COMMISSION

COMMISSION DECISION

of 8 December 1999

on the measure which the Netherlands intends to implement concerning rationalisation of pig assembly centres

(notified under document number C(1999) 5209)

(Only the Dutch text is authentic)

(2000/386/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 in accordance with that provision given notice to interested parties to submit their comments [1], and in the light of those comments,

Whereas:

I. **Procedure**

(1) The Netherlands notified the Commission of the above measure by letter of 6 August 1998 (registered as received on 10 August 1998). The Netherlands provided additional information to the Commission by letter of 29 September 1998 (registered as received on 5 October 1998) and by letter of 3 November 1998 (registered as received on 5 November 1998). Further information was provided at a meeting with Dutch Government representatives on 7 December 1998.

(2) By letter of 3 February 1999 the Commission notified the Netherlands that it had decided to initiate the procedure under Article 88(2) of the EC Treaty.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* [1]. The Commission invited interested parties to submit their comments on the measure.

(4) Having received interested parties' comments, the Commission forwarded these to the Netherlands for reaction and received the Netherlands' response by letter of 30 July 1999.

II. **Description of the measure**

(5) The measure is intended to accompany the more stringent hygiene rules which have been introduced for pig assembly centres in order to prevent the spread of classical swine fever. The amended rules serve partly to implement Council Directive 64/432/EEC [2], as amended by Directive 97/12/EC [3], but also contain additional requirements. In accordance with the second subparagraph of Article 10(1) of Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market [4], as last amended by Directive 92/118/EEC [5], the hygiene measures were notified as temporary protection measures. Since the Netherlands wishes to make the measures permanent, they were also notified (No 98/0392/NL) as a technical specification under Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [6], as consolidated by European Parliament and Council Directive 98/34/EC [7] and subsequently amended by Directive 98/48/EC [8].

[1] OJ C 108, 17.4.1999, p. 5.

[2] OJ L 121, 29.7.1964, p. 1977/64.
[3] OJ L 109, 25.4.1997, p. 1.
[4] OJ L 224, 18.8.1990, p. 29.
[5] OJ L 62, 15.3.1993, p. 49.
[6] OJ L 109, 26.4.1983, p. 8.
[7] OJ L 204, 21.7.1998, p. 37.
[8] OJ L 217, 5.8.1998, p. 26.

All pig assembly centres were closed and their operating licences revoked following the outbreak of classical swine fever. In order to reopen, firms must obtain a new licence, which will be issued only if they satisfy the new hygiene requirements.

Firms which are prepared to adapt their facilities may receive investment aid.

Firms which are unwilling/unable to meet the new hygiene requirements and therefore remain closed are offered aid for permanently ceasing to operate. The firms (including their shareholders) receiving this aid must undertake not to become involved, either directly or indirectly, in operating a pig assembly centre.

(6) The aid offered comprises two components: compensation for loss of income and compensation for loss of assets.

(7) The compensation for loss of income is NLG 3,75 per pig-equivalent ([1]), unless proof can be furnished from the annual accounts or an accountant's report that the average income margin per pig-equivalent exceeds NLG 0,75, in which case the aid may be increased up to a maximum of NLG 5 per pig-equivalent.

This calculation is based on an independent consultant's report which shows that profit per pig-equivalent varies from NLG 0,74 to NLG 1,28. The operator's return from pig assembly activities is therefore assumed to be at least NLG 0,75 per pig-equivalent. This figure is then multiplied by five to compensate for loss of income over seven years — with a correction of about 30 % because the aid is now already at the recipient's disposal, whereas the income would otherwise be earned over a number of years. A higher level of aid may be obtained if it can be demonstrated that the actual profit margin was higher.

The seven-year period is likewise based on the consultant's report, which compares various compensation schemes. Given the difficulty of setting an individual correction factor for each firm, a 30 % average has been fixed as standard.

(8) Compensation for loss of assets is based on an independent expert's estimate, expressed as the loss of rental value per m^2 actually used for bringing in, collecting, weighing and transporting pigs, together with the estimated loss of rental value for the washplace and the office space attributable to the assembly centre, multiplied by a yield factor of 10 (based on the independent consultant's report) and the estimated value of the inventory.

If the assembly centre is also used for animals other than pigs, no compensation will be granted for loss of assets: since collection of other animals can continue, it is assumed that no such loss has been incurred.

The inventory included in the loss of assets estimate must be destroyed. The assembly centre's assets must not under any circumstances be used for a pig assembly centre or, during a ten-year period after ceasing to operate, for an assembly centre for other animals.

(9) The measure, which runs until the end of 2001, can be extended and payment spread over subsequent years if revenue from the parafiscal charge is insufficient for payment in 2001.

(10) The scheme entered into force following its publication in the Dutch Official Gazette. The Dutch authorities stated that the intention was to give operators the opportunity to take an informed decision on whether or not to continue operating. Applications for aid for ceasing operation had to be submitted by 30 September 1998.

However, the Dutch authorities delayed implementation pending Commission approval of the aid. The ordinance on the parafiscal charge is moreover still subject to approval at national level.

(11) The recipients are pig assembly centres.

(12) The estimated budget for 1999, 2000 and 2001 is NLG 10 million a year. The Ministry will pay NLG 20 million, while the Livestock and Meat Marketing Board will pay the remaining NLG 10 million out of the proceeds from a parafiscal charge on pigs brought to assembly centres.

(13) The Livestock and Meat Marketing Board will levy the parafiscal charge on pig assembly centres. The charge, which is based on the number of pigs brought in, transhipped and transported out, is NLG 0,40 per piglet, NLG 0,80 per pig and NLG 1,00 per sow (should the proceeds prove insufficient, these amounts can be increased to maxima of NLG 1,00, NLG 1,50 and NLG 2,00 respectively). The charge must not be included in the price invoiced by the assembly centre to its customers. The charge does not apply to imported animals.

([1]) A pig-equivalent is a unit of account which is used to express the average number of pigs kept at the assembly centre during 1994, 1995 and 1996, on the basis of which different sorts of pigs can be compared: a piglet weighing less than 45 kg represents 0,45 pig-equivalent, a pig weighing 45 kg or more intended for slaughter represents 1 pig-equivalent, a pig weighing 45 kg or more intended for breeding represents 1,82 pig-equivalent.

(14) The procedure was initiated for the following reasons.

In the notification, the Dutch authorities justified the aid by referring to Commission practice as regards aid for ceasing production.

The Commission generally regards aid for up to 100 % of the costs involved in shedding agricultural production capacity as compatible with the common market (see, for example, aid measures N547/96, N452/95, N47/95, N463/93 and N458/94), provided that the following four conditions are met:

1. the aid must be in the general interest of the sector concerned;

2. the recipient must do sufficient in return;

3. under no circumstances must the aid scheme serve as rescue and restructuring aid;

4. loss of assets and losses resulting from future income foregone must not be overcompensated.

(15) In the case at issue, however, the Dutch authorities' proposed rules on ceasing production do not seem a suitable basis for approving the aid measure. While the rules relate to voluntary cessation of production, the firms in the case at issue have already been closed by law. Granting compensation to closed firms which are unable to meet hygiene requirements may result in overcompensation and even adversely affect trade on potential new markets (or on related markets where they are already active). The measure thus appears to lack the incentive effect which the Commission normally requires State aid measures to contain before they may be considered for approval.

Firms which are unable or unwilling to meet the new hygiene requirements and which permanently cease to operate because of the costs resulting from those requirements and because of the expected profit are, in the Commission's opinion, taking a normal business decision; the new hygiene rules appear to be a normal business risk. The Commission therefore considers that particularly compensation for loss of income, but also any other form of compensation, can be regarded as overcompensation.

(16) Another reason for initiating the procedure was the method used to calculate compensation for loss of income. The independent consultant's report shows that profit per pig-equivalent varies from NLG 0,74 to NLG 1,28. This amount is based on the annual accounts of five of the 48 pig assembly centres in the Netherlands. Pig assembly activities are often only a (small) part of a firm's transport, trade and export operations. Annual accounts do not always make it possible to determine the return from pig assembly activities alone and are sometimes not usable for other reasons either (because one-off entries or important subsidiary operations give a distorted picture).

The Commission has doubts about the statistical significance of a random sample of just five firms for the purposes of determining compensation. Given the five firms' widely differing profit margins, it doubts whether the minimum profit margin can be set at NLG 0,75 without this leading to overcompensation for some firms.

(17) The Commission therefore takes the view that the proposed scheme is not based on objective criteria and that resultant overcompensation cannot be ruled out.

(18) In the light of the above, the Commission doubts whether the proposed aid measure is compatible with the common market and has decided to initiate the procedure.

III. **Interested parties' comments**

(19) The Livestock, Meat and Eggs Marketing Board replied by fax on 29 June 1999.

(20) The Board refers to the circumstances in which the new scheme was introduced: no provision was made for transitional arrangements. Although they seek to protect society's interests and those of the pig sector, the new rules are disproportionately harmful to a relatively small group of assembly centres.

(21) In a comparable case concerning pigswill, the Dutch Supreme Court ruled on 18 January 1991 that there was a right to compensation. In that case an immediate ban on feeding kitchen and slaughter waste to pigs was accompanied by inadequate compensation arrangements. The Supreme Court ruled that the Minister had acted unlawfully by introducing the measure without providing for transitional measures or other compensation arrangements.

(22) On the basis of that judgment, the Dutch Government is required to compensate the loss incurred by assembly centres which have had to cease operating.

(23) The Board also points out that the Commission is entirely mistaken in the view that, since assembly centres not satisfying the new rules would have had to close in any case, no aid needs to be granted. The closure of firms resulting from swine fever was only temporary. Since all the firms concerned had met the requirements applying before the outbreak, they could assume that they would be able to resume operating after the outbreak. If firms which do not meet the new

requirements should not be granted aid because they would have ceased operating anyway, it must be borne in mind that this is not a voluntary decision and results from the more stringent hygiene requirements. Based on the Supreme Court judgment referred to above and given the lack of transitional measures, the State is in any case obliged to compensate the loss.

IV. **The Netherlands' comments**

(24) By letter of 5 March 1999 the Dutch authorities replied as follows to the Commission's letter notifying the Netherlands that the procedure would be initiated.

(25) In the Dutch authorities' view, the Commission took insufficient account of the context surrounding the aid measure's approval. In the light of the damage caused by swine fever, tightening up the veterinary and hygiene rules was seen as a way of preventing such problems in future. At the same time, the number of pig assembly centres had to be reduced. The package of measures had to be introduced as quickly as possible in order to minimise the risk. Since trade had in any case come to a standstill because of the outbreak of swine fever, all operating licences were revoked. Under normal circumstances provision would have been made for a transitional period, particularly since investment (in some cases up to NLG 1 million) had to be raised by firms which had not been operating for some time and hence had not been generating any turnover.

(26) A comparison can be drawn with the hygiene regulations introduced on 1 July 1998 to control infectious diseases, which was also aimed at preventing swine fever, except for the provisions on washing installations and disinfection facilities for vehicles in pig slaughterhouses; since those provisions did not enter into force until 1 December 1998, pig slaughterhouse operators were given the opportunity to invest in installations as required.

(27) The Commission is wrong to regard tightening up the hygiene requirements as something separate from the adaptation policy. Tightening up the requirements with immediate effect is possible only if the adaptation measures are approved. The Commission's reference to the Supreme Court ruling, and to the fact that the free interplay of market forces without the aid measure would not by itself induce potential aid recipients to adopt a course of action which would contribute towards achieving those objectives, are not relevant here since the aid is regarded as necessary because otherwise it would not be possible to tighten up the requirements with immediate effect.

(28) Nor can closure be said to be voluntary and permanent. Without government measures, all assembly centres would have been able to continue operating. The Commission rightly points out that it is not possible to say with certainty whether the operators planned to resume, but this is irrelevant. All aid schemes for ceasing production are intended for operators who are prepared to stop, subject to certain conditions. The underlying motives for making use of such a scheme are in themselves irrelevant (apart from the fact that the aid scheme must not serve as rescue and restructuring aid). The proposed aid measure is therefore in accordance with the policy which the Commission normally applies to schemes for ceasing production.

(29) The Dutch authorities notified the following changes to the compensation arrangements by letter of 27 May 1999. In view of the Commission's comments, 14 firms were examined more closely and it was found that in a number of them the profit margin was lower than the minimum of NLG 0,75 stated in the scheme.

(30) Compensation was revised accordingly to NLG 2,5 per pig-equivalent (instead of the original NLG 3,75), unless it can be demonstrated from the annual accounts or an accountant's report that the average income margin per pig-equivalent exceeds NLG 0,50, in which case the aid is increased proportionally up to a maximum of NLG 5,75 per pig-equivalent (instead of the original NLG 5).

(31) By letter of 30 July 1999 the Dutch authorities responded to the Board's letter. Although the Board supports the Dutch Government's statements, the Government considers the reference to the Supreme Court ruling less appropriate. The Dutch Government questions whether the case now at issue corresponds to the one dealt with on that occasion by the Supreme Court. At any event the question of whether the Dutch Government is obliged to pay compensation under Dutch law is not, in the Government's view, relevant for the purposes of determining whether the scheme is compatible with the common market.

(32) The Dutch authorities confirm that the ruling referred to shows that the Government is not free simply to make regulations more stringent without taking other interests into account. The Dutch Government takes the view that tightening up the hygiene rules for assembly centres does not result in an obligation to pay compensation. From an administrative viewpoint it regards the lack of a transitional period as the main justification for the proposed aid scheme, which is therefore considered to be compatible with the common market on the basis of Article 87 of the Treaty.

V. **Assessment of the measure**

(33) Article 21 of Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat [1] (as last amended by Regulation (EC) No 3290/94 [2]) stipulates that, save as otherwise provided in that Regulation, Articles 92 to 94 (now Articles 87 to 89) of the Treaty are to apply to this sector.

(34) Article 87(1) of the Treaty is to apply on condition that the measures provide a firm with an economic advantage which it would not have had in the normal conduct of its business, that the aid is granted to certain firms, that the aid is granted by a Member State or via State resources, and that the aid tangibly affects trade between the Member States.

(35) According to the judgment of the Court of Justice of the European Communities of 27 September 1988 in Joined Cases 106 to 120/87 (*Asteris* v *Greece*) [3], compensation which can be claimed on the basis of national case law does not constitute aid within the meaning of Article 92(1) (now Article 87(1)) of the Treaty.

(36) In the light of the Board's comments and the reference to Dutch legislation, an examination must be made as to whether the measure is actually an aid measure. According to the information supplied and the references to the Supreme Court ruling, the Dutch authorities are legally obliged to make provision for a transitional period or a compensation scheme based on the principle of equality vis-a-vis government encumbrances. The Supreme Court states that a sudden ban on using pigswill is not a normal business risk for approved firms operating in accordance with the rules. Although the ban on using pigswill is in itself regarded as a lawful measure from the viewpoint of animal health, the Minister is acting unlawfully if no arrangements are made to give firms the opportunity to adapt or, if that is not possible, otherwise to offer those firms compensation. The State must compensate for the loss incurred. The underlying idea is that the whole pig sector benefited from that measure (less risk of African swine fever), while for certain pig farmers (who used only pigswill as feed) the new measures were disproportionately harsh. In the case at issue, pig assembly centres face disproportionate difficulty while the more stringent hygiene rules benefit the whole pig sector.

(37) Although the Dutch authorities consider the Supreme Court ruling not to be relevant for the purposes of determining whether the measure is compatible with the common market, they nevertheless indirectly confirm that there is a legal obligation to make provision for transitional measures or compensation arrangements by stressing that adaptation policy cannot be regarded separately from tightening up the hygiene rules and that one is not possible without the other.

(38) The Dutch authorities pointed out that the lack of a transitional period constitutes the main justification for the proposed aid measure from an administrative viewpoint. They demonstrated that the assembly centres which do not cease operating can receive investment aid: at the same time as the measure at issue, the scope of an investment aid measure is extended to include investment for adapting facilities. The following amounts may be granted on the basis of that investment measure: maximum NLG 500 000, average NLG 304 000, minimum NLG 78 000. Under the measure at issue, the amounts are: maximum NLG 1 738 000, average NLG 741 000, minimum NLG 34 000. According to the Dutch authorities, the difference in aid amounts is justified because permanently ceasing production has more serious consequences than continuing to operate after adapting facilities. The Dutch authorities also point out that firms themselves may choose between cessation and adaptation; since a number of firms have continued operating, it can be assumed that the aid under the investment scheme provides sufficient compensation for the lack of a transitional period.

(39) In the case at issue compensation is paid only to assembly centres which permanently cease operating, while the other assembly centres do not receive the same compensation although they were nevertheless in the same situation (temporary cessation of operation without provision for a transitional period during which firms could adapt to meet the new hygiene rules). The Dutch authorities pointed out that an investment aid scheme exists for the benefit of firms which wish to adapt and to continue operating. Both measures together should therefore be regarded as measures under which all assembly centres are offered compensation for the lack of a transitional period for the introduction of more stringent hygiene rules.

(40) Given the differences between the two measures (*inter alia* the amounts of aid which can be obtained), it is difficult to regard the measures as components of one and the same compensation scheme. The proposed measure must therefore be regarded as aid within the meaning of Article 87(1). All the conditions of Article 87(1) appear to be met: the aid provides firms with an economic advantage which they would not have had in the normal conduct of their business; the aid is granted to certain firms and is funded with State resources; moreover, the aid threatens to have an adverse effect on

[1] OJ L 282, 1.11.1975, p. 1.
[2] OJ L 349, 31.12.1994, p. 105.
[3] [1988] ECR 5515, paragraph 24.

trade between the Member States by strengthening the competitive position of the firms concerned compared with other firms in the Community. An examination must therefore be made of whether a derogation can be granted from the general principle whereby State aid is incompatible on the basis of Article 87(1).

(41) The ban on State aid referred to in that provision is not unconditional. The derogations referred to in Article 87(2)(a) and (c) of the Treaty clearly do not apply in this case. Nor can it be inferred from any of the Dutch authorities' comments that the purpose of the aid would be to make good the damage caused by natural disasters or exceptional occurrences, within the meaning of Article 87(2)(b). As regards the derogations contained in Article 87(3), the measure must be examined to see whether it can facilitate the development of certain economic activities, within the meaning of Article 87(3)(c). Thus the Dutch authorities' arguments have to be examined to see whether they are sufficient to make the measure eligible for that derogation.

(42) As noted above, the Dutch authorities refer to Commission practice regarding aid for ceasing production (see recital 14). The Commission nevertheless expressed its doubts about this argument, given the lack of incentive effect, on the basis of which it initiated the procedure under Article 88(2). In its judgment in Case 730/79 (*Philip Morris* v *Commission*) [1], the Court of Justice of the European Communities agreed with the principle that aid which a Member State grants to firms is eligible for the derogations contained in Article 87(3) only when the Commission is able to establish that the aid contributes towards achieving one of the objectives (specified in those provisions) which the aid recipient would not be able to achieve on its own under normal market conditions (see also Commission Decision 89/661/EEC — Alfa Romeo [2]). Were an exception to be made for aid which in no way contributes towards achieving such an objective or which is not necessary for that purpose, this would mean that firms in certain Member States would benefit unfairly just from a strengthening of their financial position, a situation which could adversely affect trade between Member States and distort competition, without justification on grounds of Community interest as required by Article 87(3).

(43) The Dutch authorities have various objectives in this case: they wish to tighten up the hygiene requirements and at the same time reduce the number of pig assembly centres (closing 35 out of 48) so that the remaining ones can operate on a larger scale, which will help to improve quality and limit the veterinary risks, and all of this in combination with an economically healthy sector. Reducing the number of assembly centres is regarded as an essential aspect, since they can also be a source of disease.

(44) On initiating the procedure, the Commission pointed out that firms which are unable or unwilling to meet the new hygiene requirements and which permanently cease operating appear to be taking a normal business decision. Aid for ceasing operation in such circumstances cannot in principle be accepted, since the new hygiene rules count as a normal business risk.

(45) Ceasing to operate because the hygiene rules have been tightened up must nevertheless be seen in the context of a broader policy aimed at reducing veterinary risks by limiting the number of assembly centres and thereby contributing towards the sector's development.

Aid is granted for investment aimed at adapting facilities to the new hygiene rules, but such aid by itself would certainly not be sufficient to achieve the supplementary objective of reducing the number of pig assembly centres, an objective which also helps to reduce the veterinary risk. This animal health aspect justifies the aid for permanently ceasing production.

The aid measure must be assessed in the context of a dual policy under which aid is granted both for adapting facilities and for permanently ceasing production. In that context the assembly centres clearly had the choice between adapting their facilities or permanently closing down in the same way as if they had not been closed owing to a government measure. The aid clearly constitutes an incentive for the firms to follow a certain course of action (closure) which they would not otherwise have followed. The aid can therefore be regarded as a measure with incentive effect.

(46) The other conditions governing Commission approval for aid for closing production capacity appear to have been met in this case:

1. The aid must be in the general interest of the sector concerned. The aid benefits the whole sector.

2. The recipient must do sufficient in return. Recipients are required to cease all assembly centre operations.

3. Under no circumstances must the aid scheme serve as rescue and restructuring aid. No aid is granted on the basis of the firm's financial situation.

[1] [1980] ECR 2671.
[2] OJ L 394, 30.12.1989, p. 9.

4. Loss of assets and losses resulting from future income foregone must not be overcompensated. Under the amended compensation scheme, which is based on a much larger group of firms (14 out of 48), considerably lower (minimum) compensation is granted, so there is no question of overcompensation.

(47) On the basis of the above, the Commission considers that the aid measures proposed by the Dutch Government facilitate the development of economic activity in the sector. The measure therefore falls under Article 87(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The aid measure which the Netherlands intends to implement concerning rationalisation of pig assembly centres is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

The aid measure may therefore be implemented.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 8 December 1999.

For the Commission

Franz FISCHLER

Member of the Commission