COMMISSION

COMMISSION DECISION

of 21 December 2000

on the exemption from mineral levies under the manure law which the Netherlands intends to grant

(notified under document number C(2000) 4404)

(Only the Dutch version is authentic)

(2001/371/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 called on interested parties to submit their comments pursuant to the provision cited above [1],

Whereas:

I. PROCEDURE

(1) By letter dated 7 October 1999, registered on 13 October 1999, the Netherlands notified the Commission of certain exemptions to the mineral levies which have been introduced by the manure law. By letters dated 10 January 2000, registered on 12 January 2000, it provided the Commission with further information.

(2) By letter dated 20 March 2000, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the proposed exemptions to the mineral levies.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received no comments from interested parties.

(5) The Dutch authorities have provided further information by letter of 17 May 2000.

II. DESCRIPTION

(6) This system in Chapter IV of the manure law provides for an obligatory bookkeeping system for minerals on the individual holding and maximum phosphate and nitrogen emissions into the environment per holding. If emissions go beyond these maximum quantities taxes will have to be paid for these quantities. The prohibitive levies are only being levied if the total amount of phosphate and nitrogen introduced on a farm minus the total amount of minerals removed exceeds in a calendar year the norms for the permissible wastage of phosphate and nitrogen in the environment (so-called 'loss norms'). If an undertaking takes effective measures, e.g., the removal of manure which may not be spread on the land, it will not have to pay any levies.

(7) Under the proposed measure small undertakings (so-called 'hobby-undertakings') and garden centres are fully exempted from the mineral levies provided for by the manure law. Horticultural farms growing crops in glasshouses or on substrate are partially exempted.

A. EXEMPTION FOR SMALL UNDERTAKINGS (HOBBY UNDERTAKINGS)

(8) Article 38 of the manure law already provides for an exemption for, *inter alia*, extensive livestock farming, as the policy aim is to focus on the undertakings with the biggest environmental risks to which category extensive livestock farms in principle do not belong.

(9) The reason for introducing a separate exemption for small, extensive livestock farms (hobby undertakings) is that some of these may not meet the formal requirements provided for by Article 38 of the manure law. The idea is that the production of animal manure is so limited on such undertakings that measures for the disposal of the manure can easily be adopted. This exemption applies to undertakings which have on average no more than three livestock units [3] and three hectares of agriculture land during a calendar year, and

[1] OJ C 190, 8.7.2000, p. 4.
[2] See footnote 1.

[3] For example, sows for slaughter are 0,288 livestock units, which implies that about 10 such sows can be held; lying hens older than 18 weeks are 0,012 livestock units, which implies that about 250 such hens can be kept.

which do not introduce any animal or other organic fertilisers. Hobby undertakings are also exempted from the levy destined to cover the costs the government has to bear to execute the manure law.

B. EXEMPTION FOR HORTICULTURAL UNDERTAKINGS

(10) Horticultural undertakings growing crops in glasshouses (hereafter 'soil-bound horticulture') or on substrate (hereafter 'non-soil bound horticulture') are partially exempted. The reason for excluding these categories is that the system of mineral levies does not take into account the specificity of the growing processes for soil-bound and non-soil bound horticulture.

(11) The amount of fertilisers exempted under this scheme amounts to maximum 460 kg phosphates per hectare of growing medium or farm building effectively used for horticulture. The maximum for nitrogen per hectare is 800 kg.

(12) Article 54 of the manure law provides for a temporary exemption for artificial manure for determining the amount of phosphates. Therefore, a similar exemption will apply to horticulture.

C. EXEMPTION FOR GARDEN CENTRES

(13) Garden centres introduce fertilisers in order to sell them to private persons. The garden centres are exempted from the mineral levies. Furthermore, the garden centre as seller and the private person as buyer are exempted from the administrative requirement to prepare a delivery receipt for the delivery of animal or organic manure.

(14) Garden centres may also perform horticultural activities in which case the partial exemption applicable to horticultural undertakings mentioned above also applies.

D. REASONS FOR THE COMMISSION TO OPEN THE PROCEDURE

(15) Although the Dutch authorities are of the view that the tax exemptions are justified 'by the nature or general scheme of the system' (see Commission notice on the application of the State aid rules to measures relating to direct business taxation [4], hereafter 'Notice on direct business taxation') and therefore, does not constitute State aid within the meaning of Article 87(1) of the EC Treaty, they have notified the regulation for examination by the Commission.

(16) Item 23 of the notice on direct business taxation indeed provides that the differential nature of some fiscal measures does not necessarily mean that they must be considered to be State aid. This is the case with measures whose economic rationale makes them necessary to the functioning and effectiveness of the tax system. However, it is up to the Member State to provide such justification.

(17) The Dutch authorities provided the following justification:

(18) With regard to hobby undertakings: The Minas system contained in the manure law aims at reducing the loss of phosphates and nitrogen into the environment at company level. Minas does not want to bring private individuals who keep a few animals in the scope of the law, since there is no farming business and hardly any environmental risks. If one keeps a few animals but has only very limited land, it is possible that that person does not meet the requirement of 2,5 livestock units per hectare as laid down in Article 38 of the law and can thus not benefit from the exemption from the mineral levies. To avoid that individuals who keep animals for non-commercial purposes have to pay levies, the proposed measure contains an exemption for so-called hobby undertakings. Animals are deemed to be kept for non-commercial purposes when there are no more than three livestock units, irrespective of the amount of farmland available.

(19) With regard to horticulture and garden centres performing horticultural activities: the input norms of 460 kg of phosphates and 800 kg of nitrogen for horticulture undertakings and garden centres with horticultural activities are based on research data from the Research Station for Floriculture and Vegetables under glass on the uptake of phosphates and nitrogen by crops grown in glasshouses. These data show that the uptake of crops grown in glasshouses amounts on average to 460 kg phosphates and 800 kg nitrogen per year. The uptake is thus considerably higher than for outdoor crops. This is logical as production for crops cultivated under glass is eight times as high as for outdoor crops. By putting the norms for phosphate and nitrogen at the level of the uptake of phosphates and nitrogen, it can be avoided that these undertakings have to pay levies unduly. This is the reason that these norms are higher than the norms for agricultural undertakings and the norms contained in the Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [5], hereafter 'Nitrates Directive'.

(20) With regard to garden centres introducing fertilisers to sell to private persons: the amount of introduced manure and manure sold is in the end identical.

(21) The Commission considered that this explanation did not permit it to conclude that the various exemptions are justified by the nature and economy of the system.

[4] OJ C 384, 10.12.1998, p. 3.

[5] OJ L 375, 31.12.1991, p. 1.

(22) Article 38 of the manure law provides for an exemption for extensive livestock farming. Notwithstanding their limited size, some of the hobby undertakings may be economic actors. It should be emphasised that there is no *de minimis* threshold in agriculture ([6]). Providing for an additional exemption for such hobby undertakings not meeting the formal exemption requirements would not seem to be justified by the nature or general scheme of the system. Furthermore, it would not seem obvious to now apply a criterion of three livestock units (irrelevant of the amount of land, but in any event less than three hectare), whereas the general exemption of Article 38 is based on a criterion of 2,5 livestock units (per hectare).

(23) As regards the exemption for horticulture, it would seem within 'the nature or general scheme of the system' to equate the land or growing medium inside the farm building with farm land and then apply the same input norms. A normal application of the input/output regime would thus assure equal treatment and would not constitute a State aid. However, in the case at hand, it would seem that the amounts which can be introduced are much higher (460 kg phosphate per hectare and 800 kg nitrogen per hectare). Therefore, also in this respect, there would not seem to be an inherent reason for granting the proposed exemption to horticulture.

(24) As regards garden centres selling fertilisers to sell to private persons, such exemption could be viewed as an exemption 'within the nature or general scheme of the system' as the amount of introduced manure and manure sold should in the end be identical — the garden centre itself does not have any losses into the environment. In this respect, it would seem that there is no aid. However, as regards the exemption for garden centres performing themselves horticultural activities, to the extent the same system applies as for soil-bound and non-soil bound horticulture, again there would not seem to be an inherent reason for granting the proposed exemption.

(25) Finally, the Commission had already expressed doubts about the compatibility of the Dutch manure law and system of mineral levies with the Nitrates Directive. It has issued a letter of formal notice to which the Netherlands has replied and which is currently further investigated by the Commission. The system of mineral levies, which allows undertakings to continue exceeding the norms laid down in the Nitrates Directive if they pay the levies, may not be compatible with the Nitrates Directive. The fact that the norms may be exceeded by the farmers on payment of a levy may not give sufficient guarantee that the norms will be met. Also, the so-called loss norms are higher than what is allowed under the Nitrates Directive without triggering the payment of levies. Article 38 of the manure law already allows for an exemption for extensive livestock farming, submitting those farms to a maximum quantity of manure that can be spread each year which is stated in terms of phosphate instead of nitrate, as is required by the Nitrates Directive and which exceeds the maximum permitted by the Directive. Granting further exemptions may aggravate this situation.

(26) Furthermore, if the exemption were to be granted to hobby undertakings, there would seem to be no rule assuring compliance with the limit provided by the Nitrates Directive (170 kg N/ha/year). The Nitrates Directive does not provide for a *de minimis* exception for small undertakings. The Dutch authorities have not demonstrated that such hobby undertakings would *per se* meet the norms imposed by the Nitrates Directive.

(27) It should also be noted that the amount of nitrogen permitted for garden centres and horticulture vastly exceeds the amounts permitted on the basis of the Nitrates Directive (170 kg of nitrate per hectare; derogation permitted for four years up to 210 kg). In the absence of data on the loss of nitrate in the water and taking into account the high amount of input of nitrogen permitted (vastly exceeding the norms laid down in the Nitrates Directive) the Commission has doubts about the environmental effects of the proposed exemptions.

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

III. **COMMENTS FROM DUTCH AUTHORITIES**

(29) By letter of 17 May 2000, the Dutch Minister of Agriculture, Nature Conservation and Fisheries has written to Commissioner Fischler bringing forward arguments to reconsider the opinion set forward by the Commission in the opening of the procedure. By letter of 3 July 2000, the Dutch authorities have confirmed that this letter is to be viewed as the official submission of comments from the Netherlands in reaction to the opening of the proceedings in the sense of Article 6(1) of Council Regulation (EC) No 659/1999 ([7]).

(30) The information provided by the Dutch authorities is summarised hereafter.

(31) The Dutch authorities argue that the Commission wrongly assimilates the proposed measures to a tax exemption and thus a loss of tax income, which constitutes a State aid. The Commission thus neglects the prohibitive character of the levies. Minas does not aim to generate income for the State, but to regulate the use of fertilisers. It can thus be compared to fines imposed for violation of criminally sanctioned provisions. In view of the content and aims of the measure, it cannot be qualified as a tax measure, an exemption of which constitutes State aid in the sense of Article 87 of the Treaty.

([6]) Commission notice on the *de minimis* rule for State aid, OJ C 68, 6.3.1996.

([7]) OJ L 83, 27.3.1999, p. 1.

(32) Furthermore, the Dutch authorities indicate that they do not dispute the right of the Commission to object to the norms of the Dutch manure policy on the basis of the Nitrates Directive. However, the objections of the Commission should be dealt within the context of the Nitrates Directive and not via a State aid procedure.

(33) Finally, the Dutch authorities claim, without bringing forward any further arguments, that the proposed exemptions are fully justified in view of the nature and aims of Minas.

IV. **ASSESSMENT**

(34) In the absence of any further information, the doubt which lead the Commission to open the procedure against the proposed exemptions persists.

(35) Article 87(1) of the Treaty provides as follow: 'Save as otherwise provided in this 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 shall, in so far as it affects trade between Member States, be incompatible with the common market.'

(36) In the case at hand, support is granted by a Member State in favour of certain undertakings as they are relieved from certain levies. The fact that this scheme is analogous in working to fines imposed for certain criminal provisions does not alter the fact that the Minas system is construed as a levy system. Derogations therefrom may constitute State aid. This support may affect trade between Member States. There is an important trans-border trade of live animals and horticultural products. Furthermore, if a Member State would have established a fine system, it can be argued that exemptions from such a generally applicable fine system could still constitute State aid in the sense of Article 87(1) of the EC Treaty. Indeed, the Court of Justice of the European Communities has confirmed that the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense, are similar in character and have the same effect ([8]). As other undertakings are submitted to the levies (or 'fines'), the exempted undertakings clearly improve their competitive position. Contrary to what the Dutch authorities maintain, the nature and aims of the scheme do thus not permit to avoid a qualification as State aid. The Court and the Tribunal have also on various occasions confirmed that 'Article 87(1) makes no distinction according to the causes or aims of the aid in question, but defines it in relation to its effects' ([9]). The effect of the measure is to confer an advantage on certain undertakings who are exempted from certain taxes.

(37) The arguments raised by the Dutch authorities before the opening of the procedure regarding the non-commercial nature and the absence of farming business in what they call 'hobby undertakings' ([10]) (see recital 18) must also be rejected. The absence of commercial purposes is a pure presumption. As indicated in footnote 3, three livestock units is for instance the equivalent of approximately 250 laying hens. The proposed criteria indicate only that the beneficiary has a very small amount of land in comparison with the amount of animals held, and does not meet the general exemption foreseen in Article 38 of the manure law (no more than 2,5 livestock units per hectare). It follows that the proposed exemption may benefit specific undertakings involved in the commercial production of products listed in Annex I of the Treaty which are or may be involved in trans-border trade. Therefore, the measure does not seem justified by the nature or general scheme of the system.

(38) The Dutch authorities have not brought forward any additional information with regard to garden centres and horticultural undertakings.

(39) Therefore, the Commission maintains the objections it has raised against the proposed partial exemption for horticulture undertakings and garden centres performing horticulture activities. As regards the exemption for horticulture, it is within 'the nature or general scheme of the system' to equate the land or growing medium inside the farm building with farm land and then apply the same input norms. However, in the case at hand, the amounts which can be introduced are much higher (460 kg phosphate per hectare and 800 kg nitrogen per hectare ([11])). Levies must only be paid once these higher norms are exceeded. Therefore, there is no inherent reason for granting the proposed exemption to horticulture and the Dutch authorities have not provided such justification. As regards the partial exemption for garden centres performing themselves horticultural

([8]) Case C-295/97, 17 June 1999, *Piaggio* v *Ifitalia* e.a., ECR 1999 page I-3735.

([9]) Case C-75/97, 17 June 1999, *Belgium* v *Commission* ('Maribel bis/ter', ECR 1999 page I-3671; Case T-14/96, 28 January 1999, *BAI* v *Commission*, ECR 1999 page II-139.

([10]) It should also be noted that the draft law and the explanatory note just use the term 'small undertakings'. It would seem that commercial undertakings are in no way excluded from the proposed exemption.

([11]) By way of comparison, the manure law foresees a maximum permissible loss per hectare of agriculture land of 35 kg phosphates in 2000 and 2001, which will be further reduced in future to 25 kg as of 2005; for nitrogen, the maximum amount permitted for grassland is 275 kg in 2000 and 2001, to be further reduced in future (200 kg as of 2005).

activities, to the extent the same system applies as for soil-bound and non-soil bound horticulture (i.e. with higher permissible amounts of phosphates and nitrogen per hectare, whereby levies must only be paid beyond these amounts), again there is no inherent reason for granting the proposed exemption. Therefore, the measure is not justified by the nature or general scheme of the system.

(40) On the contrary, the exemptions would seem to meet all the conditions (referred to by way of analogy) mentioned in paragraphs 9 to 12 of the notice on direct business taxation: (a) the measure confers on recipients an advantage which relieves them of charges that are normally borne from their budgets, (b) the advantage is granted by the State (loss of revenue), (c) the measure may affect competition and trade between Member States, which is the case if the beneficiary carries on economic activity involving trade between Member States, (d) lastly, the measure must be specific or selective.

(41) This kind of aid must be considered as operating aid. Such aids which simply relieve economic operators of their normal operating costs confer only a short-term economic advantage for the beneficiary which ceases as soon as the payment of aid stops and are particularly liable to distort competition. Such aids therefore cannot be considered either to promote the economic development of areas where the standard of living is abnormally low (Article 87(3)(a)) nor to facilitate the development of certain economic activities or of certain economic areas (Article 87(3)(c)).

(42) Operating aid is not normally allowed (see item 5.5.1 of the Community Guidelines on State aid in the agriculture sector ([12])). Such aids can only be allowed if they are temporary and degressive, which is not the case here.

(43) The Commission explicitly rejects the argument as if the State aid procedure would be (ab)used to enforce the Nitrates Directive. The examination under Articles 87 to 89 of the EC Treaty encompasses an investigation of compatibility with other Community legislation. It is clear that the outcome of a State aid procedure may never produce a result which is contrary to the specific provisions of the Treaty ([13]). (See Article 174 (ex 130 R) of the Treaty and Community legislation adopted on that basis (see Article 87(1) of the EC Treaty)). It can also be pointed out that a specific infringement procedure has been introduced against the Netherlands for non-respect of the Nitrates Directive ([14]) where the Commission took the view that at that stage, the Dutch manure legislation would not seem to comply with the Nitrates Directive. In any event, as explained above, the Commission has confirmed the objections against the proposed tax relief independent of its compliance with the Nitrates Directive as it must be considered as a pure operating aid.

V. **CONCLUSION**

(44) For the reasons given above, the Commission must draw the conclusion that the proposed tax exemptions for small undertakings (hobby undertakings), for horticultural undertakings and for garden centres performing horticultural activities cannot be considered to be in the common interest, and thereby qualify for exemption under Article 87(3)(c) of the Treaty.

The Commission therefore takes the view that the aid measure in question is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The tax exemptions under the Minas system which the Netherlands intends to grant to small undertakings (hobby undertakings), horticultural undertakings and garden centres performing horticultural activities 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, 21 December 2000.

For the Commission

Franz FISCHLER

Member of the Commission

([12]) OJ C 28, 1.2.2000, p. 2.

([13]) Case C-225/91, 15 June 1993, *Matra* v *Commission*, ECR 1993 page I-3203.

([14]) See Commission Press Release IP/00/204 of 1 March 2000.