II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 February 1985

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

(Only the Dutch text is authentic)

(85/215/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 92 (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], as last amended by Regulation (EEC) No 1332/84 [2], 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 [3], as last amended by Regulation (EEC) No 264/82 [4],

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

Taking the following into account:

I

1. In the Netherlands special rates are charged for natural gas used in horticulture. About 10 years ago, since the use of heavy fuel oil in horticulture was producing a high degree of air pollution, the Netherlands Government encouraged the conversion of the sector to natural gas. At present over 95 % of the energy consumed in horticulture in the Netherlands is obtained from natural gas.

2. To appreciate this particular situation the following factors should be taken into account:

— natural gas in the Netherlands is produced by the Nederlandse Aardgasmaatschappij (NAM), which works the giant Groningen Field, and a number of other onshore and offshore producers,

— the gas is transported, imported, exported and sold directly to the major customers connected to the transport network by the NV Nederlandse Gasunie, Groningen, hereinafter referred to as 'Gasunie',

— natural gas is distributed to small customers by local distribution companies belonging to the Vereniging van Exploitanten van gasbedrijven in Nederland, hereinafter referred to as Vegin'.

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

Gasunie concludes standard individual contracts with the big purchasers, whatever the category of consumer concerned. 'Big purchasers' are those having an individual consumption of over 170 000 m^3 per year, supplied either directly or indirectly. Gasunie concludes contracts with Vegin for sales to small consumers and horticulturists.

(1) OJ No L 118, 20. 5. 1972, p. 1.
(2) OJ No L 130, 16. 3. 1984, p. 1.
(3) OJ No L 55, 2. 3. 1968, p. 1.
(4) OJ No L 27, 4. 2. 1982, p. 20.

3. In 1981 a preferential tariff provided for more favourable terms for horticulturists. The Commission believed that the advantage resulting from this preferential treatment should be regarded as an aid which was incompatible under Article 92 of the Treaty, and on 15 December 1981 it adopted a Decision (1) which in essence required the Netherlands Government to take the necessary steps to ensure that the aid was discontinued.

After the adoption of that Decision, which was contested in the European Court of Justice by the Government of the Netherlands and the Landbouwschap, negotiations took place between the Commission and the Netherlands Government. These resulted in an agreement on the terms of a new contract between Gasunie and the Landbouwschap, which was applied from 1 April 1983 to 30 September 1984.

The essential features of that contract were as follows :

(a) alignment of the horticultural tariff on the industrial tariff, taking account of the calorific parity between gas and heavy fuel oil as determined by the Centraal Bureau voor de Statistiek (CBS) ;

(b) the price determined by the average of CBS prices would, in the case of horticulture, be increased by a premium of 0,5 cents/m^3 ;

(c) the horticultural tariff would be revised at three-monthly intervals, like the industrial tariff.

Following the agreement, the Commission repealed the Decision of 15 December 1981 by a Decision of 22 July 1982 (2) and the Netherlands Government and the Landbouwschap withdrew their Court actions.

4. A new contract was concluded between Gasunie, Vegin and the Landbouwschap at the end of September 1984. Since the price of gas is negotiated solely between the Landbouwschap and Gasunie, only the two latter will be referred to in what follows. The contract is valid for the period 1 October 1984 to 1 October 1985 and essentially makes provision for freezing the price of gas for horticulture at the average 1983 level, plus a fixed percentage of 10 %, which brings it to 42,5 cents/m^3. If the formula valid from 1 April 1983 had been applied the price would have had to be fixèd at 46,6 cents/m^3 in the fourth quarter of 1984 and 48 cents/m^3 in the first quarter of 1985. This formula, however, has not been totally abandoned ; it remains valid in principle and could even be used during the abovementioned period as part of a set-off system. If the price resulting from the old formula was below the price level applied since 1 October 1984 the difference could be used to offset the advantage enjoyed during the previous period when the price relationship was the reverse.

For the first quarter of 1985 Gasunie also froze the industrial tariff, which resulted in a price reduction of from 1,341 to 1,478 cents/m^3 depending on the size of the consumer undertaking. This corresponds approximately to a 3 % reduction in prices to industry.

The advantage of the new system to a horticultural holding is thus as follows :

— 4,1 cents/m^3 for the fourth quarter of 1984,

— 5,5 cents/m^3 for the first quarter of 1985,

The contract concluded between the Landbouwschap and Gasunie involves the purchase of around 2 400 million m^3 of natural gas per year for about 8 000 horticulturists.

5. 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 Shell Nederland and 25 % by Esso Nederland NV (Exxon). The standard contracts and price agreements concluded by this undertaking are therefore contracts under private law. The advantage derived by the State from the operations of Gasunie is twofold : the tax on gross profits and the share in net profits after tax. The revenue accruing to the State from the operations of Gasunie, including taxes, may be evaluated at about 85 to 90 % of the total profit.

Gasunie is administered by a Supervisory Board of eight or 12 members, one or two of whom are appointed by the Minister for Economic Affairs, the other being elected by the annual general meeting of shareholders. The Director is chosen by the general meeting from a double list proposed by the Board and approved by the Minister for Economic Affairs. The Board at present comprises eight members, of whom one is appointed by the State, three represent the Staatsmijnen and two represent each of the two oil companies. Prices cannot be fixed without 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.

(1) OJ No L 37, 10. 2. 1982, p. 29.
(2) OJ No L 229, 5. 8. 1982, p. 38.

However, the Minister for 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, while for all other supplies his approval is confined to prices. 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. The Netherlands Government has stated that the terms and tariffs of Gasunie must be approved by the Minister for Economic Affairs and that 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 is concluded. In this respect, the Minister's right forms part of the system of controls normally applied to prices.

The Minister for Economic Affairs also has certain powers with regard to gas prices. 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 for Economic Affairs may, if natural gas is supplied at a price which he considers to be below the value of the gas, prohibit the delivery of natural gas inside or outside the Netherlands at a price below the price he has fixed. Under Article 2 (3) of the same law, the Minister for Economic Affairs may fix different prices for different categories of gas. However, according to the information obtained from the Netherlands Government, this law, which is still in force, has not yet been applied.

6. The Netherlands :

(a) supplies at present :

— 75 % of Community production of gherkins and cucumbers in heated glasshouses,

— 40 % of lettuces, and

— 65 % of tomatoes ;

(b) exports :

— 91 % of the tomatoes it produces,

— 68 % of the gherkins and cucumbers it produces, and

— 84 % of the cut flowers it produces.

The Federal Republic of Germany alone absorbs :

— 55 % of tomato exports,

— 73 % of gherkin and cucumber exports,

— 62 % of exports of flowers and flowers in bud.

Dutch flower exports have been generating increasing pressure on the German market since 1975. Exports of these products to the United Kingdom, Denmark, Belgium and France have increased substantially since 1974.

7. Heating costs are an important component (25 to 30 %) of the cost of producing vegetables and flowers in heated glasshouses. These costs vary considerably from one Member State to another, according to the fuel used in the horticultural sector and to the mehtods used for pricing petroleum products.

II

1. On the basis of the notification of the new contract between Gasunie, Vegin and the Landbouwschap made by the Netherlands Government on 4 October 1984, the Commission, after a preliminary examination, decided that the existence of a preferential tariff for natural gas for horticulture in the Netherlands conferred an advantage on the horticultural sector which constituted an aid which affected trade between Member States and distorted competition and was therefore incompatible with the common market within the meaning of Article 92 (1) of the Treaty. On 27 November 1984, therefore, it initiated the procedure laid down in Article 93 (2) of the Treaty in respect of that aid (2).

2. On 21 December 1984 the Netherlands Government replied that the special horticultural tariff for natural gas was the result of a contract concluded between Gasunie, Vegin and the Landbouwschap and was not the same as State aid.

The position of the Netherlands Governement on that occasion and in its replies of 3 January and 1 February 1985 to questions put by the Commission was as follows :

(a) There has been a fundamental change in the economic situation since 1982. Despite the fact that in the long term the price of gas should in principle be regarded as still linked to the price of petroleum products, it is necessary in the short term to take account of the competition from coal ;

(b) The price of heavy fuel oil has risen considerably, largely because of the rise of the US dollars. It can be expected to fall again shortly and it is in the interest of the contracting parties to stabilize the price of gas, which would otherwise reflect the movement of the price of heavy fuel oil ;

(1) *Staatsblad* No 765.

(2) SG(84) D/15.264.

(c) The price of gas has reached levels such that throughout Europe it is becoming advantageous for horticulturists to use coal instead of gas or fuel oil for heating greenhouses. Unlike the prices of fuel oil and gas, coal prices have fallen. Between 1980/81 and 1984 the share of coal in the total quantity of fuel used by glasshouse growers in the various countries neighbouring the Netherlands increased from about 5 % to 20 %. In the Netherlands the number of holdings switching to coal rose from 1 to 22 (out of a total of 8 000) over the same period ;

(d) Replacement with coal became attractive for some Dutch horticultural holdings when the price of gas was about 37 to 38 cents/m^3. When the price is above 42 to 43 cents/m^3 replacement becomes a real option for an appreciable proportion of users. It then becomes necessary for Gasunie to reduce gas prices so as not to lose customers. There are also negotiations on gas prices with purchasing countries ;

(e) The price of gas to industry was also reduced for the first quarter of 1985 for the above reasons, although to a lesser extent than the price to horticulture. For the first quarter of 1985 the reduction in the price of gas in relation to the price calculated by reference to the price of heavy fuel oil is in fact 3 % for industry and 12 % for horticulture. This difference is explained by the fact that coal is more likely to be used in horticulture than in industry for the following reasons :

— the boilers will have to be replaced in the near future on about 60 % of Dutch horticultural holdings,

— fuel accounts for a lower percentage of costs in industry, so that a changeover is more attractive in horticulture,

— energy-saving is already very advanced in horticulture, less so in industry ; further savings can be made in industry more easily by not switching to coal,

— the extra work involved in using coal is less of an obstacle for a family horticultural holding than for industry,

— the depreciation period applied in industry is two to three years ; whereas in horticulture it is five years.

3. Several Member States, and other persons concerned, have made their comments known to the Commission. All except the Landbouwschap (Netherlands) 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. Serious concern has also been expressed with regard to the harmful effects which this measure might have on horticulture in other Member States. At the Council meetings in October, November and December 1984 and in January 1985, 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 Dutch growers.

III

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

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.

The price terms on which natural gas is supplied to Dutch growers may be described as a preferential tariff. A preferential tariff is caught by the prohibition in Article 92 (1) of the Treaty when the following three factors obtain :

— when the tariff favours certain undertakings or the production of certain goods competing with the undertakings or production of other Member States, and the products in question are traded within the Community,

— when the tariff has been imposed by a public authority,

— when the tariff results in compensation from the State being paid to the distribution company or to the State receiving less revenue.

2. The existence of the preferential tariff for natural gas for Dutch horticulture provides an advantage for that sector. Since there are also sectors of industry which are liable to switch to coal, the difference between the reduction in the price of gas granted to the horticultural sector and the reduction granted to the comparable sector of industry is not justified. Such a distinction is not legitimate unless based on objective, verifiable criteria.

3. Before examining the measure in this light it is necessary to establish whether the aid in question is a State aid or an aid granted through State resources. Therefore, the nature of the State's intervention must be determined.

The State holds, partly through the Staatsmijnen, a public-sector commercial undertaking, 50 % of the capital of Gasunie. However, it does not have the controlling interest nor does it control a decisive majority of votes on pricing decisions.

Moreover, the tariffs are applicable only after approval by the Minister for Economic Affairs. 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. Indeed, 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. 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 right of veto, when determining the advantage which growers receive.

Moreover, as regards the horitcultural tariff, Gasunie takes into consideration the economic guidelines suggested to it by the Netherlands Government.

4. This conclusion is confirmed by an examination of the tariffs applied by this undertaking for natural gas. Under a normal economic approach, there is no reason why such a favourable tariff should be given to growers.

5. As regards the assessment of the differentiation of tariffs referred to in III.2 above, there is in principle nothing to stop a private or public undertaking from varying its tariffs depending on the use of the goods which it is selling. Nevertheless, such variations must have sound and comprehensible economic reasons, e.g. to ensure the competitiveness of gas on the various user markets, and must not discriminate between horticulture and other consumers in a comparable situation.

This is not so in the case in point :

(a) Under a consistent, transparent pricing policy the price of gas delivered to horticulturists should normally move in a similar fashion to the price paid by the comparable sector of Dutch industry which uses natural gas. Hitherto, the policy followed by the Netherlands consisted in aligning the price of gas on the price of petroleum products.

The Netherlands Government stated its wish not to abandon this principle. Therefore the new contract would apply only for a limited period and would contain an offsetting clause.

Nevertheless, the price currently in force was determined by reference to the competitive situation of gas in relation to coal. There, is no objection in principle to taking a fuel other than heavy fuel oil, even though, from the point of view of the Community energy policy, there is nothing against an increase in coal consumption. However, the change should be justified on economic grounds and applied in a non-discriminatory manner. Therefore it is necessary to examine whether the choice of coal as a reference reflects the objective characteristics of the different fuels, both as regards price relationships and as regards the actual possibilities for substitution.

Reference to the competitive situation of coal is only a temporary measure, since the contract in question is limited to one year, and the Netherlands Government emphasizes its wish to uphold the principle of interdependence between the price of gas and the prices of petroleum products. The current arrangements are therefore not permanent and the future attitude of the Netherlands Government is uncertain.

Such a temporary scheme can have only a limited influence on glasshouse growers who are considering opting for a coal-fired system. Dobuts concerning the economic importance and the danger represented by the use of coal in horticulture therefore seem justified in connection with the gas price indicated by the Netherlands Government ; at all events, the reasoning is inconsistent.

Even the introduction of the system of offsetting one-quarter against another, as referred to in I.4, does not provide grounds for considering that the principle of interdependence between gas and heavy fuel oil is upheld. In fact, in view of the current price of heavy fuel oil, it is unlikely that the set-off system will actually be applied.

(b) In order to justify a temporary derogation from the abovementioned principle, the Netherlands Government argues that the prices of heavy fuel oil have moved erratically under the influence of the rise in value of the US dollar, that this situation cannot be regarded as permanent and a fall in the market price can be expected in the near future, and that action to ensure price stability was therefore necessary.

The desire for price stability is comprehensible, although it is surprising that a private undertaking does not wish to take advantage of market conditions.

The Netherlands Government also claims that there is an over-supply of gas on the European market, which is causing marketing problems for Gasunie. It should be noted in this connection that the Netherlands Government does not appear to want a drop in natural gas production, since it is not delaying the depletion of fields.

However, these arguments do not only apply to horticulture. If the purpose of the price reduction was to keep customers, there should have been a reduction in all comparable sectors which use gas. Moreover, fixing gas prices on a different basis for horticulture and for the comparable sectors of industry is contrary to the kind of non-discriminatory treatment which would result from a coherent approach based on coal.

The Netherlands Government has produced no figures to justify making a distinction between horticulture and other sectors of the economy.

(c) The Netherlands Government emphasizes the risk that more coal will be used instead of gas for heating greenhouses. There is, however, no convincing argument for treating horticulture differently from comparable sectors of industry.

In certain industrial sectors there is also a risk of conversion to coal. Consequently, the decision to offer a low preferential price only to horticulturists discriminates against those sectors. Another factor which can be taken into consideration when fixing energy prices is the cost of delivery. In the case of Dutch horticulture this cost is higher than it is for industry. Consequently, this cost factor cannot be used to justify the difference in price between the horticultural and industrial sectors, on the contrary.

6. At all events, the price agreed between Gasunie and the Landbouwshchap does not reflect the competitive situation as between coal and gas as far as horticulture is concerned. An examination of the economic conditions on the basis of the following :

— the most recent data,

— a horticultural holding of average size (area 15 000 m^2, consumption 650 000 m^3 of gas per year) and a large holding (area 40 000 m^2, consumption 1 600 000 m^3 of gas per year),

— investments made either because of the need to replace the boiler or so as to obtain cost advantages from the use of coal,

— the difference in investment costs between gas-fired facilities and coal-fired facilities,

— financial incentives from the Government (subsidies to investments under the WIR — Wet Investeringsrekening),

— a five-year period of depreciation on investments,

— the price difference between natural gas and coal,

— the facilities' performance,

— running costs (maintenance, electricity, labour),

— environmental protection requirements,

leads to the conclusion that the equilibrium price, i.e. the price at which competition between gas and coal is in balance without either being advantaged or disadvantaged is between 43 and 44,3 cents/m^3. At that price, undertakings would stay with natural gas for the following main reasons : because it is easy to use, the basic investment is lower and there are no storage or environmental problems. The lowest price which would cause a significant switch to coal is 46,5 cents/m^3 for an average-sized holding and 47,5 cents/m^3 for a larger holding. With prices in the latter range, which is calculated on the basis of a repayment period of five years, it is estimated that 30 % of the natural gas consumed by the horituclutral sector would be replaced by coal in less than three years. Therefore, the price in force since 1 October 1984 confers an appreciable advantage on natural gas. It is below the equilibrium price and well below the threshold from which an appreciable switch to coal would begin to take place.

The price for gas for horitculture is therefore too low and is discriminatory.

Thus, none of the arguments put forward by the Netherlands Government has provided economic justification of the preferential treatment afforded to Dutch horticulture by Gasunie since 1 October 1984.

7. In these circumstances it can be assumed that the basis of the October 1984 agreement is the desire to reduce the price of gas for horticulture. This objective cannot be explained in terms of the normal management of a private undertaking. Rather, it corresponds to the political and economic requirements of a State. In the case in point, the Netherlands Government is giving up receipts which it could draw from its interest in Gasunie in order to grant horticulturists a financial advantage. The advantage therefore comes from State resources and the measure is to be rgarded as an aid.

8. The impact of this aid on competition and intra-Community trade derives both from the comparison between Dutch horticultural production in heated greenhouses and Community horticulture production in heated greenhouses as a whole, and from the effect of even a slight advantage in heating costs. Although heating costs vary widely from product to product and from one Member State to another, Dutch production is sufficiently large for even a slight cost advantage to have an effect on producer prices. Dutch horticultural production therefore enjoys an advantage which necessarily affects intra-Community trade, especially as the major part of Dutch produce is exported to other Member States.

9. The foregoing leads to the conclusion that:

— the price charged by Gasunie to Dutch glasshouse growers is an aid,

— it favours Dutch glasshouse growers in comparison with other gas consumers in the Netherlands,

— it distorts competition between Dutch glasshouse growers and glasshouse growers in other Member States,

— it affects intra-Community trade.

The aid therefore fulfils the conditions set out in Article 92 (1) of the Treaty.

IV

Article 92 (1) of the Treaty provides for the incompatibility in principle with the common market of aid fulfilling the criteria which it describes. The exceptions provided for in Article 92 (2) do not apply to the aid concerned. The exceptions 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. These exceptions 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. 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 those provisions. Allowing such exceptions 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.

In this specific case, the aid does not offer such an offsetting benefit. The Neterhlands 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 exceptions provided for in Article 92 (3) of the Treaty.

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.

It is also not a measure to remedy a serious disturbance in the economy of the Member State concerned within the meaning of that provision.

As regards the exceptions 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 are referred to under (c) referred to above, it must be noted that 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. Consequently, the 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 qalifying them for one of the exceptions provided for in paragraph 3 (a) and (c) of Article 92.

The aid in question does not fulfil the conditions required for eligibility for one of the exceptions under Article 92 (3) of the Treaty and consequently must be discontinued.

This Decision is without prejudice to any consequences which the Commission might draw as regards recovery of the abovementioned aid from the recipients or the financing of the common agricultural policy by the EAGGF,

HAS ADOPTED THIS DECISION:

Article 1

The aid represented by the preferential tariff for natural gas applied in the Netherlands in respect of glasshouse growers from 1 October 1984 is incompatible with the common market within the meaning of Article 92 of the Treaty and must be discontinued.

Article 2

The Netherlands shall inform the Commission before 15 March 1985 of the action it has taken to comply with Article 1.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 13 February 1985.

For the Commission

Frans ANDRIESSEN

Vice-President