II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 December 1981

on the preferential tariff charged to glasshouse growers for natural gas in the Netherlands

(Only the Dutch text is authentic)

(82/73/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables [1] and Council Regulation (EEC) No 234/68 of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage [2],

After having given notice, pursuant to the provisions of the first subparagraph of Article 93 (2), to those concerned to submit their observations, and having regard to those observations,

I

Whereas in the northern countries of the European Community large quantities of vegetables and flowers are produced in heated glasshouses; whereas the Netherlands, which alone produces 31 % of the tomatoes, 36 % of the lettuces, 65 % of the gherkins and about 30 % of the flowers grown in heated glasshouses in the Community, exports most of its glasshouse production;

Whereas heating costs are an important component of the cost of producing vegetables and flowers in heated glasshouses; whereas these costs vary considerably from one Member State to another, according to the fuel used in the horticultural sector and to the methods used for pricing oil products;

Whereas the fuel prices, exclusive of tax and expressed in EUA [3] per 1 000 m³ [4] of gas equivalent, paid by growers in November 1981 were as follows:

Horticulture [5]

	Gas	Heavy fuel oil	Light fuel oil
Netherlands	117·9	152·0	
United Kingdom		157·1	
Italy		141·8	231·4
Belgium		141·4	247·4
Denmark		154·0	254·3
Ireland			266·8
Germany			238·3
France			241·3

Whereas in the Netherlands there is another specific cause of distortion, namely the special rates charged for natural gas used in horticulture;

[1] OJ No L 118, 20. 5. 1972, p. 1.
[2] OJ No L 55, 2. 3. 1968, p. 1.

[3] Exchange rate at 17 November 1981 (OJ No C 299, 18. 11. 1981, p. 1).
[4] Equivalent rates:
— 1 000 litres light fuel oil = 1 144 m³ natural gas,
— 1 000 kg heavy fuel oil = 1 283 m³ natural gas.
[5] Average consumption 250 000 m³ per annum.

Whereas, after noting that the use of heavy fuel oil in horticulture produced a high degree of atmospheric pollution, the Netherlands Government concluded that there was a need to convert to another form of energy and, to this end, encouraged the conversion of the sector to natural gas ; whereas two measures were taken in order to make conversion more attractive, namely the granting of government aid to facilitate the necessary investments and the conclusion of an agreement between growers and the gas supply company to ensure some stability in the price of natural gas ; whereas the outcome of this is that a special tariff is applied for horticulture ;

Whereas at present 95 % of the energy consumed in horticulture is obtained from natural gas ;

Whereas to appreciate this unique situation the following factors should be taken into account :

1. natural gas in the Netherlands is produced by the Nederlandse Aardgasmaatschappij (NAM) ;
2. the gas is transported, imported and sold to the main customers connected to the transport network by the NV Nederlandse Gasunie, Groningen, hereinafter referred to as 'Gasunie' ;
3. natural gas is distributed to small customers by local distributing companies belonging to the Vereniging van Exploitanten van gasbedrijven, hereinafter referred to as 'Vegin' ;

Whereas direct sales by Gasunie represent about 45 % of the total volume of gas distributed ; whereas Gasunie serves 136 distributing companies, 29 electric power stations and 389 large industrial undertakings together with the horticulture sector represented as a whole by the 'Landbouwschap' ;

Whereas Gasunie concludes standard individual contracts with the main purchasers, whatever the category of consumer concerned ; whereas supplies of gas to the main purchasers involve more than 170 000 m^3 per year, supplied either directly or indirectly ; whereas, to permit regular adjustments or tariffs which differ according to the type of consumer, Gasunie negotiates in principle tariff agreements independent of the standard contracts, in the light of the particular situation of the economic branch concerned ;

Whereas Gasunie has concluded contracts with Vegin providing that the same tariffs be applied to purchases between 30 000 m^3 and 170 000 m^3 as to purchases of more than 170 000 m^3 per year ; whereas this provision has been applied to horticulture ; whereas, consequently, horticulturalists pay a reduced tariff beyond a level of consumption of 30 000 m^3 ; whereas industrialists pay the reduced tariff only above a purchased volume of 170 000 m^3 per year ;

Whereas at 1 December 1981 the gas tariffs negotiated in accordance with the above methods were 39·930 cents per m^3 for the whole of 1981 for small industrial consumers consuming not more than 170 000 m^3 per year ; whereas under the contract concluded between Vegin and Gasunie this price is linked to the fuel oil price for the preceding 15-month period ; whereas the price is adjusted once a year ; whereas from 1 January 1982 the price agreement will be amended ; whereas the tariff will very probably lie between 46 and 50 cents per m^3 ;

Whereas the Vegin-Gasunie contract stipulates that the adjustment of the various contracts will be renegotiated once during the five-year period ; whereas the outcome of these negotiations must be submitted by Vegin to its members ; whereas Gasunie must submit the agreement on prices for the approval of the Minister of Economic Affairs ;

Whereas, as regards tariffs for major industrial consumers, a distinction must be drawn between new contracts and old contracts ; whereas, under new industrial contacts, the tariffs were fixed as follows at 1 July 1981 :

— 170 000 to one million m^3 : 42·5 cents per m^3,
— one million to 10 million m^3 : 41·5 cents per m^3,
— 10 million to 50 million m^3 : 41·1 cents per m^3,
— above 50 million m^3 : 39·7 cents per m^3 ;

Whereas these tariffs were adjusted at 1 October 1981 ; whereas the tariff for supplies between 170 000 and one million m^3 was increased from 42·5 to 43·5 cents per m^3 ;

Whereas the tariffs charged to major consumers are adjusted at three-monthly intervals on the basis of a 'parity' price for heavy fuel oil ; whereas this price is calculated on the basis of the maximum charged for heavy fuel oil delivered free to the consumer, exclusive of tax, in accordance with the Order of the Minister of Economic Affairs on prices of oil products ; whereas the calculation is based on the calorific equivalence : 1 000 kg heavy fuel oil (3 500 sec Redwood I) for 1 283 m^3 of natural gas ; whereas the market price for heavy fuel oil may be lower than this legal maximum price ;

Whereas the maximum price used for the calculation is the price fixed for heavy fuel oil with a sulphur content of 2 % ; whereas this price is Fl 33 per tonne higher than the price of heavy fuel oil with a 3·5 % sulphur content which is widely used ; whereas the result is that the 'parity' price calculated for gas is at least 2·5 cents higher than if fuel oil with a high sulphur content had been taken as a basis ;

Whereas under the old contracts the industrial tariff was fixed at 1 April 1981 as follows :

— 31·025 cents per m^3 for deliveries up to one million m^3,

— 30·755 cents per m^3 for deliveries between one and about 8·8 million m^3,

— 30·495 cents per m^3 for deliveries in excess of 8·8 million m^3 ;

Whereas under the old contracts the price is tied to the price of heavy fuel oil ; whereas the 'parity' price to be determined may not exceed in any one year the average price of the two preceding years plus 25 % ; whereas, since the Netherlands authorities have supplied no specific information, no data are available on the number of contracts still in force, the volumes of gas concerned and the overall duration of the contracts ; whereas, in any case, this tariff situation is valid only until the end of the duration of the contracts ; whereas in 1982 all the old contracts will have expired ;

Whereas, in the horticulture sector, the last agreement between Gasunie and Landbouwschap, on 1 May 1981, fixed the tariff at 27·9 cents per m^3 at 1 July 1981 ; whereas this agreement provides for an increase of 2·5 % per m^3 as from 28 December 1981, which brings the tariff to 30·4 cents per m^3 ; whereas this tariff applies to purchases in excess of 30 000 m^3, whereas for deliveries up to 30 000 m^3 the price paid is the price applying to small industrial consumers, i.e. 39·930 cents per m^3 ;

Whereas, in accordance with the agreement in force, the disparity between the horticultural tariff and the industrial tariff will be reduced in five six-month stages starting in April 1982 ; whereas from 1 October 1982 onwards the tariff will also be index-linked to the 'parity' price for fuel oil used as a basis for reviewing the industrial tariff applied to major consumers ;

Whereas the contract concluded between Landbouwschap and Gasunie concerns purchases of about 3·5 thousand million m^3 of natural gas per year ; whereas there are 14 000 glasshouse growers and consequently the average consumption of gas per grower is about 250 000 m^3 per year ; whereas the average cost for deliveries of natural gas for a level of consumption up to 250 000 m^3 per year, taking into account the varying tariff per block of consumption, is at present :

— for horticulture : 31·5 cents per m^3,
— for industry : 41·1 cents per m^3 ;

Whereas the resulting advantage for a horticultural enterprise is 9·6 cents per m^3, i.e. 23 % of the value of the industrial tariff, with a gain of Fl 24 000 per year per holding ;

Whereas this advantage may increase even more as a result of the new tariff to be fixed at 1 January 1982 for small consumers, which is expected to be between 46 and 50 cents per m^3 ;

Whereas a rebate of 0·75 cents per m^3 consumed is granted for gas supplied to the provinces of Groningen, Frise and Drenthe and in the province of Overijssel, which is not taken into account in the above tariffs ; whereas this is a tariff rebate of a commercial nature, applied by the gas supply company and granted to consumers operating in the immediate vicinity of the Groningen gasfield ;

Whereas Gasunie is a private-law company, 40 % of the capital of which is held by the Staatsmijnen (wholly owned by the Netherlands Government but operating solely on the basis of market forces), 10 % by the Netherlands Government, 25 % by Bataafsche Petroleummaatschappij (Royal Dutch Shell) and 25 % by Esso Nederland NV (Standard Oil Company, New Jersey) ; whereas the standard contracts and price agreements concluded by this undertaking are therefore contracts under private law ; whereas the advantage derived by the State from the operations of Gasunie are twofold : the tax on gross profits and the share in net profits after tax ; whereas, since the tax is 45 %, the revenue accruing to the State from the operations of Gasunie may consequently be evaluated at about 72·5 % of the total profit ;

Whereas Gasunie may be administered by a Supervisory Board of eight or 12 members, one or two of whom are appointed by the Minister for Economic Affairs, the others being elected by the annual general meeting of shareholders ; whereas the Director is chosen by the general meeting from a double list proposed by the Board and approved by the Minister of Economic Affairs ; whereas the Board at present comprises eight members, of whom one is appointed by the State, three represent the Staatsmijnen and two represent the two oil companies ; whereas prices cannot be fixed without the approval of the board by a three-quarters majority of the votes cast, which means that Shell and Esso can veto decisions not in their interests ;

Whereas, however, the Minister of Economic Affairs has since 1963, by agreement with Gasunie, reserved the right to approve selling prices and terms of delivery for supplies to public distributors in the Netherlands ; whereas for all other supplies his approval is confined to prices ; whereas the Minister has also reserved the right to approve investments in pipelines and other forms of gas conveyance and storage, and the gas-supply programme ; whereas the Netherlands

Government has stated that the terms and tariffs of Gasunie must be approved by the Minister of Economic Affairs and Gasunie has undertaken not to conclude any agreement for the supply of gas which does not comply with the price last approved by the Minister for the category of purchasers concerned at the time the agreement was concluded; whereas, in this respect, the Minister's right forms part of the system of controls normally applied to prices;

Whereas the Minister of Economic Affairs also has certain powers with regard to gas prices; whereas, under Article 2 of the Law of 19 December 1974 [1] governing prices and tariffs applicable to natural gas supplies (Law on natural gas prices), the Minister of Economic Affairs may, if natural gas is supplied at a price which he considers to be below the value of gas, prohibit the delivery of natural gas inside or outside the Netherlands at a price below the price he has fixed; whereas, under Article 2 (3) of the same Law, the Minister of Economic Affairs may fix different prices for different categories of gas; whereas, moreover, according to the information obtained from the Netherlands Government, this law, which is still in force, has not yet been applied;

Whereas the Netherlands:

(a) supplies at present

— 65 % of Community production of gherkins and cucumbers in heated glasshouses,

— 36 % of lettuces, and

— 31 % of tomatoes;

(b) exports:

— 81 % of the tomatoes it produces,

— 76 % of the gherkins and cucumbers it produces, and

— 80 % of the cut flowers it produces;

Whereas the Federal Republic of Germany alone absorbs:

— 78 % of tomato exports,

— 88 % of gherkin and cucumber exports,

— 85 % of exports of flowers and flowers in bud from the Netherlands;

Whereas exports of flowers and flowers in bud have been generating increasing pressure on the German market since 1975; whereas exports of these products to the United Kingdom, Denmark, Belgium and France have increased substantially since 1974; whereas growers operating heated glasshouses in these countries are likely to be forced off the market;

II

Whereas, after making a study of distortions of competiton in glasshouse horticulture [2], the Commission concluded that the existence of a preferential tariff for natural gas used in horticulture in the Netherlands gave this sector a permanent advantage which affected trade between Member States and distorted competition; whereas it therefore decided to consider this tariff in the light of Article 92 of the Treaty, applying the procedure provided for in Article 93 (1) of the Treaty; whereas, after considering the matter in this light, the Commission found that the specific advantage conferred through Gasunie in the form of preferential tariffs constituted aid incompatible with the common market within the meaning of Article 92 of the Treaty, and therefore initiated on 7 November 1980 the procedure laid down in Article 93 (2) of the Treaty;

Whereas the Netherlands Government, in its answer to the Commission on 24 December 1980, stated that the special horticultural tariff for natural gas resulted from a contract freely negotiated between Gasunie and Landbouwschap and could not be considered as a State aid; whereas negotiations were under way to increase the special horticultural tariff;

Whereas at the end of May 1981 the Netherlands Government informed the Commission that under the new agreement between Gasunie and Landbouwschap the horticultural tariff would be increased by 5·5 cents before 28 December 1981; whereas the remaining disparity between the horticultural tariff and the industrial tariff would be gradually eliminated between 1 April 1982 and 1 April 1984; whereas on 25 June 1981 [3] the Commission informed the Netherlands Government that it could not terminate the procedure initiated under Article 93 (2) unless the deadline for aligning the horticultural tariff on the industrial tariff was brought forward significantly; whereas the Commission confirmed its position in a letter on 29 October 1981 in which it also asked the Netherlands Government to give assurance that the disparity between the two tariffs would become no greater than it was already;

[1] *Staatsblad* No 765.

[2] COM(80) 306 final.

[3] SG(81) D/8684.

Whereas the Netherlands Government has not given any specific reply to these two points;

Whereas several Member States, and other persons concerned, have made their comments known to the Commission; whereas all except the Landbouwschap feel that the preferential tariff for natural gas for horticulture in the Netherlands constitutes an aid within the meaning of Article 92 (1) of the Treaty which is incompatible with the common market since it affects trade between Member States and distorts competition by favouring specific undertakings; whereas serious concern has also been expressed with regard to the harmful effects which this measure might have on horticulture in other Member States; whereas, at the Council meetings in July, September and October 1981, several Member States reiterated their concern and described the increasing pressure to which they were being subjected by their own growers because of the competition, seen as unfair, from Netherlands growers;

III

Whereas, in accordance with Article 31 of Council Regulation (EEC) No 1035/72 and with Article 11 of Council Regulation (EEC) No 234/68, Articles 92 to 94 of the Treaty are applicable to the horticultural sector;

Whereas, in accordance with Article 92 (1) of the 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 is, in so far as it affects trade between Member States, incompatible with the common market;

Whereas the price at which natural gas is supplied to Netherlands growers may be described as a preferential tariff;

Whereas, in the Commission's view, a preferential tariff is caught by the prohibition in Article 92 (1) of the Treaty, when the following three factors obtain:

1. when the tariff favours certain undertakings or the production of certain goods competing with undertakings of other Member States whose products are traded within the Community;
2. when the tariff has been imposed by a public authority;
3. when the tariff results in compensation from the State being paid to the distribution company or to the State receiving less revenue;

Whereas the existence of the preferential tariff for natural gas for Dutch horticulture provides a permanent advantage for that sector in three ways:

— the price fixed: the price to growers is fixed at a lower level than the price charged to industrial consumers under old or new contracts,

— supply conditions: the reduced tariff applies from 30 000 m^3 for growers, whereas for industrial consumers it only applies from 170 000 m^3,

— the review clause in contracts: for new industrial contracts the index-linking with the fuel-oil price operates each quarter and for small-scale consumers once a year, over an average of fuel-oil prices for 15 months, whereas for growers the review procedure is that described above;

Whereas the argument that the contract signed between Landbouwschap and Gasunie covers a quantity of about 3 500 million m^3 per year cannot be accepted if one compares the horticultural tariff with that for individual industrial consumers who consume at least 250 000 m^3 per year, since it is in fact the individual grower who concludes the supply contract; whereas, moreover, the argument that the centralization of horticultural production lowers costs in specific areas close to the gas field, thus reducing distribution costs, cannot be accepted since there is an additional rebate in the gas price of 0·75 cents in those areas;

Whereas these is no specific tariff for gas used as a fuel or for any other forms of energy used in horticulture in any other Member State for the horticultural sector or for any other industrial category;

Whereas the final assessment depends on whether this is an aid granted through State resources; whereas, therefore, the nature of the State's intervention must be determined;

Whereas the State holds, partly through the Staatsmijnen, a public-sector commercial undertaking, 50 % of the capital of Gasunie; whereas, however, it does not have the controlling interest nor does it control a decisive majority of votes on pricing decisions; whereas, nevertheless, as regards the horticultural tariff, Gasunie takes into consideration the economic guidelines suggested to it by the Netherlands Government;

Whereas this conclusion is based on an examination of the tariffs applied by this undertaking for natural gas; whereas under a normal economic approach, there is no reason why such favourable tariffs should be given to growers; whereas there is obviously nothing to stop a private or public undertaking from varying its tariffs depending on the use of the goods which it is selling; whereas, nevertheless, such variations must have sound and comprehensible economic

reasons ; whereas, when such variations occur in the pricing of gas, they can only be justified by the need, in a free market economy, to ensure the competitiveness of gas on the various user markets and the Netherlands authorities have not so far been able to prove this ; whereas, in any case, such variations must respect the principle whereby prices should not be maintained at an artificially low level which does not enable the market to receive reliable information ; whereas, at present, these tariffs represent a reduction in the Gasunie's profit, which in its own interest as a commercial undertaking is justified by the fact that the Netherlands Government, which holds 50 % of the capital, may under certain circumstances influence Gasunie's commercial decisions and in this specific case may deliberately forgo certain revenue in order to provide a financial advantage for growers ; whereas to that extent, and failing any economic justification on market grounds, the advantage in question comes indirectly from State resources ;

Whereas a second factor which must be taken into consideration is that the tariffs are applicable only after approval by the Minister of Economic Affairs ; whereas, even if this approval falls within the Minister's general scope of responsibilities, nevertheless, it does mean that the Government has the power to influence price levels ; whereas it appears from the information provided by the Netherlands Government that Gasunie has formally agreed not to conclude gas-supply agreements which do not conform to the level of prices approved in the last instance by the Minister for the relevant group of users at such time as the agreements are concluded ;

Whereas it must be inferred that it is the Government which does, in fact, have a dominant influence, even if only in the form of a veto, when determining the advantage which growers receive ;

Whereas, in this context, a third relevant factor is that to make the increase in tariffs which occurred in April 1980 and May 1981 more acceptable to undertakings, the authorities deided to reinvest in that sector the major share of the additional revenue obtained from the increase in tariffs, which indicates that some of the Gasunie revenue does in fact constitute Netherlands Government resources ; whereas the Netherlands Government set up an aid programme of Fl 270 million in 1981 and Fl 30 million in 1980 to allow for the installation of energy-saving equipment ;

Whereas, in view of the foregoing, it is reasonable to conclude that, for its own reasons, the Netherlands Government provides, through Gasunie, beneficial tariffs for Dutch horticulture and thus gives that production sector financial advantages which constitute an aid within the meaning of Article 92 (1) of the Treaty ;

IV

Whereas Article 92 (1) provides for the incompatibility in principle with the common market of aid fulfilling the criteria which it describes ; whereas the derogations from this provided for in paragraph 3 of that Article specify objectives pursued in the interest of the Community and not only in that of specific sectors of a national economy ; whereas these derogations must be interpreted strictly when examining any aid programme for a specific region or sector or any individual case where general aid measures are applied ; whereas they cannot be granted except in cases where the Commission is able to establish that the aid is necessary to achieve one of the objectives covered by these provisions ;

Whereas allowing such derogations to aid measures which do not offer such an offsetting benefit would amount to allowing trade between the Member States to be affected and competition to be distorted without justification from the point of view of Community interest and would bring about undue advantage for certain Member States ; whereas, in this specific case, the aid measures do not offer such offsetting benefits ;

Whereas the Netherlands Government was unable to provide any justification nor could the Commission find any, indicating that the aid in question fulfilled the conditions required for application of one of the derogations provided for in Article 92 (3) of the Treaty ;

Whereas this is obviously not a measure intended to promote the execution of an important project of common European interest within the meaning of Article 92 (3) (b), since this pricing system runs counter to the objectives of the common energy policy which aims at energy-saving and a rational use of energy ; whereas, moreover, in its communication to the Council of 1 October 1981 on the development of a new energy strategy for the Community, the Commission emphasized the need to achieve these objectives in agriculture, which entails the abolition of direct or indirect aid for energy use ; whereas this is also not a measure to remedy a serious disturbance in the economy of the Member State concerned within the meaning of that provision ;

Whereas, as regards the derogations provided for in Article 92 (3) (a) and (c) with regard to aid to promote or to facilitate the economic development of areas or of certain economic activities as referred to under (c) referred to above, it must be noted that the aid is granted only in terms of the quantities of gas purchased without reference to the adjustment or improvement of firms' structures or of energy-saving or development in the regional context; whereas, consequently, the tariff aid must be considered as an aid towards the running costs of the undertakings concerned, a type of aid to which the Commission has in principle always been opposed, since such aids are not linked to conditions qualifying them for one of the derogations provided for in paragraph 3 (a) and (c) of Article 92;

Whereas, in view of the above, the aid measure in question does not fulfil the conditions required for eligibility for one of the derogations under Article 92 (3) of the Treaty and consequently must be discontinued by 1 October 1982; whereas this entails the alignment of the horticultural tariff on the industrial tariff as regards prices, supply conditions and review clauses,

HAS ADOPTED THIS DECISION:

Article 1

The Kingdom of the Netherlands shall take the necessary measures to ensure that:

1. the aid consisting in a preferential tariff for horticulture shall be abolished by 1 October 1982 by alignment of the horticultural tariff on the industrial tariff;

2. in the meantime, the difference between the prices for horticulture and the prices applicable to industry shall not increase in relation to the situation existing on 1 December 1981.

Article 2

The Kingdom of the Netherlands shall inform the Commission before 15 January 1982 of the action it has taken to comply with this Decision.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 15 December 1981.

For the Commission

Poul DALSAGER

Member of the Commission