Member State would be obliged to notify the Commission of any initiative which constituted 'assistance', 'relief' or even 'cooperation' aimed at achieving an objective. That was clearly not the road down which the legislature intended to go.

82. 'Aid' for the purposes of Article 93(3) has a technical meaning which is set out in Article 92(1). It refers, therefore, only to measures which, financed through State resources, procure an advantage for a particular sector. It is for each Member State to assess whether a particular plan satisfies those criteria.

83. This follows logically from the case-law of the Court to the effect that a national court may have cause to interpret and apply the concept of aid contained in Article 92 in

order to determine whether State aid introduced without observance of the procedure provided for in Article 93(3) ought to be subject to this procedure. [35]

84. This type of judicial review is meaningful only if the State has previously undertaken to carry out an assessment of the same kind when deciding whether a particular plan needs to be notified. In the event of uncertainty, it may — like the courts — seek clarification from the Commission.

85. For its part, the Commission must analyse whether the notified plan is capable of distorting competition. This assessment as to compatibility includes an examination of the impact of the plan on intra-Community trade.

86. Consequently, a Member State is obliged to notify to the Commission only planned measures which constitute State aid under Article 92(1) of the Treaty, as interpreted in the light of the case-law of the Court of Justice.

Concerning the third question referred: the role of the de minimis rule

87. The third question referred asks whether, when assessing the obligation to notify an aid plan, the national court is able to take into consideration the *de minimis* rule, and whether it can even do so retroactively.

88. The Commission first laid down the *de minimis* rule, which states that small quantities of aid are not included in the scope of Article 92 of the Treaty, in the Community guidelines on State aid for small and medium-sized enterprises of 1992. [36]

Underlying this exemption is the idea that, since the amount involved is small, [37] such aid does not have a perceptible effect on competition or on trade between Member States.

35 — Judgments in *Steinike and Weinlig*, cited above, paragraph 14; *Kirsammer-Hack*, cited above, paragraph 14; and *SFEI and Others*, cited above, paragraph 49.

36 — OJ 1992 C 213, p. 2 (hereinafter: 'the 1992 Guidelines'); in particular, paragraph 3.2.

37 — Up to ECU 50 000 for any one firm in respect of a given type of expenditure over a three-year period.

The Commission was entitled to decide, in the exercise of its broad economic discretion, [38] that that type of aid was compatible with the common market and need not be notified to it under Article 93(3) of the Treaty.

89. In 1996, the Commission increased the maximum amount of aid qualifying for the rule. [39] Finally, the adoption of Regulation No 69/2001 [40] provided a suitable legal framework for the application of the *de minimis* rule. None the less, those provisions are irrelevant, *ratione temporis*, for the purposes of settling this case, since it follows from the order for reference that the dispute relates to the levies imposed from 1988 to the date of the writ of summons, that is, until 29 March 1995. [41]

90. Since the criteria for defining *de minimis* aid are wholly objective and binding on the Commission, it is appropriate that the national court should consider them when assessing whether there is an obligation to notify a particular aid plan.

91. However, there is no legal basis whatsoever for giving the *de minimis* rule retroactive effect, since such effect cannot be assumed to exist in the case of a provision which includes an exception to a statutory obligation. In the absence of such an exception in the period prior to publication of the rule, the Commission has exclusive responsibility, subject to the supervision of the Court of Justice, for deciding whether aid is compatible with the common market. [42]

Moreover, the 1992 Guidelines clearly stipulate that '*[i]n future...* one-off payments of aid of up to ECU 50 000... will no longer be considered notifiable'. [43]

92. The Hoge Raad asks, finally, how the *de minimis* rule is to be applied to aid such as

38 — See the judgment in Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031 ('*Renove*'), paragraph 52.

39 — It increased to ECU 100 000 (OJ 1996 C 68, p. 8).

40 — Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30).

41 — See point 17 above.

42 — Judgments in *FNCE*, cited in footnote 8 above, paragraph 14, and *Steinike and Weinlig*, cited in footnote 29 above, paragraph 9.

43 — Paragraph 3.2, second subparagraph.

collective advertising campaigns which benefit an entire sector.

93. My starting point, as I explained previously, is that an advertising campaign such as that in the main proceedings does not constitute State aid for the purposes of Article 92(1).

94. Moreover, when it comes to calculating the amount of the aid, in order to establish whether it falls below the permitted threshold, it is necessary to estimate the relative advantage each employer is likely to have received and deduct from it the amount of the contributions paid. I realise that such a calculation is far easier to describe in the abstract than to carry out in practice, but it is difficult to conceive of any more detailed legal guidelines which could be given in this regard.

Conclusion

95. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Hoge Raad der Nederlanden as follows:

'1. A national court may order merely that the charges earmarked for financing State aid be repaid, without recovering the benefit received by the beneficiaries of that aid, only in circumstances where doing so does not adversely affect the Community objective of undistorted competition.

2. It is also for the national court to establish whether the remedies available for challenging the validity of alleged State aid are equivalent to those based on national law and whether, in practice, they make it possible to safeguard the effectiveness of the relevant Community legislation.

3. When assessing whether a scheme operated by a corporate professional body constitutes State aid, the national court must satisfy itself that that body has acted within the framework of its public law duties. It must also establish, to that end, whether that body had a sufficient degree of control over the resources from which the measure was financed.

4. The criteria for defining the *de minimis* rule must be taken into consideration by the national court when assessing whether there was an obligation to notify a particular aid plan, implemented after the entry into force of that rule. When it comes to calculating the amount of the aid in order to establish whether it falls below the permitted threshold, it is necessary to estimate the relative advantage each employer is likely to have received and deduct from it the amount of the contributions paid.

5. A Member State must notify to the Commission only planned measures which constitute State aid under Article 92(1) of the EC Treaty (now Article 87(1) EC), as interpreted in the light of the case-law of the Court of Justice.'