II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 July 1999

concerning State aid, financed by parafiscal charges, which the Netherlands intends to grant for promoting ornamental plants

(notified under document number C(1999) 3440)

(Only the Dutch text is authentic)

(2000/116/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organisation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage [1], as last amended by Regulation (EC) No 3290/94 [2],

The parties concerned having been given notice, in accordance with the first subparagraph of Article 88(2) of the Treaty, to submit their comments [3], and having regard to those comments,

Whereas:

I. **Procedure**

(1) In accordance with Article 88(3) of the Treaty, the Dutch authorities notified the above aid measure to the Commission by letter of 9 December 1996, registered on 12 December 1996. Further information was supplied by letter of 4 March 1997, registered on 5 March 1997.

(2) By letter SG(97) D/4124 of 30 May 1997 the Commission informed the Dutch Government of its decision to initiate the procedure, under Article 88(2) of the Treaty, in respect of the notified aid measure.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission asked the interested parties to submit their comments on the aid in question. It passed the comments received on to the Dutch authorities and gave them the opportunity to react. The Netherlands informed the Commission of its comments by letter of 22 June 1998.

(4) Further information was supplied at a meeting between representatives of the Dutch Government and the producer organisation on 23 November 1998.

II. **Detailed description of the aid measure**

(5) The notification concerns altering a parafiscal charge levied in order to finance an existing aid scheme for promotional activities. The new provision would allow a charge to be applied to products imported from other Member States, but would ensure that the resulting revenue was channelled back to the representative promotional organisations.

(6) The existing aid is granted for sales promotion in the ornamental plant sector (aid measure No 766/95). The promotional activities are carried out by the Bloemenbureau Holland. The aid is financed from a parafiscal charge which the former Productschap voor Siergewassen (PVS) — now the Productschap Tuinbouw — levies on sales, in the Netherlands, of ornamental plants or their propagating material. The charge is based on the value of the products sold and must be paid by all growers and importers of ornamental plants. Products imported from other Community Member States are expressly exempt from the charge.

[1] OJ L 55, 2.3.1968, p. 1.
[2] OJ L 349, 31.12.1994, p. 105.
[3] OJ C 227, 26.7.1997, p. 5.
[4] See footnote 3.

The Commission has always regarded revenue from a charge imposed by national law as State resources within the meaning of Article 87(1) of the Treaty. Since the revenue in question is used to promote certain Dutch products (flowers and plants), and since it therefore 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods', the Dutch measure is an aid measure within the meaning of Article 87(1) of the Treaty.

Under the draft amendment, the exemption for products imported from other Member States is to be abolished and they are to be taxed in the same way as Dutch products or products imported from third countries. All revenue from the charge on products imported from other Member States is to be used for promotion campaigns in the Member States concerned, based on close consultation between the Productschap and the other Member States' representative organisations.

The Productschap will conclude contracts for carrying out the promotional activities with the representative organisations in all the Member States, stipulating how the revenue is to be spent on generic promotion campaigns for ornamental plants. The Dutch authorities have submitted a model contract.

(7) The Dutch authorities have emphasised that the proposed contracts with representative promotional organisations in the other Member States will be concluded on a voluntary basis, without any pressure being exerted. In its contract offer letter to potential partner organisations, the Productschap explains that the purpose of the contract is to levy a charge on products from the Member State concerned and to reimburse the resulting revenue. The Dutch authorities point out that one of the recitals preceding the contract provisions states that the charge is to be levied on 'products traded in or via the Netherlands'. According to the Dutch authorities, the contract can therefore be concluded only if the other Member State's representative organisation expressly agrees that its products traded in or via the Netherlands are to be subject to the charge and that the resulting revenue is to be channelled back.

The Dutch authorities guarantee that, if such a contract cannot be concluded in respect of a particular Member State, that Member State's products will not be subject to the charge.

(8) The main provision of the model contract proposed by the Productschap is that the promotional activities are to be determined and implemented in mutual consultation between the Productschap and the Member State's promotional organisation. The contract also stipulates that all promotional activities are to be subject to approval by the Member State's promotional organisation, which may veto any proposal at any time. Where consultation does not result in agreement being reached, a committee set up by both parties may issue a binding recommendation. The committee is to be made up of a member appointed by each side and an independent third party appointed by the contracting organisations' representatives.

(9) The Productschap applies three selection criteria in order to ensure that partner organisations in the other Member States are representative. Such organisations must:

(a) be able to carry out promotional activities;

(b) operate throughout the Member State concerned;

(c) represent a broad cross-section of producers and traders.

(10) The Commission has noted from the information provided by the Dutch authorities that, even where an organisation which satisfies the three criteria has not been found, a producer or trader organisation should be sought which represents the sector and which is engaged *inter alia* in promotional activities. Where several organisations satisfy the selection criteria, they are all to be consulted and either the contract is to be concluded with them all or those with which no contract is concluded are to recognise as representative the organisation with which the contract is concluded. According to the Dutch authorities, this makes it possible to avoid an arbitrary choice of partner organisation.

(11) The Dutch authorities have provided a detailed overview of the partner organisations with which work will be undertaken in the different Member States, other potential partner organisations, and the reasons why — in accordance with the above criteria — each organisation was chosen.

As regards the nature of the promotional aid, the Dutch authorities have confirmed their previous statement that the existing programme (aid measure No 766/95) complies with the Commission framework for national aids for the advertising of agricultural products [5] and that the same applies to promotional activities carried out in cooperation with partner organisations in other Member States. The Commission therefore regards the new programme's aid component as compatible with the common market.

(12) The Dutch authorities propose to introduce a charge on products imported from other Member States. Based on the judgment by the Court of Justice of the European Communities in Case 47/69 *France* v *Commission* [6], the Commission generally regards aid financed from parafiscal charges which also apply to products imported from other Member States as incompatible with the common market.

(13) The Commission considers the fact that other Member States' partner organisations must first agree to the charge being levied on their products is an important factor which distinguishes it from usual parafiscal charges. That agreement appears to make the charge on imported products voluntary in character, since the

[5] OJ C 302, 12.11.1987, p. 6.
[6] European Court Reports 1970, p. 487.

Productschap may levy charges on products imported from other Member States only if the partner organisations in the Member States concerned accept the scheme. The charge on imported products can therefore be mandatory in character only if such agreement exists.

In the Commission's opinion, the fact that the revenue is channelled back to the partner organisations is also a factor which distinguishes the scheme from usual parafiscal charges.

(14) The Commission therefore concluded that, subject to the conditions referred to under point 13, the proposed scheme could be regarded as compatible with the common market since it is based on voluntary agreement by the representative partner organisations in the Member States concerned and since, because the tax revenue is channelled back to the Member States in question, it could be assumed that the tax burden which is coupled with the benefit resulting from the aid measure is no greater for imported products than for domestic products.

(15) Nevertheless, the Commission very much doubts whether the conditions referred to under point 13 have been complied with when implementing the scheme in practice.

(16) Consequently, it has initiated the procedure in accordance with Article 88(2) of the Treaty.

III. **Possible economic impact of the charge**

(17) Based on the Productschap's data, the proposed charge turns out to have the following economic effects:

Cut flowers and pot plants 1998

(NLG × 1 000)

Country	Imports	Revenue following introduction of the parafiscal charge
France	29 300	274
Belgium	79 600	745
Germany	34 500	322
Italy	9 600	90
United Kingdom	7 800	73
Ireland	4 000	37
Denmark	10 800	101
Greece	1 700	16
Portugal	2 100	20
Spain	103 800	970
Austria	600	6
Finland	200	2
Sweden	400	3
TOTAL	**284 400**	**2 659**

(18) The estimated and actual costs in respect of promotional activities financed from parafiscal charges levied solely on Dutch growers' products are:

(NLG)

Year	Estimate	Actual costs
1993	26 045 000	25 550 002
1994	26 880 000	26 907 924
1995	27 710 000	
1996	28 250 000	

(19) The charge percentage amounted to 0.8 % (1995), 0.95 % (1996), 1.05 % (1997) and 1.15 % (1998).

(20) The economic effects are also apparent when Dutch bulb exports are compared.

Dutch bulb exports (Eurostat data)

Value

(EUR 1 000)

	1994	1995	1996
within the Community	275 717	286 589	293 790
outside the Community	310 533	279 217	253 598

Source: Eurostat.

Quantity

(tonnes)

	1994	1995	1996
within the Community	85 848	88 482	93 726
outside the Community	84 430	65 954	65 674

Source: Eurostat.

IV. **Comments by the other Member States and interested parties**

4.1 *Belgium*

(21) The Belgian authorities submitted their comments on the Dutch Government's proposed measures by letter of 22 August 1997.

(22) They disputed that products imported from other Member States were now exempt from the parafiscal charge.

(23) The Belgian authorities also wondered what the difference was with the current situation. In their view, it was not clear whether the charge applied to auctions or to all imported products. The measure's scope (products subject to the charge) also seemed rather vague.

(24) There was no guarantee whatsoever that revenue from the charge would be used to promote the products on which it was levied (for example, if a certain percentage of the charge applied to pot plants, then the same percentage of the resulting revenue should be spent on promoting pot plants). Moreover, revenue from the charge on Belgian products should also be distributed according to the products' regional origin.

(25) As regards partner organisations being representative, the Belgian authorities pointed out that promotion was a regional matter in Belgium. Since the charges were levied on the production sector, it should be involved in the promotional activities in consultation and cooperation with the sales sector.

(26) By letter of 18 January 1999, the Belgian authorities withdrew their reservations. They no longer needed to be taken into account, because a cooperation agreement had been concluded between the Productschap and VLAM (the organisation responsible for promoting the sale of agricultural products in the Flemish Region).

4.2 *United Kingdom*

(27) The United Kingdom authorities submitted their comments by letter of 29 August 1997.

(28) According to the United Kingdom, there was a representation problem. The Productschap worked mainly with two British organisations, neither of which were at all representative of most producers and traders. Consequently, there was a risk that certain traders would have to pay the charge without being represented.

(29) There was a threat of discrimination against products from Member States not taking part in the scheme.

(30) Moreover, producers and traders from other Member States would not necessarily derive equal benefit from the Productschap's sales promotion. Nor was it clear what would happen to revenue not used for promotion. Rules should be introduced in order to ensure that the charges received were channelled back.

(31) Lastly, a number of practical aspects could give rise to problems. The Productschap should of course ensure that the origin of imported products was precisely determined. If it failed to do so, there was a risk that an unfair system of permanent parafiscal charges would develop.

(32) The British authorities therefore took the view that the Dutch proposal ran counter to the interests of producers in other Member States. They opposed the charge on imported products.

(33) By letter of 5 January 1999, the Flowers and Plants Association submitted its comments in favour of the system proposed by the Productschap. The association claimed to represent all major British exporters of narcissi. The scheme proposed by the Productschap would enable the association to carry out generic promotional campaigns.

4.3 *Denmark*

(34) The Danish authorities submitted their comments by letter of 3 September 1997.

(35) Quite apart from anything else, the administrative difficulties involved in collecting parafiscal charges on products imported from other Member States had to be regarded as impeding smooth operation of the internal market. Moreover, approval of the Dutch scheme could create a precedent for other Member States.

(36) The voluntary nature of the scheme was insufficient justification for a change in Commission practice with regard to parafiscal charges on imported products.

(37) The proposed scheme would also result in a double charge on Danish products which were exported to the Netherlands and which were already taxed in Denmark.

4.4 *Sweden*

(38) The Swedish authorities submitted their comments by letter of 23 September 1997.

(39) Although the charges were voluntary and were channelled back to the exporting country, the scheme hampered trade within the internal market and entailed extra administrative costs. The parafiscal charge could also result in certain producers no longer selling their products on the Dutch market, and this would benefit Dutch producers.

(40) Since domestic charges were already levied in a number of countries, the scheme would result in double taxation.

(41) A voluntary charge could be collected — either indirectly via a representative organisation, or directly — only if all producers and traders agreed to it.

(42) The Swedish authorities doubted whether market operators from the other Member States would derive as much benefit from the scheme as those in the Netherlands.

(43) The Trädgårdsnäringens Riksförbund (Swedish horticultural producers' association) and the Blomstergrossisternas Riksförbund (Swedish flower wholesalers' association) submitted their comments by letter of 22 December 1998.

(44) In its reply to the Commission, the Swedish Government had drawn attention to the legal and competition aspects. According to the two associations, in doing so it had taken little account of the Swedish representative organisations' much more favourable assessment. The Swedish associations fully supported the Dutch proposal. Most European countries benefited from Dutch promotional activities. In the light of the Community's efforts to boost flower and plant sales and to compensate Community producers for the liberalisation of imports from third countries under the special programme to promote sales, the Dutch promotion plan could also play an important role. The plan could even provide a basis for the Community programme.

(45) The voluntary nature of the system would constitute another aspect which would have to be taken into account.

V. **The Netherlands' comments**

(46) By letter of 22 June 1998 (which referred to the Productschap's comments contained in a letter of 30 January 1998 annexed to the Dutch authorities' letter) the Dutch authorities reacted as follows:

5.1 *With regard to Belgium's comments*

(47) In accordance with the Productschap's rules, since 1 January 1996 the charge had no longer been applied to products from other Member States. If auctions had still applied charges after that date for technical reasons, those charges would be reimbursed.

(48) Not only sales at auctions would be taxed, but also trade around auctions. The system would be the same as the one applying before 1999. The charge would apply only to floricultural products. Specific rules applied to floricultural products and flower bulbs.

(49) A distinction was already being made between pot plants and other floricultural products. Consideration should therefore be given to allocating the revenue to each group of products taxed. Division of the revenue originating in Belgium from the charge would depend on the representative organisations.

(50) The proposed scheme benefited the whole floricultural sector (producers and traders alike).

5.2 *With regard to the United Kingdom's comments*

(51) First a national organisation was selected. If that turned out to be impossible, then the Productschap tried to work with organisations which represented a large part of the sectors concerned. To that end, discussions were held with other organisations (such as the National Farmers' Union). For as long as there was no grouping of representative organisations, the Productschap proposed to continue to work with the two British organisations with which it was currently working. According to the Productschap, the promotional activities benefited the whole sector and so the problem of taxation without representation had to be seen in perspective.

(52) It was pointed out that only three Member States had not yet signed the contract. Those three accounted for less than 1 % of the total amount collected.

(53) Consideration might be given to reimbursing Member States revenue not used for promotion. Such a solution however did not seem really necessary in view of the contracts already concluded.

(54) The Productschap regarded itself as able to determine imported products' origin with a considerable degree of certainty. An annual discussion would take place with the Member States' relevant authorities in order to determine the amounts due to each country.

5.3 *With regard to Denmark's comments*

(55) According to the Productschap, there would be no double charge because the charges collected in the Netherlands were channelled back to Denmark.

5.4 *With regard to Sweden's comments*

(56) In the Productschap's opinion, Dutch market operators were not placed at an advantage.

(57) According to the Productschap, there would be no double charge because the charges collected in the Netherlands were reimbursed to Sweden.

VI. **Assessment of the aid measure**

(58) The doubts which led the Commission to initiate the procedure under Article 88(2) of the Treaty still remain.

6.1 *Extent to which the partner organisations are representative*

(59) Entirely voluntary contributions from the floricultural sector which are intended to finance promotional activities are not to be regarded as State aid within the meaning of Article 87(1), since 'aid granted by a Member State or through State resources in any form whatsoever' is not involved. This is not so in the present case. In order to guarantee that the charge is applied on the basis of a voluntary contract, the agreement of all ornamental plant producers and traders in the Member State concerned is required. The organisations with which contracts are concluded should therefore represent all the Member State's producers and traders, which is not so in the case of the proposed Dutch scheme. A charge ordinance provides the legal basis which will allow the Productschap to levy a charge on imported products. Based on the Court of Justice's case div. law ([7]), the Commission has always held that revenue from a contribution which the government makes mandatory must be regarded as State resources within the meaning of Article 87(1). Consequently, State aid within the meaning of Article 87(1) is definitely involved. A parafiscal charge which is levied on imports is incompatible with the common market because it may adversely affect trade between Member States.

(60) At the meeting on 23 November 1998 the Productschap's representatives pointed out the similarity to the scheme introduced by Council Regulation (EC) No 2275/96 of 22 November 1996 introducing specific measures for live plants and floricultural products ([8]) and Commission Regulation (EC) No 803/98 of 16 April 1998 laying down detailed rules for 1998 for the application of Council Regulation (EC) No 2275/96 introducing specific measures for live plants and floricultural products ([9]).

In this connection, it should be pointed out that programmes to increase the consumption of live plants and floricultural products are to be presented by representative groups of operators in one or more branches of activity in the live plant and floricultural products sector (Article 4 of Regulation (EC) No 803/98).

The partner organisations with which the Productschap has concluded contracts are the same as those which operate within that European framework. The Productschap therefore assumes that the European authorities have established that the partner organisations are representative and have accepted them as such.

(61) This argument cannot be accepted, however. There is a clear distinction between organisations which are designated to administer European budgets on the basis of a Council regulation and under the supervision of the Member States and the Commission, and the same organisations which — in most cases without a legal basis in their national legislation — would be designated by the Productschap to attend both to the charge on firms which may or may not be members of those organisations and to flower and plant promotion financed out of the revenue from such a charge. A Community legal instrument (particularly a regulation) which introduces horizontal approximation through common criteria and seeks a degree of harmonisation in the public interest does not necessarily justify a Member State introducing tax obstacles at its own instigation. There is also the risk that the charge will be applied without representation.

(62) Moreover, the fact that promotional activities in other Member States are to be carried out in consultation with the Productschap gives the Productschap a certain say, while other Member States' organisations do not enjoy such control over promotional activities carried out in the Netherlands. This imbalance gives grounds for suspecting that the measure is geared to Dutch operators.

6.2 *Allocation of the rechannelled funds*

(63) It is not clear whether producers and traders in each of the other Member States would be able to derive as much benefit from the promotional support measures applied by the partner organisations there as would Dutch producers and traders from the measures applied by the Productschap.

([7]) Judgment in Case 78/76, *Steinike & Weinlig* v *Germany*, ECR 1977, p. 595.

([8]) OJ L 308, 29.11.1996, p. 7.
([9]) OJ L 115, 17.4.1998, p. 5.

The Court of Justice has consistently ruled [10] that if the advantages stemming from the use of the proceeds of the charge in question fully offset the burden borne by the domestic product when it is placed on the market, that charge constitutes a charge having an effect equivalent to customs duties, contrary to Articles 23 and 25. If those advantages only partly offset the burden borne by domestic products, the charge in question is subject to Article 90 of the Treaty. In the latter case, the charge would be incompatible with Article 90 and is therefore prohibited to the extent to which it discriminates against imported products, that is to say to the extent to which it substantially offsets the burden borne by the taxed domestic product compared with the imported product.

In the present case, it has not been established that there is no discrimination against imported products, or that the parafiscal charges and the resulting revenue do not contravene Article 90 of the Treaty. The essential question is whether imported products really can benefit from the aid scheme in the same way as domestic products: even if the rules guarantee equal treatment for domestic and imported products, conditions in practice inevitably favour domestic operators because promotional activities are undertaken in response to domestic specialisations, requirements and market opportunities (seasonal fluctuations and changes in the varieties grown). Even assuming that imported products really are able to benefit from the aid scheme in the same way as domestic products, in practice there is no mechanism whereby the Commission can actually verify whether products from the other 14 Member States are benefiting from the aid in the same way as domestic products — particularly since the Dutch authorities have failed to state the identification system which would be used to determine the origin of imported products (see recital 31 above), apart from a vague assurance from the Productschap that it regards itself as able to determine the origin (see recital 54 above).

(64) Moreover, the purpose of Articles 87 and 88 differs from that of Article 90. The fact that a national measure meets the requirements of Article 90 does not necessarily mean that it complies with other provisions such as Articles 87 and 88. Where an aid measure is financed from a charge on certain firms or products, the Commission is required to examine not only whether the method of financing complies with Article 90 of the Treaty but also whether that method and the aid so funded are compatible with Articles 87 and 88 [11].

In so far as the charges are not voluntary (which is the case, as set out at recital 59) and are channelled back to the exporting country, there is a risk that the proposed scheme will hamper trade within the single market and will entail additional administrative costs.

The proposed scheme seems primarily designed to restore the competitive position of Dutch products which are themselves affected by the parafiscal charges. Imported products, which would have become more competitive because only domestic products are taxed, lose that advantage when they are likewise taxed. Spending the revenue from the charge for promoting imported products does not necessarily offset the loss of that competitive advantage, since equal treatment is not assured in practice (see point recital 63 above).

The proposed scheme threatens to distort free competition. The aid's adverse effect on trade between Member States may be exacerbated by the method through which the aid is financed, since that method likewise imposes a burden on imported products.

(65) It should be added that operators in other Member States often bear the burden of granting aid to finance comparable promotional activities. When producers in other Member States export to countries which levy an import charge, they are financing the same activity twice over.

In view of this, the Dutch authorities have stated that they are prepared to reintroduce a scheme such as that which used to exist between Germany and the Netherlands, whereby operators were exempted from the charge if they were able to demonstrate that they had already paid a similar charge in the other country.

However, such a formality (submitting documents in order to obtain exemption from the charge) could be regarded as a measure having equivalent effect and therefore be prohibited under Article 28 of the Treaty — i.e. 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' [12]. Formalities (even those entailing no more than the submission of documents) which are presumably accompanied by a control system are capable of hindering intra-Community trade. Furthermore, such border controls are justified only in a limited number of special cases [13].

(66) Moreover, the revenue from the parafiscal charges may turn out to be insufficient to launch a promotion campaign. In that event, there are no corrective measures to provide equitable compensation for producers and traders in other Member States and there is nothing to prevent the partner organisation from retaining the money.

[10] See particularly the judgments in Joined Case C-78 to C-83/90, *Compagnie Commerciale de l'Ouest and others* v *Receveur Principal des Douanes de la Pallice Port* ECR 1992, p. I-1847, paragraph 27, and Case C-17/91, *Georges Lornoy en Zanen NV and others* v *Belgian State*, ECR 1992, p. I-6523, paragraph 21.

[11] Judgment in Case 47/69, already referred to in footnote 6; see also judgments in Cases C-266/91, *Celulose Beira GmbH* v *Fazenda Pública*, ECR 1993, p. I-4337, and C-72/92 *Firma Herbert Scharbatke GmbH* v *Federal Republic of Germany*, ECR 1993, p. I-5509.

[12] Judgment in Case 8/74, *Dassonville*, ECR 1974, p. 837.

[13] Judgment in Case 159/78, *Commission* v *Italy*, ECR 1979, p. 3247.

VII. **Conclusion**

(67) In the light of the above, the Commission considers that there are insufficient grounds for departing from its usual practice with regard to State aid financed from parafiscal charges which are also levied on imported products, namely that the scheme must be based on voluntary agreement by operators or representative partner organisations in the Member States concerned and that the resulting revenue must be channelled back to those Member States.

The Commission therefore takes the view that the aid measure in question, which is financed from parafiscal charges which also apply to products imported from other Member States, is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid which the Netherlands intends to grant for promoting ornamental plants and which is financed from a parafiscal charge on products imported from other Member States is incompatible with the common market. The aid scheme must therefore not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 20 July 1999.

For the Commission

Franz FISCHLER

Member of the Commission