II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 March 1992

concerning aid envisaged by the Netherlands Government in favour of an environmentally-sound disposal of manure

(Only the Dutch text is authentic)

(92/316/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 in accordance with the abovementioned Articles, given notice to the parties concerned to submit their comments to it,

Whereas :

I

The Netherlands Government intends to institute an aid scheme for stimulating an environmentally-acceptable disposal of surplus manure (stimulering milieuhygiënisch verantwoorde afzet van mestoverschotten). This scheme, which is to be financed entirely with the yield of a levy to be paid by animal husbandry units who produce more manure than their land can take (i.e. more than 125 kg phosphates per hectare per annum), will finance the activities of the public foundation national manure bank (Stichting Landelijke Mestbank — SLM) in regions where there is a concentration of such units. The SLM as the statutory task of disposing of surplus manure in an environmentally-acceptable manner.

The nature of the environmental damage which may be caused by the inappropriate disposal of animal manure comes under many headings. These include contamination of surface and subterranean water supplies, gaseous emissions and residual heavy metals, through to bacteriological and aesthetic aspects. Whether or not environmental damage will be caused by the disposal of animal manure depends critically upon the conditions under which the disposal takes place, in terms of methods, timing and quantities.

By letter dated 8 April 1991 the Netherlands Government notified the Commission, pursuant to Article 93 (3) of the Treaty, of its intentions.

After a first examination of the notification, the Commission considered that the aid was likely to distort competition and affect trade between Member States by favouring certain animal farmers in the Netherlands. The Commission noted that the description of activities to be financed by the SLM was not very clear, but that these would seem to concern transportation, storage and price regulation for manure disposal.

In so far as the aid would be used to supply manure processing factories with manure, aid would seem to be granted to those factories as well. The Commission also took into consideration that it had previously-accepted two other manure aid schemes in the Netherlands : an aid scheme for the distribution of high quality manure with decreasing aid intensities until its expiration in 1995 and an aid scheme in favour of the construction of some 20 manure processing factories in 1990 to 1994 [1].

The Commission concluded that the aid scheme for stimulating an environmentally-acceptable disposal of surplus manure would seem to involve operation aid, to which in principle none of the derogations in Article 92 can apply. Furthermore, the new aid scheme would seem to be incompatible with the conditions under which the Commission had approved the two previous schemes referred to above. The degressivity and the date of expiration of the scheme for distributing high-quality manure would have no real significance if the new scheme were adopted. As for the manure processing factories, the

[1] OJ No C 82, 27. 3. 1991, p. 3.

Commission had based its approval on, among others, the Netherlands Government's assurance that no additional aid would be granted to these factories. The Commission's letter of approval dated 7 February 1991 had specifically noted this point and indicated the Commission's a priori negative attitude towards any further manure aid in the Netherlands. The Commission therefore decided to initiate the procedure laid down in Article 93 (2) of the Treaty.

The Netherlands Governement was informed of this decision by letter dated 4 June 1991 and was invited to provide its comments within one month. The other Member States and interested third parties were also given notice to submit their comments [1].

II

Within the framework of the procedure the Netherlands Government submitted observations by letters dated 5 July 1991, in bilateral meetings on 7 October and 17 October 1991 and by letter dated 18 November 1991. The Netherlands Government explained the operations of the manure bank SLM and the way these would be financed by means of levies and tariffs. The Netherlands Government accepted that the scheme had to be assessed by the Commission on the basis of Article 92 of the Treaty, but believed that there would be no distortion of competition, nor an effect on trade, given that the scheme would be financed entirely by means of a levy paid by animal husbandry units. In this context, the Netherlands Government also held that the scheme respected the 'polluter pays principle' and claimed that the draft scheme in question would not entail additional aid to manure processing factories, nor would it serve to prolong the existing aid scheme for transporting high quality manure. With its latest letter, the Netherlands Government submitted the SLM's budget for 1992, which it had adapted in order to meet the Commission's concerns regarding the types of activity to be aided under the scheme.

Within the framework of the procedure, observations were also submitted by the Danish Government, by the European fertilizer manufacturers association EFMA, by the Italian federation of pig-breeders, by a German agricultural organization and by five individual manure processors in the Netherlands, Belgium and France. These observations were submitted to the Netherlands Government for its comments by letter dated 29 August 1991. The Netherlands Government submitted such comments by letter dated 7 October 1991.

III

The cost of an environmentally-sound disposal of the waste an economic operator produces is basically an element of his production cost. Animal husbandry units having an economic advantage through intensive production methods and relatively low transportation cost for feed due to their being concentrated in certain regions, must also bear the cost of an environmentally-sound disposal of their manure, in accordance with the polluter pays principle and Article 130r (2) of the Treaty, especially the principle that the polluter must pay. In the same way as the cost of production and profits are different for every individual operator, the cost of manure disposal will also differ, depending among others on the availability of and distance to potential outlets, such as land that can take additional manure or processing facilities.

Consequently the provision of public funds to the manure bank SLM in order to finance certain of its operations constitutes a type of State aid. The fact that these funds are raised by means of a levy on the production of surplus manure does not alter this appraisal. In the present case the levy is introduced by a regulation of the Landbouwschap (Agricultural Board), i.e. as an obligatory measure under public law; payment of the levy can be enforced. In its judgment of 11 November 1987 in Case 259/85 [2], the Court of Justice stated that the mere fact that a system of subsidies which benefits certain companies in a specific sector is financed by a parafiscal charge levied on every supply of national goods in that sector is not sufficient to divest the system of its character as aid granted by a Member State within the meaning of Article 92 of the Treaty.

The rate of levy on surplus manure is fixed annually by the Landbouwschap. In doing so the Landbouwschap takes into account several factors: whether there is a regional surplus of manure, the type of manure produced and the magnitude of surplus production at farm level. For example, in 1992 the levy on surplus pig manure in the east of the Netherlands will be Hfl 3,23 per tonne, in the south of the Netherlands Hfl 3,69 per tonne and in the rest of the Netherlands nil.

The yield is in the first place used to cover the fixed cost (infrastructure and overheads) of the manure banks, in the second place their variable operation cost. The remainder of its operation cost is financed by means of tariffs paid by those units that actually supply manure to the SLM. Of the Hfl 71,6 million total expenditure the SLM is expected to have in 1992, Hfl 40 million will be covered by levies, Hfl 31,5 million by means of tariffs.

The effect of the proposed aid scheme will be to partly harmonize the cost of manure disposal, and therefore part

[1] OJ No C 189, 20. 7. 1991, p. 5.

[2] France v. Commission, [1987] ECR 4418, paragraph 23.

of the production cost of animal husbandry units, by means of the levy. A second effect of the scheme will be an increasing willingness of manure producers to deliver their surplus manure to the SLM rather than to dispose of it through direct contacts with owners of land elsewhere, given that they will in any case have to finance part of the cost of the SLM, whether they use that manure bank or not.

In so far as the yield of the levy is used to finance part of the cost of supplying processing factories with manure, the aid is likely to favour these factories as well. The scheme will enable the SLM to create storage facilities and to regulate the supply of manure and the price at which it is offered to processing factories, thus limiting their normal entrepreneurial risk. Even though the Netherlands Government in its letter dated 5 July 1991 denied that the objective of the scheme was to grant additional aid to manure processing factories and stressed that the SLM will negotiate with these factories on a commercial basis in order to determine the quantities of manure that will be delivered and the price thereof, the Commission holds that the effect of the aid to the SLM will be to absorb part of the risk manure processing factories would normally have to bear. In this context the Commission notes that the Dutch delegation at the meeting held on 17 October 1991 recognized that the proposed scheme will have the effect of speeding up the construction of large-scale manure processing plants, so that these will be available when needed.

IV

There is competition between animal farmers in the Community and animals and their meat are traded between Member States. The Dutch animal husbandry sector accounts for an important part of Community production. In 1989 15 % of pork production in the Community, 9,2 % of egg production and 7,2 % of poultry production took place in the Netherlands.

In 1988 the Netherlands exported 759 049 tonnes of pigmeat (CN code 0203) to other Member States, in 1989 751 252 tonnes and in 1990 761 772 tonnes, which represented almost 50% of the totality of intra-Community trade in these products. In those years the Netherlands imported 24 214 tonnes, 16 747 tonnes and 22 227 tonnes respectively from other Member States.

In 1988 the Netherlands exported 365 938 tonnes of eggs (CN code 040700) to other Member States, in 1989 370 523 tonnes and in 1990 373 930 tonnes, which represented approximately 75 % of the totality of intra-Community trade in these products. In those years the Netherlands imported 9 407 tonnes, 13 253 tonnes and 19 556 tonnes respectively from other Member States.

In 1988 the Netherlands exported 218 480 tonnes of poultry meat (CN code 0207) to other Member States, in 1989 221 937 tonnes and in 1990 248 793 tonnes, which represented 40 to 45 % of the totality of intra-Community trade in these products. In those years the Netherlands imported 46 365 tonnes, 48 755 tonnes and 52 043 tonnes respectively from other Member States.

Manure processing is one of the four mechanisms with which the Netherlands Government intends to prevent and to dispose of surplus manure. The other mechanisms are : prohibition of expansion of manure production in units which already produce more manure that their land can take ; reduction of manure production and minerals in manure by using appropriate feeds ; distribution of manure inside the Netherlands.

In 1989 there was processing capacity available in the Netherlands for 420 000 tonnes of manure per annum. The environmental targets set by the Netherlands Government make it necessary to have processing capacity for 6 million tonnes per annum by the end of 1994 and for 20 million tonnes per annum by the year 2000. These ambitious targets call for the building of up to 20 large-scale processing plants with capacities of 250 000 to 500 000 tonnes per year before 1995.

Processed animal manure contains N, P and K in proportions similar to those in chemical fertilizers, but in lower concentrations (6 % — 6 % — 6 %). Its content of organic matter is, however, much higher. This organic matter improves the soil structure and the soil's ability to absorb water and minerals. Notably in a warm and dry climate, organic fertilizers used over a longer period have been shown to lead to significantly higher crop yields.

When used as a fertilizer, manure competes with other organic fertilizers. According to a study made for the responsible Dutch Ministry in 1990 on the sales potential in other countries for Dutch processed animal manure (1), this product will compete with local animal manure, fish-meal, bone-meal, milled seed-waste, compost and sewage sludge. The potential market for processed animal manure depends in the first place on the price at which it is offered. According to the study referred to above, potential markets can be found inside the Community in France and in Spain and to a lesser extent in Portugal, Italy and Greece and in third countries such as the USA, Japan and Canada.

Depending on soil and crops, processed animal manure may also be in competition with chemical fertilizers. In a study paper on animal manure in Europe dated September 1991, EFMA calculated that if 50 % of the total one million tonnes of nitrogen coming from animal husbandry based on imported feedstuff were to be processed, the use of nitrogen from animal manure would rise by 100 000 tonnes, which represents about 1 % of the total sale of nitrogen fertilizer in Europe in 1988. In the paper EFMA assumed, however, that processing on such a scale would not take place, because the costs to the farmers would be prohibitive.

(1) Booz-Allen & Hamilton : Afzetmogelijkheden voor verwerkte dierlijke mest, Den Haag 1990.

There is trade between Member States in animal and vegetable fertilizers, whether or not mixed together or chemically treated (CN code 3101). In 1988 the Netherlands exported 160 877 tonnes to other Member States, in 1989 210 170 tonnes and in 1990 253 182 tonnes, mainly to the Belgium-Luxembourg Economic Union, Germany and France, which represented 44 to 60 % of the totality of intra-Community trade in these products. In those years the Netherlands imported 44 404 tonnes, 37 357 tonnes and 65 994 tonnes respectively from other Member States. Dutch exports of processed animal manure to other Member States and to third countries can be expected to increase markedly if the planned processing plants are built.

Intensive, concentrated animal husbandry exists not only in the Netherlands, but also in other Member States, especially Belgium, France, Germany and Italy. In order to cope with the associated environmental problems, Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrate from agricultural sources (1) requires all Member States to take measures in order to dispose of their manure surplus in an environmentally-sound manner. There will consequently be increased competition between suppliers of manure, processed or not, in the Community and some replacement of chemical fertilizers by organic fertilizers.

Where financial aid strengthens the position of certain undertakings compared with others that are competing with them in the Community, such aid must be deemed to affect competition with such other undertakings. The measures envisaged may well increase competition from Dutch intensive animal husbandry and from processed manure.

Consequently, the aid which the Netherlands Government intends to grant to an environmentally-sound disposal of surplus manure affects trade between Member States and distorts competition between animal-farmers within the meaning of Article 92 (1) of the Treaty. In so far as the surplus manure in question is processed in order to be brought on the market as a dry organic fertilizer, the aid is also likely to distort competition with other manufacturers of organic and chemical fertilizers.

Article 92 (1) of the Treaty lays down the principle that aid having certain characteristics which it specifies is incompatible with the common market.

The derogations from that principle which are set out in Article 92 (2) of the Treaty are inapplicable in this instance, given the nature and objectives of the aid, and were not in any case invoked by the Netherlands Government.

(1) OJ No L 375, 31. 12. 1991, p. 1.

V

Article 92 (3) of the Treaty specifies the aid which may be considered to be compatible with the common market. Compatibility with the Treaty must be viewed in the context of the Community and not of a single Member State. So as to maintain the proper functioning of the common market and take account of the principles laid down in Article 3 (f) of the Treaty, the derogations to the principle of Article 92 (1) which are set out in Article 92 (3) must be interpreted strictly in examining any aid scheme or any individual aid measure.

In particular, the derogations may be applied only if the Commission finds that, if the aid were not granted, market forces alone would not be sufficient to induce the recipients to act in such a way as to achieve one of the objectives pursued.

Applying the derogations to cases which do not contribute to such an objective, or where the aid is not necessary for this purpose, would mean conferring undue advantages on the industries or undertakings of certain Member States, whose financial position would be strengthened, and affecting trading conditions between Member States and distorting competition, without any justification based on the common interest referred to in Article 92 (3).

With regard to the derogations provided for in Article 92 (3) (a) and (c) for aid intended to promote or facilitate the promotion of certain regions, it should be noted that the standard of living in none of the regions of the Netherlands is abnormally low nor does one of the regions suffer from serious underemployment within the meaning of the derogation laid down in Article 92 (3) (a). Several regions in the Netherlands qualify for regional aid within the meaning of the derogation provided for in Article 92 (3) (c); these regions are mainly situated in the north of the Netherlands, whereas the manure problem is the largest in the south and the east. Moreover, the Netherlands Government has not claimed that the aid in question would serve to facilitate the development of certain regions.

With regard to the derogations provided for in Article 92 (3) (b), it is firstly to be noted that the aid is not intended to remedy a serious disturbance in the Dutch economy; nor, indeed, has the Netherlands Government put forward any argument calling for the application of this derogation. With respect to the derogations for aid to promote the execution of an important project of common European interest, the Commission has taken into consideration that the Community framework on State aids in environmental matters, of which all Member States were informed by letters dated 7 November 1974 and 7 July 1980, foresees that during a transitional period State aids designed to assist existing firms in adapting to laws or regulations imposing new major burdens relating to envi-

ronmental protection will qualify for derogation under Article 92 (3) (b) of the Treaty, by being aids to promote the execution of an important project of common European interest. The framework specifies however that, in order to qualify for exemption under Article 92 (3) (b), national aids will have to be granted to finance investments necessary to the adaptation which the recipient firms will have to make to their plants in order to satisfy new major environmental obligations imposed by the State or the Community.

In the present case, the aid planned by the Netherlands Government is not designed to finance investments in animal husbandry units in order to comply with new environmental legislation, but on the contrary to allow manure producers to maintain their present production, by financing a new outlet for their surplus manure. The framework does not exclude environmental aids other than those it declares compatible with the common market; such other aids must then, however, qualify for the exemptions in Article 92 (3) (a) or (c).

With regard to the derogations provided for in Article 92 (3) (c) for aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Commission notes that the aid scheme proposed by the Netherlands Government — even though it serves to maintain the present intensive, concentrated production structure of a large part of Dutch animal husbandry — can be said to facilitate its developments, by creating a system for an environmentally-sound disposal of its surplus manure. Having due regard to Article 130r of the Treaty the Commission notes that the environmental policy pursued by the Netherlands Government, in so far as it reduces manure pollution, is in the interest of the Community as a whole.

When the Commission decided in December 1990 not to object to the Netherlands Government's intention to grant 35 % investment aid for the construction of large-scale manure processing plants until the end of 1994, it did so on the basis of the environmental considerations referred to above and the high commercial risk involved in large-scale manure processing. At the same time the Commission expressed its concerns that if these processing plants should turn out to be less profitable than expected, the Netherlands Government might be tempted to introduce a system of operating aid.

With regard to the aid scheme now proposed, the Commission has taken note of the Netherlands Government's reasoning that a central organization such as the SLM serves a useful purpose for the sector as a whole : the SLM is obliged to accept all manure offered to it, thus creating a controllable and environmentally-sound outlet for animal husbandry units that will find it increasingly difficult to dispose of their manure by other means. The Commission has also taken account of the argument presented by the Dutch delegation in the meeting held on 17 October 1991, that the necessary processing capacity will be available when it is needed, thanks to the scheme.

The Commission is of the opinion that the aid to be granted under the scheme Stimulering milieuhygiënisch verantwoorde afzet van mestoverschotten consists of two components :

First, the financing of the SLM's fixed costs (administrative apparatus, creation and maintenance of storage facilities) in order to have an organization available to all manure producers who may, at any given time, have a surplus of manure and no other outlet. It is the Commission's view that the SLM serves a useful purpose for the Dutch animal husbandry sector as a whole and the facilities it offers can therefore well be financed by means of a levy. The Commission has previously approved aid in other Member States to collective sectoral activities financed by means of quasi-fiscal levies on domestic production (1).

Secondly, as for the financing of the variable costs the SLM will increasingly have, that is the cost of transporting, storing and delivering manure to other areas in the Netherlands or to processing factories, it is the Commission's view that these variable costs should eventually be entirely covered by the tariffs that manure producers who actually use the SLM as an outlet have to pay. In the SLM's budget for 1992, its variable cost is only partially covered by tariffs and partly by the yield of the levy. If this situation was to become permanent, the Dutch authorities could well grant operating aid to manure processing factories via the SLM, once these factories have been built, for their exploitation and for their export of processed manure to other Member States. Such operating aid would adversely affect trading conditions to an extent contrary to the common interest, to the detriment of other suppliers of fertilizers.

The second component of the aid proposed by the Netherlands Government can therefore not be allowed to continue to be granted after the initial period in which the first processing factories are to be built, that is the period until the end of 1994. The Netherlands Government itself has repeatedly stated that 35 % investment aid will only be necessary for the construction of the first large-scale processing factories to be built in this period, given the extraordinary risks involved in this stage.

(1) e.g. 20th Competition Report, point 274.

Similarly, the use of part of the yield of the levy on surplus manure for financing other than infrastructural and overhead cost in the SLM can be considered to promote the creation of an environmentally-sound disposal mechanism for manure without adversely affecting trading conditions to an extent contrary to the common interest, if it remains limited to the initial period, in which the SLM has to start up its operations and manure producers will become acquainted with it, and if it is entirely financed by the sector itself.

VI

Conclusion : The scheme Stimulering milieuhygiënisch verantwoorde afzet van mestoverschotten involves aid fulfilling the tests set out in Article 92 (1) of the Treaty. The aid is completely financed by means of a levy imposed on the overproduction of manure. The aid to the fixed cost of the manure bank SLM can be considered compatible with the common market under Article 92 (3) (c). The aid to the variable cost of actually handling manure can only be considered compatible during the starting period ending on 31 December 1994. From 1 January 1995 on the latter aid cannot be granted. Reporting obligations will ensure verification that this condition is complied with,

HAS ADOPTED THIS DECISION :

Article 1

The aid entirely financed by means of a levy on manure surplus production, which the Netherlands intend to grant for stimulating an environmentally-acceptable disposal of surplus manure, can be considered compatible with the common market under Article 92 (3) (c) of the EEC Treaty, in so far as the aid does not exceed the fixed cost of the administrative apparatus and the creation and maintenance of storage facilities by the Stichting Landelijke Mestbank (SLM).

Article 2

The aid referred to in Article 1 can also be considered compatible with the common market if it covers part of the variable cost of the SLM in its starting period for manure disposal 1992 to 1994.

From 1 January 1995 on, however, such aid no longer meets the conditions for exception provided for in Article 92 (3) and therefore may not be granted after that date.

Article 3

The Netherlands shall submit annual reports on the operations of the SLM and the way these are financed, allowing the Commission to verify that this Decision is complied with.

Article 4

The Netherlands shall inform the Commission, within two months of the notification of this Decision, of the measures taken to comply with it.

Article 5

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 11 March 1992.

For the Commission

Leon BRITTAN

Vice-President