JUDGMENT OF THE COURT (First Chamber)

15 July 2004 *

In Case C-345/02,

REFERENCE to the Court of Justice under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings before that court between

Pearle BV,

Hans Prijs Optiek Franchise BV,

Rinck Opticiëns BV

and

Hoofdbedrijfschap Ambachten,

* Language of the case: Dutch.

on the interpretation of Articles 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) and 93(3) of the EC Treaty (now Article 88(3) EC),

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV, by P.E. Mazel, advocaat,

— Hoofdbedrijfschap Ambachten, by R.A.A. Duk, advocaat,

— the Netherlands Government, by S. Terstal, acting as Agent,

— the Commission of the European Communities, by J. Flett and H. van Vliet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by H.G. Sevenster, acting as Agent, and of the Commission, represented by H. van Vliet, at the hearing on 29 January 2004,

after hearing the Opinion of the Advocate General at the sitting on 11 March 2004,

gives the following

Judgment

1 By judgment of 27 September 2002, received at the Court on 30 September 2002, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Articles 92(1) of the EC Treaty (now, after amendment, Article 87 (1) EC) and 93(3) of the EC Treaty (now Article 88(3) EC).

2 Those questions were raised in proceedings concerning the lawfulness of charges imposed by the Hoofdbedrijfschap Ambachten (Central Industry Board for Skilled Trades, 'the Board') on its members, amongst which are included the appellants in the main proceedings, with a view to funding a collective advertising campaign for the benefit of the undertakings in the field of optical services.

The legislative background

The relevant provisions of Community law

3 Article 92(1) of the Treaty provides:

'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 Treaty provides:

'(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 92, 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 subparagraph of the Commission Notice of 6 March 1996 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9; 'the *de minimis* notice'), '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 subparagraph of the *de minimis* notice, Article 92(1) 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 granted. That maximum amount applies to aid of all kinds, irrespective of the form it takes or the objective pursued, with the exception of export aid, which is excluded from the benefit of the *de minimis* rule.

The relevant provisions of domestic law

The Netherlands law on the organisation of business

7 The Wet op de bedrijfsorganisatie (Netherlands law on the organisation of business, 'the WBO') of 27 January 1950, in the amended version in force at the time of the facts giving rise to the dispute in the main proceedings, governs the tasks, composition, working methods, financial affairs and supervision of trade associations which are entrusted with personal responsibility for the organisation and development of their sector of activity. In accordance with Article 71 of the WBO, those associations must take into account the interest of the undertakings in the sector concerned and of their staff, and also the general public interest.

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

9 The Netherlands legislature has conferred on those associations the powers necessary in order for them to carry out their tasks. Article 93 of the WBO provides, inter alia, that their governing bodies may, without exception, adopt the bye-laws they deem essential to the attainment of the objectives referred to in Article 71 of that law, in the interest both of the activity of the undertakings in the economic sector involved and of the working conditions of the staff employed by those undertakings. Those bye-laws require the approval of the Sociaal-Economische Raad (Social and Economic Council) and, according to Article 93(5) of the WBO, they may not interfere with the free play of competition.

10 In accordance with Article 126 of the WBO the trade associations may, in order to meet their costs, adopt bye-laws imposing levies on the undertakings within the sector of activity concerned. General levies support the running of the trade association as such. 'Compulsory earmarked levies' serve specific purposes.

The Netherlands law on administrative proceedings concerning the organisation of business

11 The Wet houdende administratieve rechtspraak bedrijfsorganisatie (Netherlands law on administrative proceedings concerning the organisation of business) of 16 September 1954, in the amended version in force at the time of the facts giving rise to the dispute in the main proceedings, lays down the detailed rules governing administrative proceedings brought in connection with the organisation of business.

12 In accordance with Articles 4 and 5 of that law, natural or legal persons whose interests are directly affected by a decision taken by a trade association may bring an action before the College van Beroep voor het bedrijfsleven (administrative tribunal for commercial and industrial matters, governed by Netherlands law) if they consider the decision to be contrary to a provision of law of general application. Article 33(1) of that law provides that the action must be brought within 30 days of the communication or adjournment of the decision or of the enforcement of the act.

13 By virtue of the rule of Netherlands case-law on formal legal force, where an action for recovery of a sum not due is brought before the civil court, the latter must start from the principle that the decision on the basis of which the payment was made was consistent with the law, so far as both the mode of its adoption and its content are concerned, if the interested party has failed to make use of an administrative means of redress that was open to him.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Pearle BV, Hans Prijs Optiek franchise BV and Rinck Opticiëns BV ('the appellants in the main proceedings') are companies established in the Netherlands and trading in optical equipment. In that capacity and pursuant to the WBO, they joined the Board, a trade association governed by public law.

15 In 1988, at the request of a private opticians' association, the Nederlandse Unie van Opticiëns ('the NUVO') of which the appellants in the main proceedings were then members, the Board for the first time imposed on its members, pursuant to a bye-law adopted on the basis of Article 126 of the WBO, a 'compulsory earmarked levy' to finance a collective advertising campaign for opticians' businesses. A similar levy was subsequently imposed every year, at least until 1993.

16 The levy thus imposed on the appellants in the main proceedings came to HFL 850 for each establishment. They introduced no administrative action challenging the levy decisions addressed to them by the Board.

17 On 29 March 1995 the appellants brought proceedings against the Board before the Rechtbank 's-Gravenhage (District Court of The Hague), seeking annulment of the bye-laws introducing the compulsory earmarked charges at issue and an order that the Board should repay the sums not due paid on the basis of those bye-laws.

18 They maintained that the services provided by means of the advertising campaign constituted State aid within the meaning of Article 92(1) of the Treaty and that the Board's bye-laws introducing the levies intended to finance that aid were unlawful, since they had not been notified to the Commission pursuant to Article 93(3) of the Treaty.

19 By an interim decision the court of first instance accepted in part the appellants' arguments. That decision was set aside on appeal, whereupon the appellants appealed on a point of law to the Hoge Raad der Nederlanden.

20 Those being the circumstances, the Hoge Raad decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'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 Treaty], and must the plans to implement it be notified to the Commission under Article 93(3) [of the 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) [of the Treaty] apply to any aid or only to aid which satisfies the definition in Article 92(1) [of the Treaty]? 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) [of the Treaty]?

If so, how much discretion? And to what extent can such free discretion affect the obligation to notify under Article 93(3) [of the Treaty]? 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) [of the Treaty] is involved, must it then consider the '*de minimis*' rule, as formulated by the Commission in ... the [*de minimis* notice] ..., 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) [of the Treaty]? 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 and Others* [1996] ECR I-3547, for the purposes of the practical effect of Article 93 (3) [of the Treaty], 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) [of the Treaty], 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 Treaty]?'

Concerning the questions referred for a preliminary ruling

Introductory remarks

21 By its three first questions, which are to be considered together, the national court seeks in substance to ascertain whether the funding of advertising campaigns by the Board for the benefit of opticians' businesses can be regarded as State aid within the meaning of Article 92(1) of the Treaty and whether, if necessary taking into account the *de minimis* rule, the Board's bye-laws imposing levies on its members in order to fund those campaigns ought — as components of an aid scheme — to have been notified to the Commission in accordance with Article 93(3) of the Treaty. In that manner it seeks enlightenment as to whether the compulsory earmarked levies imposed on the appellants in the main proceedings are, because they are directly linked to what might be unnotified aid, also vitiated by unlawfulness with the result that they must theoretically give rise to reimbursement.

22 In the fourth and fifth questions the issue is whether the practical effect of Article 93 (3) of the Treaty militates against the application of the rule of Netherlands case-law on formal legal force to circumstances such as those in the present case.

Concerning the first, second and third questions

Observations submitted to the Court of Justice

23 The appellants in the main proceedings and the Commission submit that the Board's funding of an advertising campaign for the benefit of opticians' businesses constitutes State aid for the purposes of Article 92(1) of the Treaty and ought to have been notified to the Commission in accordance with Article 93(3) of the Treaty. They explain that the concept of aid referred to in Article 92(1) of the Treaty includes the advantages granted by the State directly and those granted through a public or private body, such as the Board, designated or established by that State (Case C-379/98 *PreussenElektra* [2001] ECR I-2099).

24 A measure taken by a public authority which benefits certain undertakings or certain products does not cease to be characterised as aid just because it is financed in part or in whole by contributions imposed by the public authority and levied on the undertakings concerned (Case 78/76 *Steinike & Weinlig* [1977] ECR 595, and Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 23). A measure could thus fall within the ambit of Article 92(1) of the Treaty, even if it was wholly funded by payments of that kind.

25 According to the appellants and the Commission, the Netherlands Government ought to have notified to the Commission all the necessary information about the system established. That information ought to have related both to the organisation of the advertising campaign and to the methods by which it was funded (Case 47/69 *France* v *Commission* [1970] ECR 487).

26 The Board contends that the collective advertising campaign which it supported does not amount to State aid for the purposes of the Treaty. When the authorities mount such a campaign for the benefit of a particular form of trade, trade craft or industry and fund that action by means of a compulsory earmarked charge to which the participants contribute up to the amount of the benefit which they derive from it, there is in practical terms no component of funding from State resources.

27 In the Netherlands Government's submission, a bye-law adopted by a body governed by public law which, at the request of a private association, introduces charges for the purpose of funding a collective advertising campaign, does not amount to State aid within the meaning of Article 92(1) of the Treaty. It observes that, according to the Court's case-law (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, and *PreussenElektra*), only those advantages that are financed directly or indirectly by State resources are to be regarded as aid within the meaning of that provision. The Netherlands Government points out that, in this case, although the Board, because of its statutory powers, acted as a vehicle for the levying and allocation of the resources generated in aid of an objective previously settled by the trade, that body could not dispose of its resources freely.

The Court's reply

28 It is provided in Article 93(3) of the Treaty that the Commission is to be informed of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market, it is without delay to initiate the procedure provided for in Article 93(2) of the Treaty, and the Member State concerned may not put its proposed measures into effect until that procedure has resulted in a final decision.

29 The Court's case-law makes it clear that where the method by which aid is financed, particularly by means of compulsory contributions, forms an integral part of the aid measure, consideration of the latter by the Commission must necessarily also take into account that method of financing the aid (Joined Cases C-261/01 and Case C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 49, and Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 44).

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

31 It is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by the national authorities of the obligations imposed on the Member States by Article 93(3) of the Treaty (see, to this effect, Case C-354/90 *Fédération nationale du Commerce Extérieur des Produits Alimentaires et Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraph 12, and Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 30). A national court may have cause to interpret the concept of aid contained in Article 92 (1) of the Treaty in order to determine whether a State measure has been introduced contrary to that provision (see *Steinike & Weinlig*, paragraph 14; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 14, and *SFEI*, paragraph 49). The obligation to notify and the prohibition of implementation laid down in Article 93(3) of the Treaty apply in fact to plans to grant or alter aid within the meaning of Article 92(1) of the Treaty.

32 It must also be pointed out that, according to settled case-law, classification as aid requires that all the conditions set out in that provision should be fulfilled (see Case C-142/87 *Belgium* v *Commission ('Tubemeuse')* [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68, and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74).

33 Article 92(1) of the Treaty lays down four conditions. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 75).

34 With regard to the first condition, it is clear from established case-law that there is no need to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies established or appointed by that State (Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 12, *PreussenElektra*, paragraph 58, and Case C-126/91 *GEMO* [2003] ECR I-13769, paragraph 23).

35 However, for advantages to be capable of being categorised as aid within the meaning of Article 92(1) of the Treaty, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 11, *France* v *Commission*, paragraph 24, and *GEMO*, paragraph 24.

36 Even if the Board is a public body, it does not in the circumstances of the case appear that the advertising campaign was funded by resources made available to the national authorities. On the contrary, the judgment making the reference makes it clear that the monies used by the Board for the purpose of funding the advertising campaign were collected from its members who benefited from the campaign by means of compulsory levies earmarked for the organisation of that advertising campaign. Since the costs incurred by the public body for the purposes of that campaign were offset in full by the levies imposed on the undertakings benefiting therefrom, the Board's action did not tend to create an advantage which would constitute an additional burden for the State or that body (see Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 21).

37 Furthermore, the file clearly shows that the initiative for the organisation and operation of that advertising campaign was that of the NUVO, a private association of opticians, and not that of the Board. As the Advocate General pointed out in paragraph 76 of his Opinion, the Board served merely as a vehicle for the levying and allocating of resources collected for a purely commercial purpose previously determined by the trade and which had nothing to do with a policy determined by the Netherlands authorities.

38 This case is not on all fours with that giving rise to the judgment in *Steinike & Weinlig*. First, the Fund concerned in the latter case was financed both by direct State subsidies and by contributions from the member undertakings the rate and basis of levying which were set by the law establishing the Fund. Second, the Fund in question served as a vehicle for the implementing of a policy determined by the State, namely, the promotion of national agriculture and forestry and of the national food industry. Likewise, in Case 259/85 *France* v *Commission* the DEFI committee, to which were remitted the proceeds of the parafiscal charges levied pursuant to a decree of the French Government on supplies of textile goods in France, was

implementing actions decided on by that government for the support of the textile and clothing industries in France.

39 It follows that the first condition laid down in Article 92(1) of the Treaty for it to be possible that a measure should be classified as State aid is not satisfied in circumstances such as those of the dispute in the main proceedings.

40 As a result, since the means by which the advertising campaign was funded did not form an integral part of an aid measure for the purposes of Article 92(1) of the Treaty, it was not necessary for them to be notified to the Commission as provided in Article 93(3) of the Treaty. That being so, there is no need to give a specific answer to the Hoge Raad van Nederlanden's question concerning the relevance of the *de minimis* notice in assessing whether the obligation to notify had been complied with.

41 Having regard to all the foregoing considerations, the answer to be given to the three first questions must be that on a proper construction of Articles 92(1) and 93(3) of the Treaty, bye-laws adopted by a trade association governed by public law for the purpose of funding an advertising campaign organised for the benefit of its members and decided on by them, through resources levied from those members and compulsorily earmarked for the funding of that campaign, do not constitute an integral part of an aid measure within the meaning of those provisions and it was not necessary for prior notification of them to be given to the Commission since it has been established that that funding was carried out by means of resources which that trade association, governed by public law, never had the power to dispose of freely.

Concerning the fourth and fifth questions

42 By those questions the national court seeks in substance to ascertain whether, in circumstances such as those of the dispute in the main proceedings, it is contrary to Community law for the courts with jurisdiction to apply the rule of Netherlands case-law on formal legal force which prevents their remaining able to examine the lawfulness of the Board's decisions imposing charges on the appellants in the main proceedings where the bye-laws on which those decisions were based were introduced in contravention of Article 93(3) of the Treaty.

43 However, given that the answer to Questions 1 to 3 makes it clear that the Board's decisions imposing the charges for the purpose of funding the advertising campaign at issue do not form an integral part of an aid measure within the meaning of Article 92(1) of the Treaty and that they did not have to be notified in advance to the Commission, it must be declared that the premiss on which these questions are predicated is not in the circumstances of this case fulfilled. There is therefore no further need to answer those questions.

Costs

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

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 27 September 2002, hereby rules:

On a proper construction of Articles 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) and 93(3) of the EC Treaty (now Article 88(3) EC), bye-laws adopted by a trade association governed by public law for the purpose of funding an advertising campaign organised for the benefit of its members and decided on by them, through resources levied from those members and compulsorily earmarked for the funding of that campaign, do not constitute an integral part of an aid measure within the meaning of those provisions and it was not necessary for prior notification of them to be given to the Commission since it has been established that that funding was carried out by means of resources which that trade association, governed by public law, never had the power to dispose of freely.

Jann Rosas von Bahr

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 15 July 2004.

R. Grass P. Jann

Registrar President of the First Chamber