JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
16 September 1998 *

In Case T-188/95,

Waterleiding Maatschappij 'Noord-West Brabant' NV, a company incorporated under Netherlands law, established at Oudenbosch, the Netherlands, represented by P. H. L. M. Kuypers, of the Breda Bar, and H. M. Gilliams, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Jean-Marie Bauler, 47 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by H. van Vliet, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Kingdom of the Netherlands, represented by M. Fierstra and J. S. van den Oosterkamp, Deputy Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Embassy of the Netherlands, 5 Rue C. M. Spoo,

intervener,

* Language of the case: Dutch.

APPLICATION for the annulment of the Commission's decision SG(95) D/8442 of 3 July 1995 concerning Aid No NN 13/95 — Netherlands — Wet belastingen op milieugrondslag,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber, Extended Composition),

composed of: P. Lindh, President, R. García-Valdecasas, K. Lenaerts, J. D. Cooke and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 25 March 1998,

gives the following

Judgment

Facts

1 In 1992, the Netherlands Government presented to the Netherlands Parliament (the States-General) a draft Law originally entitled 'Wet op de verbruiksbelastingen op milieugrondslag' and subsequently amended to 'Wet belastingen op milieugrondslag' (Law introducing taxes on consumption for the protection of the envi-

ronment; 'the WBM'). It proposed charging new consumption taxes on groundwater and waste and bringing the existing tax on fuel oils under the aegis of the same law. The proposal envisaged a tax of HFL 0.25 per m^3 of groundwater extracted by water distribution companies (Article 9(a)). A preferential rate of HFL 0.125 per m^3 was to be applied to other undertakings which extracted their own groundwater ('self-supplying undertakings') (Article 9(b)). It envisaged, however, total exemption from the tax on groundwater for self-supplying undertakings with an extraction capacity not exceeding $10m^3$ per hour (Article 8(a)). Extraction of water by an undertaking for irrigation or watering purposes was also exempted, on condition that it did not exceed 100 000 m^3 per annum (Article 8(e)). The tax on waste was fixed at HFL 28.5 per 1 000 kilos (Article 18). The draft Law included an exemption from the waste tax for the recycling of unpurifiable dredging spoil and polluted earth (Article 17).

2 By letter of 7 August 1992, that draft Law was notified to the Commission pursuant to Article 93(3) of the EC Treaty.

3 By letter of 3 December 1992, the Commission informed the Netherlands Government that, on 25 November 1992, it had taken Decision SG(92) D/17278 in which it chose not to raise any objection to the aid measures included in the WBM relating to the taxes on groundwater extraction and waste presented to a waste treatment establishment.

4 It indicated in that letter that the consumption tax on groundwater extraction provided for the following types of relief:

— a certain number of exemptions for small extractions on a permanent or temporary basis, functioning as thresholds to simplify the practicability of collecting the tax;

— a differential rate according to whether extraction was carried out by water distribution companies or by self-supplying undertakings.

5 An announcement of that decision appeared in the *Official Journal of the European Communities* of 24 March 1993 (1993 C 83, p. 3).

6 By letter of 6 December 1993, the Netherlands Government notified the Commission under Article 93(3) of the Treaty of a proposal to amend the WBM. The proposed amendments concerned, *inter alia*, the rate of the tax on groundwater, to be fixed at HFL 0.34 for water distribution companies and HFL 0.17 for self-supplying undertakings (new Article 9(a) and (b)).

7 By letter of 13 April 1994, the Commission informed the Netherlands Government of its decision of 29 March 1994 not to raise any objection to those amendments.

8 An announcement of that decision appeared in the Official Journal of 4 June 1994 (1994 C 153, p. 20).

9 Then, by letter of 27 October 1994, the Netherlands Government notified the Commission under Article 93(3) of the Treaty of a proposal to amend the WBM by introducing one further adjustment on a permanent basis and two on a temporary basis, which it had laid before the Netherlands Parliament on 13 October 1994.

10 With regard to the tax on groundwater, it proposed two advantageous tax measures ('the exemption for rinsing water'), exempting the extraction of groundwater for rinsing reusable containers (new Article 8(h) of the WBM) and providing for a tax refund for undertakings procuring water from a water distribution company in order to rinse reusable containers (new Article 10a).

11 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 (new Article 18 of the WBM), together with tax refunds for persons delivering de-inking residues for processing (new Article 18a(1); 'the exemption for de-inking residues'), and for persons delivering waste from the recycling of plastic materials to a waste processing undertaking (new Article 18a(2); 'the exemption for waste from the recycling of plastic materials').

12 By letter of 25 November 1994, the Commission requested further information, which the Netherlands Government supplied by letter of 20 December 1994. In that letter, it informed the Commission that the Second Chamber of the Netherlands Parliament had in the meantime adopted the draft Law with some amendments, one of which consisted in temporarily classifying purifiable and unpurifiable dredging spoil together as unpurifiable.

13 The final version of the WBM including those amendments was approved by the Netherlands authorities on 23 December 1994. The Law entered into force on 1 January 1995.

14 Meanwhile, the applicant, a Netherlands water distribution company, and the Vereniging van Exploitanten van Waterleidingbedrijven in Nederland (Union of Water Distribution Companies in the Netherlands; 'VEWIN') had lodged a complaint with the Commission on 16 December 1994, impugning the WBM as incompatible with Community law and requesting the Commission to take a number of steps, including a formal examination of the disputed aid measures under Article 93(2) of the Treaty, with a hearing of the complainants before taking a decision.

15 By letter of 25 January 1995, entitled 'Aid Measure No NN 13/95 (N639/94) — Draft Law amending the WBM', the Commission informed the Netherlands Government that, by reason of the adoption and entry into force of the draft Law

amending the WBM by the introduction of one further adjustment on a permanent basis and two on a temporary basis before its approval by the Commission, the aid measures contained in the Law were regarded as unnotified aids. It also requested communication of the full statutory texts of the WBM.

16 On 15 February 1995, the Netherlands Government sent those texts to the Commission. It informed the Commission that they were identical to those already sent with the letter of 20 December 1994. It added that the tax refunds would not take effect until 1 April 1995, thus giving the Commission sufficient time to take its decision.

17 On 17 March 1995, the applicant and VEWIN lodged a further complaint, demanding once again that the Commission commence a formal examination of the disputed aid measures and calling upon it to order suspension of the operation of the WBM.

18 By Decision SG(95) D/8442 of 3 July 1995 concerning Aid No NN 13/95 — Netherlands — Wet belastingen op milieugrondslag ('the contested decision'), the Commission informed the Netherlands Government of its analysis of the situation:

'The aid measures in the WBM, which fall within the scope of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement, may be regarded as compatible with the common market by reason of Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement, since they comply with Paragraph 3.4 of the Community guidelines on State aid for environmental protection' (contested decision, p. 9, seventh paragraph).

19 By letter of 2 August 1995, it informed the complainants that it approved the aid measures impugned by them in the complaints referred to above. It attached a copy of the contested decision to its letter.

Procedure and forms of order sought

20 By application lodged at the Registry of the Court of First Instance on 9 October 1995, the applicant brought an action for the annulment of the contested decision.

21 By a document lodged at the Court Registry on 11 December 1995, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure.

22 By order of 27 March 1996, the Kingdom of the Netherlands was granted leave to intervene in support of the Commission.

23 By order of 17 October 1996, the Court of First Instance (Fourth Chamber, Extended Composition) decided to join the objection of inadmissibility to the substance of the case.

24 The applicant claims that the Court should:

— annul the contested decision;

— in the event of the contested decision not being capable of annulment on the strength of the applicant's first four pleas in law, order the Commission to produce all internal documents relating to the adoption of that decision in order to determine whether it was adopted in accordance with the principle of collegiality and the rules of procedure of the Commission;

— order the Commission to pay the costs.

25 The Commission claims that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss it as unfounded,

— order the applicant to pay the costs.

26 The Kingdom of the Netherlands urges that the Commission's claims be upheld.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry. It did, however, invite the parties to reply to a number of written questions before the hearing, which they did within the time-limits.

28 The parties presented oral argument and their replies to the Court's questions at the hearing on 25 March 1998.

Law

29 The applicant puts forward six pleas in law in support of its action, arguing: (1) failure to commence the formal procedure laid down by Article 93(2) of the Treaty, constituting a procedural irregularity; (2) infringement of Article 190 of the Treaty; (3) infringement of various general principles of Community law; (4) misuse of powers; (5) infringement of Article 163 of the Treaty; and (6) failure to commence the formal procedure laid down by Article 93(2) of the Treaty in relation to the aid elements in the WBM previously approved by the Commission.

30 The applicant having withdrawn its fifth plea in the course of the hearing, its second head of claim, seeking a measure of organisation of procedure in support of that plea, has become devoid of purpose.

Admissibility

31 The Commission and the Kingdom of the Netherlands consider that the action is inadmissible for two reasons; first, the applicant is not individually concerned by the contested decision within the meaning of the fourth paragraph of Article 173 of the Treaty, and, secondly, the contested decision was a confirmatory decision in so far as it declared compatible with the common market aid elements in the WBM which had already been approved by decisions which had since become immune from challenge.

32 It will be necessary to examine those two pleas of inadmissibility in turn, before examining a number of special circumstances relied upon by the applicant in order to justify its claim that this action is admissible.

A — *Whether the applicant is directly and individually concerned by the contested decision*

Arguments of the parties

33 The Commission maintains that the applicant is not individually concerned by the contested decision.

34 It argues that the case-law of the Court of Justice and the Court of First Instance has consistently shown that only undertakings in direct competition with the beneficiaries of a measure of State aid may, in appropriate circumstances, be individually concerned by a decision approving that aid.

35 In this case, the undertakings benefiting from the aid in question were in the food, paper and cardboard, and plastic recycling industries. They were not therefore in a position of direct competition with the applicant, which is a water distribution company. Nor, the Commission submits, is the applicant in competition with self-supplying undertakings, which have obtained authorisation to extract groundwater themselves in order to use it in the production of other goods.

36 At the hearing, referring to Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraphs 33 to 43, and Case T-189/97 *Comité d'Entreprise de la Société Française de Production* v *Commission* [1998] ECR II-335, paragraph 42, the Commission further argued that, even if the applicant did have the status of a party concerned within the meaning of Article 93(2) of the Treaty, that fact would be insufficient to demonstrate that it was individually concerned by the contested decision within the meaning of the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107.

37 It further maintains that the applicant cannot be individually concerned by reason of the legislative character of the contested decision, which merely approved the application of tax provisions having a general scope. Such a measure applies to situations which are determined objectively, and entails legal effects for a class of persons envisaged in a general and abstract manner (Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477). Thus it affects the applicant only in its objective capacity as a water distribution company.

38 The Commission disputes the applicant's assertion that the disputed aids are financed by taxes imposed upon it. The proceeds of the taxes envisaged by the WBM are to be paid into the general budget of the Netherlands State. In any event, the Commission submits, the financing of the aids is irrelevant to the admissibility of the action. The action does not become admissible simply because the applicant considers itself adversely affected through being liable to certain taxes envisaged in the WBM, a matter bearing no relation to any element of aid that may be contained in that law.

39 The Kingdom of the Netherlands considers that the criteria adopted in the case-law for identifying persons individually concerned by a Commission decision approving a State aid measure after following the formal procedure laid down by Article 93(2) of the Treaty should also apply to a case where the Commission takes a decision under Article 93(3) after a preliminary examination. By aligning the two situations, the number of possible actions against decisions adopted pursuant to Article 93(3) of the Treaty would be limited, thus respecting both the purpose of such actions, namely the safeguarding of the rights of parties concerned within the meaning of Article 93(2), and the scope of the fourth paragraph of Article 173.

40 Like the Commission, the Kingdom of the Netherlands emphasises that an applicant must be in competition with the undertakings benefiting from the aid measure in question in order to be individually concerned by the approval decision. In this case, it argues, the applicant's complaints are based solely on the fact that it is liable to the tax envisaged in the WBM, and are thus entirely unconnected with

any competition encountered in the course of its activities. The applicant has not adduced any reason to show how the contested decision may adversely affect its legitimate interests and seriously jeopardise its position on the market in question, as required by the judgment of the Court of Justice in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, paragraph 28. Moreover, the mere fact that the applicant carries on a water distribution business does not necessarily imply that it is in competition with the undertakings benefiting from the aid contained in the WBM.

41 The Netherlands Government observes that the applicant's interest lies in the abolition not of the relief established by the WBM but of the taxes on waste and groundwater provided for therein. It points out that the applicant itself states that it is significantly affected by the tax on waste, since water distribution undertakings produce large quantities of purifiable sludges that are subject to the waste tax. Referring to Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33, and Case T-443/93 *Casillo Grani* v *Commission* [1995] ECR II-1375, paragraph 7, and Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraphs 12 to 16, the Netherlands Government maintains that the applicant has no interest in bringing an action. First, it is not a competitor of the beneficiaries of the aid, so that any annulment of the contested decision would not affect its competitive position. Secondly, such annulment would not affect its position as a taxpayer under the WBM, since it would remain liable to the taxes introduced by that law.

42 The applicant maintains that it is individually concerned by the contested decision. In its submission, the conditions for the admissibility of an action against a Commission decision taken in the context of the preliminary procedure under Article 93(3) of the Treaty are less rigorous than those for an action against a Commission decision taken under the formal procedure in Article 93(2), which are aimed at safeguarding the procedural rights which parties concerned derive from that latter provision. All parties concerned are entitled, without distinction, to argue against a decision taken in the context of the preliminary procedure. 'Parties concerned' within the meaning of Article 93(2) of the Treaty are not only the undertaking benefiting from the aid but also 'the persons, undertakings or associations whose

interests might be affected by the grant of the aid, in particular competing undertakings and trade associations' (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 24). The use of the adverbial phrase 'in particular' shows, in the applicant's submission, that the Court was citing competitors of the beneficiaries by way of example only. It is therefore sufficient to establish a causal link between the granting of the aid and the damage caused to the interests of the person or undertaking bringing an action for annulment, without the latter having to be in competition with the aid beneficiary.

43 The applicant submits that it is in any event in competition with the self-supplying undertakings, since, through the effect of the WBM, undertakings will switch from supply from water distribution companies like the applicant to self-supply (see paragraph 45 below).

44 The applicant states that it is significantly affected by the tax on waste, since water distribution undertakings produce large quantities of purifiable sludges that are subject to the waste tax.

45 It considers, moreover, that it has lost income through the loss of undertakings which, as a result of aid measures in the WBM, have switched from water supply from the applicant to self-supply. The WBM granted exemptions for self-supplying undertakings, making extracted water significantly cheaper than water bought from the applicant. There was therefore a direct causal link between the exemption of self-supplying undertakings and the damage suffered by the applicant.

46 The exemption for rinsing water has, it submits, the same effect. Users of that water are in very many cases self-supplying undertakings. The defection of water

users will, it argues, inevitably lead to further increases in the price of water, in turn provoking further switches to self-extraction, given that most of the costs of a water distribution company are fixed costs. It is, it maintains, obvious that the price of water will rise if the costs have to be shared amongst a diminishing number of consumers.

47 The applicant also submits that it is affected by the grant of the aid inasmuch as it is financed, in the WBM, by an increase in the tax on waste from HFL 28.50 to HFL 29.20. The applicant thus suffers an extra tax burden to finance the grant of aid to other undertakings, and is accordingly affected by that aid.

48 The WBM was adopted with a view to influencing the volume of the distribution and use of water. Therefore, as a water distribution company, the applicant was affected by the aid measures comprised in the WBM.

49 Water distribution companies hold a unique position under the system of the WBM. They are the only undertakings hit by the full rate of the tax on groundwater. At the time the WBM was adopted, the number of water distribution companies subject to the full rate of the tax was known and ascertainable, with the result that they formed a closed group the members of which were individually identifiable by the levy introduced by the WBM.

Findings of the Court

50 The fourth paragraph of Article 173 of the Treaty allows natural or legal persons to challenge decisions which are addressed to them or those which, although in the

form of a regulation or a decision addressed to another person, are of direct and individual concern to them.

51 In this case, it will be necessary to examine first what is meant by a party concerned for the purposes of Article 93(2) of the Treaty, when taken as a condition for the admissibility of the action. It will then be necessary to ascertain whether the applicant does in fact have the status of a party concerned within the meaning of that provision.

— The status of a party concerned within the meaning of Article 93(2) of the Treaty, as a condition for the admissibility of the action

52 In the context of Article 93 of the Treaty, the preliminary stage of the procedure for reviewing aid under Article 93(3), which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question, must be distinguished from the examination under Article 93(2). It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, cited above, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38).

53 Where, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision by the Commission before the Court (*Cook* v *Commission*, cited above, paragraph 23; *Matra* v *Commission*, cited above, paragraph 17; *Commission* v *Sytraval and Brink's France*, cited above, paragraph 40). Therefore, the Court of Justice and the Court of First Instance will declare an action for the annulment of a decision taken on the basis of Article 93(3), brought by a party concerned within the meaning of Article 93(2),

to be admissible where that person is by his action seeking the safeguarding of his procedural rights under Article 93(2) (*Cook* v *Commission*, cited above, paragraphs 23 to 26; *Matra* v *Commission*, cited above, paragraphs 17 to 20; Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 45).

54 However, where an applicant does not seek the annulment of a decision taken on the basis of the preliminary procedure laid down by Article 93(3) of the Treaty on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Article 93(2), or on the ground that the procedural safeguards provided for by Article 93(2) were infringed, the mere fact that the applicant may be considered to be a party concerned within the meaning of Article 93(2) does not render it individually concerned for the purposes of the fourth paragraph of Article 173 of the Treaty (*Skibsværftsforeningen*, cited above, paragraph 45). In such a case, the action will be admissible only if the applicant is affected by the contested decision by reason of other circumstances distinguishing it individually in like manner to the person addressed, in accordance with the *Plaumann* test (*Skibsværftsforeningen*, cited above, paragraph 45).

55 In this case, the contested decision was taken on the basis of Article 93(3) of the Treaty, without the Commission having initiated the formal procedure provided for in Article 93(2).

56 In its application, the applicant requests the annulment of the contested decision on the ground that the Commission wrongfully refused to initiate the formal procedure provided for in Article 93(2) as regards the aid approved by that decision. It considers that it was necessary to initiate such a procedure, since an initial assessment of the aid in question raised serious doubts as to its compatibility with the common market.

57 In the light of the above, therefore, the applicant must be regarded as directly and individually concerned by the contested decision if it appears that it has the status of a person concerned within the meaning of Article 93(2) of the Treaty.

58 In those circumstances, the Commission's argument that mere status as a person concerned is insufficient to distinguish the applicant individually for the purposes of the fourth paragraph of Article 173 of the Treaty must be rejected. It should, moreover, be pointed out that the case-law cited by the Commission in support of its argument (see paragraph 36 above) arose in the context of annulment actions directed against decisions declaring aid compatible with the common market following the initiation of the procedure under Article 93(2) of the Treaty.

— Whether the applicant has the status of a party concerned within the meaning of Article 93(2) of the Treaty

59 The Commission and the Netherlands Government consider that the applicant does not have the status of a person concerned within the meaning of Article 93(2) of the Treaty, since it is not a direct competitor of the beneficiaries of the aid measures approved by the contested decision. Referring to the judgment in *Kahn Scheepvaart* v *Commission*, cited above, they further consider that the action should be declared inadmissible, given the general scope of the contested decision.

60 It is settled case-law that 'parties concerned' within the meaning of Article 93(2) of the Treaty include not only the undertakings benefiting from the aid but also the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (*Intermills* v *Commission*, cited above, paragraph 16; *Cook* v *Commission*, cited above, paragraph 24; *Matra* v *Commission*, cited above, paragraph 18; and *Commission* v *Sytraval and Brink's France*, cited above, paragraph 41, confirming the

judgment of the Court of First Instance in Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651).

61 Although the use by the Community judicature of the phrase 'in particular' might suggest that an undertaking which is not a direct competitor of the beneficiary of aid may have the status of a person concerned within the meaning of Article 93(2), it must nevertheless be emphasised that, in *Intermills* v *Commission*, the applicant was the beneficiary of an individual aid measure declared incompatible with the common market, whilst in *Cook* v *Commission*, *Matra* v *Commission* and *Sytraval and Brink's France* v *Commission* the applicants were or represented competitors of the beneficiary of the individual State measure impugned. The action in *Intermills* v *Commission* was declared admissible on the ground that, in its capacity as beneficiary of the aid in question, the applicant was directly and individually concerned by the Commission's decision (at paragraph 5 of the judgment). In *Cook* v *Commission*, *Matra* v *Commission*, and *Sytraval and Brink's France* v *Commission*, the applicants, as direct competitors of the beneficiaries of the impugned State measure, clearly had the status of persons concerned within the meaning of Article 93(2) of the Treaty. Moreover, the actions concerned compliance with the procedural guarantees laid down by that provision. The applicants were therefore entitled to seek annulment of the Commission decision declaring the aid compatible with the common market (*Cook* v *Commission*, paragraphs 23 to 26, and *Matra* v *Commission*, paragraphs 17 to 20) or declaring that the impugned measures did not constitute aid within the meaning of Article 92(1) of the Treaty (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 48).

62 Where, however, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that a general aid scheme is compatible with the common market, an action for annulment of such a decision will be inadmissible if the applicant's competitive position in the market is not affected by the grant of the aid. In such circumstances, the applicant does not have the status of a person concerned within the meaning of Article 93(2).

63 Thus, in its order of 30 September 1992 in Case C-295/92 *Landbouwschap* v *Commission* [1992] ECR I-5003, the Court of Justice held (at paragraph 12):

'... it is apparent from the file that the aids at issue benefit only a group of large industrial undertakings with which neither the applicant nor the horticulturalists whom it represents are in competition. Confirmation or annulment of the contested decision, in which the Commission authorised the granting of those aids to the industrial undertakings in question, is therefore in no way capable of affecting their interests.'

64 Similarly, in its judgment in *Kahn Scheepvaart* v *Commission*, cited above, the Court of First Instance held (paragraphs 49 and 50) that the applicant did not have the status of a person concerned within the meaning of Article 93(2) of the Treaty and that, since it was not in competition with the beneficiaries of the general aid scheme in question, it was 'only indirectly and potentially affected' thereby. That action, too, was therefore declared inadmissible.

65 It is therefore necessary to examine the various arguments put forward by the applicant to show that, despite the general nature of the aid contained in the WBM, it nevertheless has the status of a party concerned within the meaning of Article 93(2) of the Treaty.

66 The applicant claims, first, that water distribution companies are the only undertakings to be charged the full rate of the tax on groundwater. It stresses, moreover, that it produces large quantities of purifiable sludges subject to the waste tax and that that tax was increased in order to finance the aid notified to the Commission on 27 October 1994.

67 Those arguments must be rejected. In order to demonstrate its status as a party concerned within the meaning of Article 93(2) of the Treaty, the applicant is required to establish that the aid provided for by the WBM affects its competitive position on the market. The fact that it is charged the full rate of the groundwater tax does not in itself demonstrate that its competitive position on the market is affected by the aid contained in the WBM, in particular the reduced rate of groundwater tax for certain undertakings. Nor does the fact that the waste tax may have been increased in order to finance the cost of certain aid measures provided for by the WBM lead to the conclusion that those measures affect its competitive position on the market, simply because the applicant must bear that tax by reason of its objective capacity as a producer of waste, but on the same basis as any other economic operator in an identical situation.

68 To follow the applicant's reasoning would amount to recognising that any taxpayer is a party concerned within the meaning of Article 93(2) of the Treaty in relation to aid financed through the general tax resources of a Member State. Such an interpretation would be clearly incompatible with the interpretation given to Article 93(2) by the case-law (*Intermills* v *Commission*, cited above, paragraph 16; *Cook* v *Commission*, cited above, paragraph 24, *Matra* v *Commission*, cited above, paragraph 18; *Kahn Scheepvaart*, cited above, paragraphs 47 to 50). Moreover, in actions for annulment of decisions taken on the basis of Article 93(3) of the Treaty, it would have the effect of depriving the concept of a 'person individually concerned' for the purposes of the fourth paragraph of Article 173 of the Treaty of all legal significance.

69 Secondly, the applicant maintained at the hearing that water distribution companies are the only undertakings which might reasonably be expected to bring an action for annulment of the contested decision. Such a circumstance on its own, however, is again insufficient to demonstrate that the aid approved in the contested decision affects the applicant in its competitive position on the market. The argument must therefore be rejected, and it is thus unnecessary to consider whether it is out of time. Moreover, as the Commission rightly argued at the hearing, the argument is factually inaccurate. There was nothing to prevent the direct competitors of the aid beneficiaries, established in other Member States and affected in

their competitive position by the exemption for rinsing water enjoyed by Netherlands producers, from bringing an action for annulment of the contested decision.

70 Before going on to examine, thirdly, the applicant's remaining arguments, it is necessary to recall the various aid elements comprised in the WBM, since those arguments relate precisely to specific aids contained in that Law.

71 The WBM contains, first, a series of exemptions from the waste tax: an exemption for the recycling of unpurifiable polluted dredging spoil and earth (Article 17); an exemption for the recycling of waste by the undertaking on its own account (Article 12(c)); an exemption for exported waste (see the explanatory memorandum to the WBM); an exemption for de-inking residues (Article 18a(1)); an exemption for waste from the recycling of plastic materials (Article 18a(2)) and an exemption for the recycling of purifiable polluted dredging spoil (letter from the Netherlands Government to the Commission of 20 December 1994; see paragraph 12 above).

72 There is nothing to prevent the applicant from benefiting in particular from the exemption for recycling of waste on its own account or from the exemption for exported waste. As a potential beneficiary of such exemptions, the applicant has no interest in demanding the annulment of the contested decision in so far as it declares such aid compatible with the common market.

73 As regards the other exemptions from the waste tax, it appears that the beneficiaries of the aid are undertakings specialising in dredging, de-inking or plastics recycling. In principle, therefore, such exemptions cannot affect the competitive position on the market of the applicant, which is a water distribution company.

74 In order to demonstrate that it nevertheless has the status of a party concerned within the meaning of Article 93(2) of the Treaty, the applicant has merely argued, in the course of the written procedure before this Court, that it is significantly affected by the waste tax because water distribution companies produce large quantities of purifiable sludges that are subject thereto, and because the exemptions from the WBM are financed under its provisions by an increase in the waste tax from HFL 28.50 to HFL 29.20.

75 Those arguments have already been rejected at paragraphs 67 and 68 above. Nor, although the applicant is undoubtedly affected by the waste tax, as an undertaking producing waste, is there anything in the documents before the Court to show that its competitive position on the market might have been affected by the grant of the exemptions from that tax.

76 The WBM also contains a series of exemptions concerning the groundwater tax: a reduced rate for self-supplying undertakings (Article 9(b)) and total exemption for self-supplying undertakings with an extraction capacity not exceeding 10 m^3 per hour (Article 8(a)) (hereinafter jointly referred to as 'the relief for self-supplying undertakings'); an exemption for water extraction by an undertaking for irrigation or watering purposes, provided such extraction does not exceed 100 000 m^3 per annum (Article 8(e)) (hereinafter 'the exemption for irrigation or watering purposes'); and an exemption for rinsing water (Articles 8(h) and 10a).

77 Concerning the relief for self-supplying undertakings, the applicant raises two arguments in addition to that already examined and rejected above (paragraphs 67 and 68). It argues first that the WBM was adopted with a view to influencing the volume of the distribution and use of water. It then maintains that the relief for self-supplying undertakings has led to a considerable reduction in its income, many of its business customers having chosen to switch to self-extraction. There was therefore a direct causal link between the relief for self-supplying undertakings and the damage suffered by the applicant.

78 The first argument, which has not been developed further, does not state whether or to what extent the applicant's competitive position on the market has been affected by the aid contained in the WBM. It must therefore be dismissed.

79 With regard to the second argument, however, it is clear that the beneficiaries of the relief for self-supplying undertakings are current or potential customers of the applicant. By means of that aid, they are encouraged to switch to self-supply to meet their water needs. The applicant has calculated, without being contradicted on the point by the Commission or the Netherlands Government, that the switch to self-supply has caused a fall in its turnover of approximately HFL 1 million in 1995 (observations of the applicant on the objection of inadmissibility, p. 5).

80 That switch towards self-supply, which has been documented by the applicant, does indeed demonstrate that, for its customers, self-extracted water constitutes a substitute for water distributed by water distribution companies. In those circumstances, the relief for self-supplying undertakings directly affects the structure of the market in the provision of water in which the applicant operates and therefore affects its competitive position on that market.

81 The Court therefore finds that, in relation to that relief, the applicant has the status of a party concerned within the meaning of Article 93(2) of the Treaty.

82 Turning next to the exemption for rinsing water, the applicant has merely claimed that it has the same effect as the relief for self-supplying undertakings, inasmuch as users of rinsing water are in very many cases self-supplying undertakings.

83 That argument must be rejected. The exemption for rinsing water does not as such contain any encouragement to current or potential customers of the applicant to switch to self-extraction. An undertaking which procures its water from a distributor will obtain repayment of the tax paid on groundwater used for rinsing reusable containers (Article 10a of the WBM). It does not therefore bear a tax on rinsing water. If the undertaking in question switches to self-supply, the result will be identical from an economic point of view. It will still not pay tax on self-extracted water used for rinsing reusable containers (Article 8(h) of the WBM).

84 The applicant has thus not demonstrated that the exemption for rinsing water affects its competitive position on the market. In relation to that exemption, therefore, it cannot be regarded as having the status of a party concerned within the meaning of Article 93(2) of the Treaty.

85 Finally, the exemption for irrigation or watering purposes is indeed capable of causing a certain amount of 'desertion' to self-extraction. In this case, unlike the case of the exemption for rinsing water, the WBM does not provide for the possibility of recovering the tax paid where the undertaking procures water from a water distribution company for irrigation or watering purposes. The exemption for irrigation or watering purposes is therefore capable of encouraging certain undertakings to switch from water distribution companies to self-extraction. Thus, as with the relief for self-supplying undertakings (see paragraphs 79 to 81 above), this aid element affects the applicant's competitive position on the market so that, in relation to that element, it has the status of a party concerned within the meaning of Article 93(2) of the Treaty.

86 On the strength of the above considerations as a whole, the Court concludes that the applicant has the status of a party concerned within the meaning of Article 93(2) of the Treaty in relation to two aid elements in the WBM, namely the relief for self-supplying undertakings and the exemption for irrigation or watering purposes. The applicant must therefore be regarded as directly and individually

concerned by the contested decision in so far as the Commission declares those two aid elements compatible with the common market without initiating the procedure under Article 93(2) of the Treaty (*Cook* v *Commission* and *Matra* v *Commission*, cited above).

87 According to the Commission and the Netherlands Government, the two aid elements of the WBM in question have already been approved by previous decisions of the Commission now immune from challenge. It is therefore necessary to examine whether the contested decision is a purely confirmatory decision as regards the compatibility of those two aid elements with the common market.

B — *Whether the action is inadmissible for being directed against a decision confirming earlier decisions approving the relief for self-supplying undertakings and the exemption for irrigation or watering purposes*

Arguments of the parties

88 The Commission and the Kingdom of the Netherlands maintain that the action has been brought out of time. The relief for self-supplying undertakings had already been approved by the Commission's decision of 25 November 1992, communicated to the Netherlands Government by letter of 3 December 1992 and published in summary form in the Official Journal of 24 March 1993 (see paragraphs 3 to 5 above). That decision had never been challenged by the applicant. The letter from the applicant and VEWIN of 16 December 1994, in which both forwarded their complaint to the Commission, showed that, at the time the complaint was lodged, the applicant was aware of the Commission's letter of 3 December 1992. In the absence of publication or notification, it is for a party who has knowledge of a decision concerning it, as, for example, in this case through publication of the essential elements of the decision in the Official Journal, to request the whole text thereof within a reasonable period (Joined Cases T-432/93, T-433/93 and T-434/93

Socurte and Others v *Commission* [1995] ECR II-503, paragraph 49). The Commission had, moreover, circulated a press release on 25 November 1992 concerning the 1992 decision, which was also cited in its annual report on competition. It was also apparent from the applicant's letter to the Netherlands Ministry of Foreign Affairs of 23 November 1994 that at that time it already had a copy of the Commission's letter of 3 December 1992.

89 Regarding the decision of 29 March 1994, communicated to the Netherlands Government by letter of 13 April 1994 (see paragraph 7 above), the Commission observes that the amendment made to the WBM appeared in the Official Journal of 4 June 1994 and that the applicant clearly had a copy of the letter of 13 April 1994, since it was annexed to the written observations on the objection of inadmissibility.

90 Therefore, the Commission submits, the present action is inadmissible, the applicant having failed to bring an action for annulment in time against the decisions of 25 November 1992 and 29 March 1994, of which it had been able to take cognisance when they were published in the Official Journal (Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833).

91 The Commission and the Netherlands Government also dispute the assertion that the contested decision arises from a new overall assessment of the WBM. It was not therefore in substitution for the previous decision of 25 November 1992. The Commission maintains that, in accordance with the judgment in Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* v *Inspecteurs der Vennootschapsbelasting* [1984] ECR 3435, at paragraph 21, no new assessment of the tax exemptions already approved and entirely distinct from the tax exemptions notified on 27 October 1994 was necessary following that latter notification.

92 The Commission adds that, even if the Member State in question does not implement the approved measures immediately, the principle of legal certainty implies that a decision becomes immune from challenge as from the expiry of the two-month period referred to in Article 173 of the Treaty, so that, on the one hand, the

Member State concerned may be certain that it may introduce the measure envisaged, and, on the other, the Commission may close the file.

93 As for the applicant's argument that the notification of the draft WBM by the Netherlands Government on 7 August 1992 did not relate to the planned introduction of an aid scheme, because the Netherlands Parliament had not yet accepted the draft Law, the Commission and the Kingdom of the Netherlands argue that Article 93(3) of the Treaty, which requires notification of 'any plans to grant or alter aid', does not mean that only definitive aid measures may be validly notified. They submit, moreover, that it is clear from the case-law that a Member State may decide to alter a draft measure that has already been notified (*Heineken Brouwerijen*, cited above).

94 Finally, the Kingdom of the Netherlands points out that reasons were stated for the decision of 25 November 1992, so that the applicant cannot claim that it was non-existent in the absence of a statement of reasons.

95 The applicant considers that its action is not inadmissible solely because it did not take legal action against the approval decisions prior to the contested decision. In this case, only a draft Law adopted by the Netherlands Parliament would constitute an aid 'plan' within the meaning of Article 93(3) of the Treaty, which the Crown would then bring into force by a Royal Decree, after approval by the Commission. In the applicant's submission, it is for the Netherlands Parliament to adopt the final text of a law, so that all previous notifications by the Netherlands Government were irrelevant. Thus only the Netherlands Parliament's draft of December 1994 constituted an aid 'plan' within the meaning of Article 93(3) of the Treaty. Therefore, since the previous notifications to the Commission could not relate to 'plans' within the meaning of Article 93(3) of the Treaty, it would have been premature for the applicant to react, had it been aware of those notifications.

96 Moreover, the contested decision constituted an overall assessment of all the types of aid contained in the WBM, so that the previous approvals were re-evaluated in the light of new amendments. The applicant states that it expressly called upon the Commission to carry out an overall assessment of the WBM, since, under the case-law, where an aid plan is amended before it is finally adopted, the prohibition on putting it into effect contained in Article 93(3) of the Treaty, and likewise the Commission's assessment, concern the whole aid scheme including the amendments and not the amendments separately (see *Heineken Brouwerijen*, cited above). An overall assessment of all the aid measures in the WBM was all the more necessary since the amendments made to previous plans were numerous and had an influence on aid measures already authorised, and since the Commission had in the meantime changed its parameters by adopting the Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3). The applicant submits, moreover, that the contested decision shows that the Commission did in fact carry out an overall assessment of the aid measures in question (p. 8, second, third and last paragraphs, and p. 9, fifth and last paragraphs). The Commission there stated explicitly that it saw no reason to reconsider its position in relation to previous drafts and referred to the WBM and not to the amendments thereto. In addition, after having been informed by the applicant that the notified text of the WBM did not correspond to the text finally adopted, the Commission requested the Netherlands Government by letter of 25 January 1995 to send it the final texts of the WBM. Finally, the Netherlands Parliament approved the draft WBM in its entirety and did not merely ratify amendments proposed by the Netherlands Government.

97 The applicant argues that the Netherlands Government was obliged, by virtue of the scheme of Article 93 of the Treaty and of Article 5, imposing a duty to contribute in good faith to the achievement of the objectives of the Treaty, to notify only the final version of the WBM. The Netherlands Government had, however, taken the approach of submitting to the Commission a series of provisional drafts. It was only through the complaint by VEWIN and the applicant that the Commission was informed of the exact text of the WBM, which led it on 25 January 1995 to ask the Netherlands Government to send it 'the full texts of the WBM'.

98 In its reply, the applicant also refers to the case of *Socurte and Others* v *Commission*, cited above. It states that it was never aware of any reasoning whatsoever to justify the authorisation of the previous versions of the draft WBM. It adds that when, at the end of 1994, it learned of the existence of previous notifications, it immediately contacted the Commission and set out in detail in a complaint why it considered that the authorisation already granted could in no way be justified.

99 Moreover, the previous approval decisions were not supported by any reasoning at all. The applicant was not therefore in a position to verify their legality or to decide whether it wished to bring an action for annulment against them. It was impossible on the strength of the publications in the Official Journal concerning the previous notifications (OJ 1993 C 83, p. 3, and OJ 1994 C 153, p. 20) to identify either the beneficiaries of the aid notified or the grounds justifying the Commission's decisions not to raise objections to the aid in question. The Commission could not therefore expect the applicant to bring an action against those decisions, of which it knew neither the details nor the reasoning. A different interpretation would lead to a situation in which the Commission drew advantage from its own infringement of Article 190 of the Treaty, the aim of which is, in particular, to protect the rights of third parties. In any event, as a result of the failure to provide reasoning, the applicant submits, those decisions have to be regarded an non-existent or absolutely void.

Findings of the Court

100 The plea of inadmissibility raised by the Commission and the Netherlands Government is in two parts; alleging first that, at the time this action was brought, the time-limits for an annulment action in respect of the decisions of 25 November 1992 and 29 March 1994 had already expired, and, secondly, that the contested decision is purely confirmatory of those two decisions.

101 Before examining the parties' arguments, it is necessary to recapitulate the chronology of the decisions which the Commission adopted concerning the various aid elements in the WBM.

102 By letter of 3 December 1992, the Commission informed the Netherlands Government that, on 25 November 1992, it had taken Decision SG(92) D/17278 not to raise any objection to the aid measures contained in the draft WBM and notified to it on 7 August 1992. The draft WBM to which the decision of 25 November 1992 related already provided for the relief for self-supplying undertakings, namely a total exemption for such undertakings with an extraction capacity not exceeding 10 m^3 per hour (Article 8(a)) and a preferential rate for such undertakings which exceeded that threshold, which was then fixed at HFL 0.125 per m^3 (Article 9(b)). The same draft also provided for the exemption for irrigation or watering purposes (Article 8(e)).

103 By letter of 6 December 1993, the Netherlands Government notified the Commission under Article 93(3) of the Treaty of a proposal to amend the WBM. The proposed amendments concerned, in particular, the rate of the tax on groundwater, which was then fixed at HFL 0.34 for water distribution companies and HFL 0.17 for self-supply undertakings (Article 9). By letter of 13 April 1994, the Commission informed the Netherlands Government of its decision of 29 March 1994 not to raise any objection to the amendments notified to it.

104 Finally, by letter of 27 October 1994, the Netherlands Government notified the Commission under Article 93(3) of the Treaty of its proposal to 'amend the WBM by introducing one further adjustment on a permanent basis and two on a temporary basis'. That notification of 27 October 1994 gave rise to the adoption of the contested decision. The amended WBM provided for an increase in the tax on waste from HFL 28.50 to HFL 29.20 per thousand kilos (Article 18). It also provided for the introduction of certain reliefs from the tax on groundwater and the tax on waste, namely the exemption for rinsing water (Articles 8(h) and 10a), the

exemption for de-inking residues (Article 18a(1)) and the exemption for waste from the recycling of plastic materials (Article 18a(2)).

— The expiry of the time-limits for bringing annulment actions against the decisions of 25 November 1992 and 29 March 1994

105 The chronological summary of the facts given above shows that the two aid elements of the WBM in relation to which the applicant has the status of a party concerned within the meaning of Article 93(2) of the Treaty, namely the relief for self-supplying undertakings and the exemption for irrigation or watering purposes, were already declared compatible with the common market in the Commission decision of 25 November 1992. In addition, an amendment in the preferential rate of the tax on groundwater for self-supplying undertakings was declared compatible with the common market by the decision of 29 March 1994. The rate in question is that of HFL 0.17 per m^3 (Article 9) which also appears in the definitive version of the Law which entered into force on 1 January 1995.

106 It is clear that the notification of 27 October 1994, which gave rise to the adoption of the contested decision, did not in any way alter the two aid elements in the WBM in relation to which the applicant has the status of a person concerned within the meaning of Article 93(2) of the Treaty.

107 However, as the applicant rightly points out, the Commission made a finding in the contested decision as to the compatibility of all the aid measures contained in the WBM with the common market, and not just of the amendments notified on 27 October 1994. It concluded (at p. 9, seventh paragraph, of the contested decision) that 'the aid measures in the WBM ... may be regarded as compatible with the common market by reason of Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement, since they comply with Paragraph 3.4 of the Community guidelines on State aid for environmental protection'.

108 Before examining whether the contested decision is purely confirmatory of the decisions of 25 November 1992 and 29 March 1994, in so far as it declares the relief for self-supplying undertakings and the exemption for irrigation or watering purposes to be compatible with the common market, it is necessary to ascertain whether the decisions of 25 November 1992 and 29 March 1994 had become final in relation to the applicant at the time this action was brought. The case-law to the

effect that a decision that is purely confirmatory of an earlier decision is not a measure open to legal challenge is based on the concern that the time-limits for bringing an action should not be allowed to recommence once they have expired (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 4; Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16; Case C-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraph 14; Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1355, paragraph 48; Case T-224/95 *Tremblay and Others* v *Commission* [1997] ECR II-2215, paragraph 49; and Case T-235/95 *Goldstein* v *Commission* [1998] ECR II-523, paragraph 41). On that basis, an action against a confirmatory decision is inadmissible only if the decision confirmed has become final in relation to the person concerned through not having been challenged before the Court within the required period. Where the confirmed decision has not become final, the person concerned is entitled to challenge the original decision, the confirmatory decision or both (Joined Cases 193/87 and 194/87 *Maurissen and Union Syndicale* v *Court of Auditors* [1989] ECR 1045, paragraph 26; Case T-64/92 *Chavane de Dalmassy and Others* v *Commission* [1994] ECR-SC II-723, paragraph 25).

109 If, therefore, the respective periods within which actions could have been brought under Article 173 of the Treaty for annulment of the decisions of 25 November 1992 and 29 March 1994 had not yet expired at the time the present action was brought, the action should be declared admissible, notwithstanding the possibility that the contested decision may be purely confirmatory inasmuch as it declares the relief for self-supplying undertakings and the exemption for irrigation or watering purposes compatible with the common market.

110 Under the fifth paragraph of Article 173 of the Treaty, annulment actions must be brought within two months of the publication of the measure, its notification to the applicant, or, in the absence thereof, the day on which it came to the knowl-

edge of the latter, as the case may be. That time-limit is to be extended on account of distance in some cases, pursuant to Article 102(2) of the Rules of Procedure of the Court of First Instance and Article 1 of Annex II to the Rules of Procedure of the Court of Justice.

111 Although a decision declaring aid notified by a Member State to be compatible with the common market is notified only to its addressee, namely the Member State, and only a summary thereof is published in the Official Journal, a third party may not bring an annulment action against it at any time. The case-law shows that it is the responsibility of a person who becomes aware of the existence of a measure concerning him to request the full text within a reasonable period. Subject to that reservation, the two-month period referred to above does not start to run until the third party concerned has an exact knowledge of the content and grounds of the measure in question so as to be able to exercise his right of action (*Socurte* v *Commission*, cited above, paragraph 49).

112 In this case, the applicant's letter to the Netherlands Ministry of Foreign Affairs of 23 November 1994 (Annex XVI to the rejoinder) shows that at that time the applicant already had a copy of the letter of 3 December 1992 whereby the Commission notified the Netherlands authorities of its decision of 25 November 1992. In that letter, the applicant's lawyer states: 'I already have a copy of the Commission's letter of 3 December 1992.'. Thus by 23 November 1994 at the latest, the applicant had an exact knowledge of the content and grounds of the measure in question, so that it was in a position to exercise its right of action.

113 Therefore, at the time this action was brought on 9 October 1995, the two-month time-limit for bringing an action prescribed by the fifth paragraph of Article 173 of the Treaty, extended by six days on account of distance pursuant to Article 102(2) of the Rules of Procedure of the Court of First Instance and Article 1 of Annex II to the Rules of Procedure of the Court of Justice, had expired in relation to the decision of 25 November 1992.

114 Concerning the decision of 29 March 1994, the Court notes that the written submissions prepared by the Netherlands Government on 8 February 1995 in the context of its dispute with VEWIN and the applicant (Annex B to the additional complaint of 17 March 1995; Annex 5 to the application) refer to the Commission's letter of 13 April 1994 which notified the decision of 29 March 1994 to the Netherlands Government and state that that decision is produced in Annex 8 to those written submissions (point 24). Questioned on that point at the hearing, the applicant acknowledged that, by 8 February 1995 at the latest, it had an exact knowledge of the actual wording of the decision of 29 March 1994. Therefore, at the time the present action was brought on 9 October 1995, the time-limit for bringing an annulment action, extended by six days on account of distance, had also expired in relation to the decision of 29 March 1994.

115 The applicant's argument that the reasons for the decisions of 25 November 1992 and 29 March 1994 were not stated, thus preventing it from being in a position to assess whether to bring an annulment action, must be rejected. If the applicant considered that the reasons for the decisions of 25 November 1992 and 29 March 1994 were not sufficiently stated, it could, in an annulment action against those decisions, have raised a plea arguing lack or insufficiency of reasoning, any such lack or insufficiency not being a factor of such a kind as to prevent the time-limit for bringing an action from expiring.

116 Nor can the applicant deduce from the alleged lack of reasoning that the decisions of 25 November 1992 and 29 March 1994 were non-existent, since a lack of reasoning does not in itself lead to a finding of non-existence. A measure may conceivably be regarded as legally non-existent only if it is tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 49 and 50), something which clearly does not apply to the facts of this case.

117 The applicant also argues that only the Netherlands Parliament's draft of December 1994 constituted an aid 'plan' within the meaning of Article 93(3) of the Treaty. It would thus have been premature for it to take action against the decisions of

25 November 1992 and 29 March 1994, since they did not yet concern aid 'plans' within the meaning of that provision.

118 That argument must also be rejected. Article 93(3) of the Treaty requires notification of 'any plans to grant or alter aid'. The aid measures must therefore be notified to the Commission while they are still at the draft stage, that is to say before they are implemented and while they are still capable of being adjusted in the light of any observations the Commission may have. Since Article 93(3) of the Treaty does not contain any formal criterion, it is for each Member State to determine at what stage of the legislative procedure it decides to submit the aid plan for examination by the Commission, provided always that the plan is not implemented before the Commission has declared the aid compatible with the common market.

119 The notifications made by the Netherlands authorities on 7 August 1992 and 6 December 1993 related respectively to aids and to an amendment to aid contained in a draft Law presented to the Netherlands Parliament. They therefore concerned 'plans to grant or alter aid' within the meaning of Article 93(3) of the Treaty. The approach taken by the Netherlands authorities, namely notification of a draft Law containing aid plans before its formal adoption by the national Parliament, demonstrated scrupulous compliance with the obligations imposed on Member States by Article 93 of the Treaty, since it allowed amendment of the aid elements in the draft, in the light of any observations the Commission might make, in the course of the legislative procedure itself.

120 It follows from all the above considerations that the decisions of 25 November 1992 and 29 March 1994 had become immune from challenge at the time the present action was brought. The action should therefore be declared inadmissible if it appears that the contested decision is purely confirmatory of the decisions of 25 November 1992 and 29 March 1994 in so far as it declares the relief for self-supplying undertakings and the exemption for irrigation or watering purposes compatible with the common market.

— Whether the contested decision was purely confirmatory

121 In the contested decision (p. 9, seventh paragraph), the Commission declared 'the aid measures in the WBM' compatible with the common market. That declaration of compatibility is thus not limited to the amendments made to the WBM and notified to the Commission on 27 October 1994. The question therefore arises as to whether the contested decision, in so far as it declares the aid already approved in the decisions of 25 November 1992 and 29 March 1994 to be compatible with the common market, is purely confirmatory of those decisions, in which case it is not a measure open to legal challenge (see the case-law cited in paragraph 108 above), such a decision not giving those concerned the opportunity of reopening the question of the legality of the measure which is confirmed (Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 103; *Tremblay and Others*, cited above, paragraph 49).

122 On that point, the contested decision shows that the Commission only carried out an examination of the aid elements notified on 27 October 1994, namely the exemptions for rinsing water, de-inking residues and waste from the recycling of plastic materials. Thus the Commission first refers to the fact (p. 1, second paragraph, of the decision) that 'on 25 November 1992 it had approved the original version of the draft law on which the exceptions were based'. Subsequently (pp. 4 to 6 of the decision), it confines itself to describing the three exemptions notified and then, in its legal assessment (pp. 6 to 10), it examines the compatibility of those aid measures with the common market.

123 It is true that the Commission states (p. 9, fifth paragraph, of the contested decision) in relation to the aid already approved on 25 November 1992, particularly the relief for self-supplying undertakings (as amended by the decision of 29 March 1994) and the exemption for irrigation or watering purposes, that it 'does not consider it necessary to review its decision of 1992 given that the arguments cited in the previous paragraphs [of the contested decision] also apply to the Law in its original version'.

124 However, that passage, placed in its context, cannot be regarded as proof that the aid already approved by the decisions of 25 November 1992 and 29 March 1994 was the subject of a fresh examination in the contested decision.

125 It must be seen as a reply to the complaints of the applicant and VEWIN of 16 December 1994 and 17 March 1995, in which the complainants requested that the procedure under Article 93(2) of the Treaty be opened in respect of all the aid elements in the WBM, stressing: 'This is after all a global measure [...] in which all the taxes, exemptions and reliefs constitute an inextricable whole.' (additional complaint of 17 March 1995, point 8.4). It does not imply that, in the contested decision, the Commission carried out a fresh examination of the aid which had been the subject-matter of the decisions of 25 November 1992 and 29 March 1994, but must be interpreted as meaning that the reasons which led the Commission to declare the aid in question compatible with the common market in the decisions of 25 November 1992 and 29 March 1994 remain unchanged in the contested decision.

126 The fact that the contested decision contains a reply to a request formulated in the applicant's complaint has no relevance to the admissibility or otherwise of the present action.

127 It should be recalled in that respect that decisions adopted by the Commission in the area of State aid are addressed to the Member States concerned, even where they concern State measures to which objection is taken in complaints on the ground that they constitute State aid contrary to the Treaty and the Commission refuses to initiate the procedure under Article 93(2) because it considers that the measures complained of are compatible with the common market (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 45).

128 Where, as in this case, the Commission replies, when examining new aid, to an argument or a request put forward by a complainant in respect of different aid already approved, that circumstance does not in itself demonstrate that the latter has been the subject of a fresh examination by the Commission. To hold otherwise would amount to accepting that, simply by lodging a complaint against aid measures already approved, an undertaking might extend the time-limit for bringing an action for annulment of the approval decision, in cases where the time-limit had not yet expired, or reopen it in cases where the approval decision had become immune from challenge at the time the complaint was lodged, whereas the time-limit prescribed for bringing actions under Article 173 of the Treaty is a matter of public policy (*Mutual Aid Administration Services* v *Commission*, cited above, paragraph 38).

129 Moreover, the Commission was not required to re-examine in the contested decision the relief for self-supplying undertakings and the exemption for irrigation or watering purposes which had already been approved, since the amendments made to the WBM and notified to the Commission on 27 October 1994 constituted separate aid measures which were not capable of influencing the assessment which the Commission had made of the initial draft of the WBM in its decisions of 25 November 1992 and 29 March 1994 (*Heineken Brouwerijen* v *Inspecteurs der Vennootschapsbelasting*, cited above, paragraph 21).

130 Furthermore, the applicant acknowledged at the hearing, in reply to a question from the Court, that two of the three aid measures notified on 27 October 1994, namely the exemptions for de-inking residues and waste from the recycling of plastic materials, were not in any way linked to the aid approved by the decisions of 25 November 1992 and 29 March 1994.

131 It cannot reasonably be maintained that the exemptions for de-inking residues and for waste from the recycling of plastic materials, which concern the waste tax and are addressed to a group of specific potential beneficiaries, namely the paper and cardboard and plastics recycling industries, could have had an impact on the relief

for self-supplying undertakings and the exemption for irrigation or watering purposes, which concern the groundwater tax and promote self-extraction of water.

132 Thus, bearing in mind the distinction between the exemptions concerning the waste tax and those concerning the groundwater tax, it is not possible that the exemptions for de-inking residues and waste from the recycling of plastic materials, notified to the Commission on 27 October 1994, could have been capable of influencing the assessment which the Commission had already made in its decisions of 25 November 1992 and 29 March 1994 on the relief for self-supplying undertakings and the exemption for irrigation or watering purposes.

133 The applicant maintains nevertheless that the third aid element notified on 27 October 1994, namely the exemption for rinsing water, was such as to have an impact on the assessment of the relief for self-supplying undertakings. It explains that the undertakings benefiting from the exemption for rinsing water are often self-supplying undertakings which already enjoy relief from the tax on groundwater, thus aggravating the effects of the relief for self-supplying undertakings.

134 That argument must be rejected. The aid enjoyed by self-supplying undertakings, which was approved by the decisions of 25 November 1992 and 29 March 1994, is in no way affected by the exemption for rinsing water, since that exemption applies to any groundwater which is used for rinsing reusable containers, whether supplied by a water distribution undertaking or self-extracted (see paragraph 83 above). In those circumstances, the exemption for rinsing water cannot have any impact on the effects of the relief for self-supplying undertakings and the exemption for irrigation or watering purposes, approved by the decisions of 25 November 1992 and 29 March 1994.

135 Moreover, the fact that on 23 December 1994 the Netherlands Parliament adopted the WBM in its entirety and not just the amendments notified to the Commission on 27 October 1994 does not demonstrate that, following that notification, the Commission re-examined the aid elements which it had already declared compatible with the common market.

136 Nor can the applicant derive any argument from the fact that, by letter of 25 January 1995, the Commission requested the Netherlands Government to send it the final texts of the WBM. The sending to the Commission of the full text of the WBM, as adopted by the Netherlands Parliament on 23 December 1994, could only have reassured the Commission that the aid elements of the WBM notified on 27 October 1994, were distinct from the aid elements already approved on 25 November 1992 and 29 March 1994.

137 Moreover, that distinction between the various aid measures submitted for the Commission's assessment entails the rejection of any line of argument based on the Netherlands authorities' alleged practice of submitting a series of provisional drafts to the Commission.

138 Nor can the applicant rely on the fact that, before adopting the contested decision, the Commission amended its framework for assessment by adopting the Community guidelines on State aid for environmental protection, cited above. Those guidelines expressly provide (paragraph 4.2) that they 'are without prejudice to schemes that have already been authorised when the guidelines are published'. Under the applicant's argument, the Commission would have been required to re-examine, at the time of the adoption of its decision of 29 March 1994 and not at the time of the adoption of the contested decision, the aid already approved in its decision of 25 November 1992. That decision of 29 March 1994, which declares amendments to the aid approved on 25 November 1992 to be compatible with the common market, is subsequent to the publication of the Community guidelines in the Official Journal, which occurred on 10 March 1994. However, the decision of 29 March 1994 has become immune from challenge (see paragraph 114 above).

139 Furthermore, as the aid notified on 27 October 1994 is distinct from that already approved on 25 November 1992 and 29 March 1994, the Commission would have infringed the principles of legal certainty and the protection of legitimate expectation had it subjected the aid already approved to a fresh examination in the contested decision. It should be emphasised here that, at the time the contested decision was adopted, the aid contained in the WBM had already been implemented by the Netherlands authorities. Even if those authorities had implemented all the categories of aid contained in the WBM, including the aid notified on 27 October 1994 but not yet approved, the prohibition on putting the measures into effect contained in the final sentence of Article 93(3) of the Treaty would still not have applied to the relief for self-supplying undertakings and the exemption for irrigation or watering purposes, since those were separate aid measures which had been subject to an earlier assessment (*Heineken Brouwerijen* v *Inspecteurs der Vennootschapsbelasting*, cited above, paragraph 22).

140 Thus, at the time the contested decision was adopted, the two aid elements in the WBM in respect of which the applicant has the status of a party concerned within the meaning of Article 93(2) of the Treaty had not only been declared compatible with the common market but had also been put into effect in accordance with the final sentence of Article 93(3) of the Treaty. In those circumstances, the Commission could only have carried out a re-examination of the relief for self-supplying undertakings and the exemption for irrigation or watering purposes under the procedure laid down in Article 93(1) of the Treaty in respect of existing aid.

141 It follows from the above that the contested decision must be regarded as purely confirmatory of the decisions of 25 November 1992 and 29 March 1994, in so far as it declares the relief for self-supplying undertakings and the exemption for irrigation or watering purposes compatible with the common market. Since the time-limits for bringing actions for annulment of the two confirmed decisions had already expired at the time the present action was brought, the action is inadmissible in so far as it seeks to call into question the assessment which the Commission made of the two categories of aid already approved.

C — *The special circumstances invoked by the applicant in support of its contention that the action is admissible*

142 In its application, the applicant raises two further arguments in support of its contention that this action is admissible, whether it is a party concerned within the meaning of Article 93(2) of the Treaty or not.

143 First, it emphasises that it lodged a complaint with the Commission, then an additional complaint, which the contested decision mentioned. It considers that the action must be declared admissible in order to protect its procedural rights vis-à-vis the Commission in its capacity as a complainant. The Commission is obliged, it argues, in the case of a 'preliminary procedure', where it is confronted with a complaint in which serious arguments as to the compatibility of an aid measure are set out, to carry out a detailed and impartial investigation of the matter and, where it intends to reject the complaint, first to give the complainant the possibility of taking a position in relation to the information it has collected and the conclusions it draws therefrom (Case C-269/90 *Technische Universität München* v *Hauptzollamt München-Mitte* [1991] ECR I-5469; Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501; Case T-95/94 *Sytraval and Brink's France* v *Commission*, cited above).

144 In reality, the Court's case-law shows that the Commission is under no obligation to hear the complainants during the preliminary phase of examining aid instituted by Article 93(3) of the Treaty (Case C-367/95 P *Commission* v *Sytraval and Brink's France*, cited above, paragraph 59). To require the Commission, in the context of the preliminary procedure envisaged in Article 93(3) of the Treaty, to engage in adversarial proceedings with the complainant could lead to discrepancies between the procedural system laid down by that provision and that laid down by Article 93(2) of the Treaty (same paragraph).

145 The applicant's argument based on alleged infringement of its procedural rights during the 'preliminary procedure' must therefore be rejected.

146 Secondly, the applicant maintains that, where aid is implemented by means of fiscal or parafiscal charges, persons and undertakings that are subject to such taxes or charges may oppose their levying or apply for their repayment before the national courts (Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *France* [1991] ECR I-5505, paragraph 12 et seq.; Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* v *Receveur Principal des Douanes de La Pallice Port* [1992] ECR I-1847; Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez Nutrition Animale* v *Directeur des Services Fiscaux des Pyrénées Atlantiques* [1992] ECR I-3899, paragraphs 25 and 26; Case C-17/91 *Georges Lornoy en Zonen and Others* v *Belgian State* [1992] ECR I-6523; Case C-114/91 *Claeys* [1992] ECR I-6559). That right would be illusory if those liable for the tax or charge were not able to challenge before the Court of First Instance the Commission's approval of the aid granted. In such circumstances, the Commission would have an exclusive competence in the assessment of the compatibility of aid measures with the common market, and the national courts would have no jurisdiction to review the Commission's action in that area. Thus, if this action were to be declared inadmissible, examination of the Commission's decision not to open a formal procedure under Article 93(2) of the Treaty would in practice be placed beyond the reach of any judicial review.

147 It should be remembered that, in this case, the action is out of time as regards the two aid elements of the WBM in relation to which the applicant has the status of a party concerned within the meaning of Article 93(2) of the Treaty. The circumstances pleaded by the applicant are in no way capable of reopening the time-limit laid down by Article 173 of the Treaty. Moreover, even if a national court does not have jurisdiction to rule on the compatibility of aid with the common market (Case C-44/93 *Namur-Les Assurances du Crédit* v *Office National du Ducroire and Belgian State* [1994] ECR I-3829, paragraph 17), it may nevertheless examine the validity of a Commission decision declaring aid compatible with the common market. Since the power to hold a Community measure invalid, if it is raised before a national court, is reserved for the Court of Justice, a national court which considers the decision invalid is required to refer a question to the Court of Justice

for a preliminary ruling under Article 177 of the Treaty (Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paragraphs 14 to 17). To follow the applicant's argument would amount to accepting that every action brought by a natural or legal person before the Court of First Instance for the annulment of a measure of a Community institution must be held admissible, on the ground that national courts do not themselves have jurisdiction to hold measures of those institutions invalid (same judgment, paragraph 20). Such an interpretation would result in depriving the condition that the applicant must be individually concerned within the meaning of the fourth paragraph of Article 173 of the Treaty of all legal significance.

148 The applicant's last argument must therefore also be rejected.

D — *Overall conclusions*

149 It follows from the above considerations as a whole that the applicant may be regarded as directly and individually concerned by the contested decision to the extent only that it declares the relief for self-supplying undertakings and the exemption for irrigation or watering purposes to be compatible with the common market. However, in so far as it approves those aid elements, the contested decision is a measure confirming the decisions of 25 November 1992 and 29 March 1994, which were not challenged by actions within the prescribed time-limits.

150 The action must therefore be declared inadmissible.

Costs

151 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and those incurred by the Commission, as pleaded by the latter.

152 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Kingdom of the Netherlands must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to bear its own costs and those incurred by the Commission;

3. Orders the Kingdom of the Netherlands to bear its own costs.

Lindh García-Valdecasas Lenaerts

Cooke Jaeger

Delivered in open court in Luxembourg on 16 September 1998.

H. Jung P. Lindh

Registrar President