COMMISSION DECISION

of 19 June 2002

on State aid implemented by the Netherlands for operations by Dutch tugboats in seaports and on inland waterways in the Community

(notified under document number C(2002) 2158)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2002/901/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 the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 [1] laying down detailed rules for the application of Article 93 of the EC Treaty,

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By complaint lodged on 17 April 2000, the Commission was informed that the Netherlands had allegedly illegally granted State aid in respect of tonnage tax to tugboat operations in ports and on inland waterways in the Community. Three other parties [3] raised concerns about this issue, one of whom filed a formal complaint.

(2) By letter of 12 September 2000, the Commission addressed a number of preliminary questions to the Dutch authorities, which were discussed in a meeting and formally replied to by letter of 8 November 2000, as rectified by a corrigendum of the same day.

(3) Furthermore, the complainant who filed the complaint of 17 April 2000 provided numerous additional items of information which led to several meetings between the complainant and Commission staff.

(4) Following a letter from Germany of 18 January 2001, a meeting on this matter was held with the German authorities on 29 March 2001.

(5) On the basis of the information at their disposal, the Commission services held a meeting with the Dutch authorities on 19 April 2001.

(6) By letter dated 11 July 2001, 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 aid.

(7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission invited interested parties to submit their comments.

(8) The Commission received initial comments from the Dutch government and comments from 51 interested parties. It forwarded them to the Netherlands, which was given the opportunity to react; its comments were received by letter of 18 April 2002, registered on 22 April 2002 (A/57255).

2. DETAILED DESCRIPTION OF THE AID

2.1. Commission Decisions in Cases N 394/88, N 384/91, N 738/95, NN 89/97 and N 8/98

(9) By letter of 23 August 1988, the Netherlands first notified a fiscal facility for the improvement of the competitive position of the Dutch fleet. The Netherlands referred to a 1985 Commission communication to the

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 298, 24.10.2001, p. 5.
[3] Letter of 4 August 2000, registered in the DG for Energy and Transport on 9 August 2000.
Formal complaint of 4 April 2001, registered in the Secretariat of the Commission on 6 April 2001.
[4] See footnote 2.

Council concerning a common Community sea transport policy. These measures were approved by the Commission by letter of 2 December 1988.

(10) On 12 December 1994, the Commission decided to raise no objections to income tax and social security contribution reductions of 19 % and 5 % respectively (the 'fiscal facility') (Case N 384/91).

(11) By letter of 12 April 1996 (SG(96) D/3852), the Commission informed the Netherlands of its decision to raise no objections to further reductions in income tax and social security contributions of up to 38 % and 10 % respectively ('fiscal facility') and to raise no objections to the introduction of a 'tonnage tax' (Case N 738/95).

(12) As announced in its letter of 12 April 1996 mentioned in recital 11, the Commission reassessed and reapproved the tonnage tax and informed the Netherlands thereof by letter of 31 July 1997 (SG(97) D/6453) (Case NN 89/97).

(13) By letter of 20 May 1998 (SG(98) D/4032), the Commission informed the Netherlands of its decision to raise no objections to an increase from 38 % to 40 % in the aid under the fiscal facility approved under Case N 738/95.

2.2. **'Fiscal facility' and 'tonnage tax'**

(14) The *'fiscal facility'* provides for reductions in the levels of income tax and social security contributions for Community seafarers normally paid by the employer. Such a measure is intended to improve the competitiveness of the Dutch merchant fleet.

(15) The *'tonnage tax'* is an optional measure regarding corporate taxation of shipping companies. Under the tonnage tax, profits from maritime shipping activities are established at a standard rate on the basis of the tonnage operated by the shipping company irrespective of the actual profits made or the associated costs. Such a measure is also intended to improve the competitiveness of the Dutch merchant fleet.

(16) Neither of the Commission decisions in Cases N 738/95 and NN 89/97 (extension of the 'tonnage tax', see below) refers to tugboat operations or to tugboats in particular.

2.3. **Relevant scope of the notifications**

(17) The notifications and the information provided by the Dutch authorities in the cases mentioned in section 2.2 are clearly focused on transport operations carried out (mainly) at sea and include some further explanations, according to which tugboat operations carried out mainly at sea would qualify for the fiscal facility and the tonnage tax.

(18) It should be added that the tax law notified to the Commission in this context is entitled 'Belastingwetten in het belang van de zeescheepvaart' (Tax law related to seagoing shipping). The extent to which the information provided during the notifications in the abovementioned cases focused exclusively on maritime transport activities carried out at sea is illustrated below.

2.3.1. *Notification in Case N 384/91*

(19) The first notification in this context concerns Case N 384/91 which was approved in 1995. The notified law ([5]) provides that 'seagoing ship means a ship issued with a certificate of registry within the meaning of Article 3(1) of the "Zeebrievenwet" (Certificates of Registry Act), … that is operated at sea as part of a commercial undertaking or is intended for tugboat or rescue activities at sea and is engaged in providing such services to seagoing ships, with the exception of ships used for pilot services.'

(20) The explanatory note on this article (page 11) provides that the seagoing ship must be operated at sea as part of a shipping undertaking or intended and used for tugboat or rescue activities for seagoing ships. A seagoing ship that is used both at sea and on inland waterways is considered as being operated at sea provided its main activities are carried out at sea.

2.3.2. *Notification in Case N 738/95*

(21) According to the notification from the Dutch authorities, the only change in the 1995 Law as regards the 'fiscal facility', between Case N 348/91 and Case N 738/95, was the amount of aid. The prevailing definition of 'seagoing ship' remained unchanged as a basis for Case N 738/95.

(22) The same applies for the increase in aid intensity between the fiscal facility approved under Case N 738/95 and Case N 8/98, where nothing else changed apart from the increase in aid intensity.

([5]) Tax and National Insurance Contribution Scheme for Shipping Act 1994.

(23) Article 8c(2) of the 1964 Income Tax Act, as amended by the law notified as Case N 738/95 ([6]), provided that: 'For the purpose of this Article (related to tonnage tax), profits from shipping shall be taken to be profits earned from the use of a ship for the transport of goods or persons in international traffic over sea … as well as profits earned from the use of a ship for towing or the provision of general assistance at sea to the ships referred to above.'

(24) In the explanatory memorandum on the amending law ([7]) mentioned in recital 23, the following interpretation of Article 8c(2) was given: 'For the purpose of the tonnage tax basis, profits from shipping are taken to be profits earned from the use of a ship for the transport of goods or persons in international traffic over sea … as well as profits earned from the use of a ship for towing or the provision of general assistance at sea to ships.'

(25) That explanatory memorandum further contained the following paragraph: 'International traffic over sea: Following from the definitions given [in Article 50 of the Income Tax Act 1964 and Article 19 of the Corporate Tax Act 1969], for the purpose of the regulation under consideration, international traffic over sea is taken to mean traffic between a Dutch port and a foreign port and traffic between one foreign port and another. This does not cover traffic between two Dutch ports and the associated transport from the port to the depot or from the port to the consignee. The ship must be employed at sea for the transport of goods and persons. For the purposes of these regulations, a ship which is used for both activities at sea and on inland waterways is held as being used for activities at sea if the main focus of the activities is at sea …'.

(26) Finally, it is mentioned that 'Towing and the provision of general assistance: furthermore, ships intended to be used for towing or providing general assistance to ships at sea are taken into account for the purposes of the tonnage basis'.

([6]) Amendment to the Income Tax Act 1964, the Corporation Tax Act 1969 and the Tax and National Insurance Credit for Shipping Act 1995 (amendment to some of the tax laws relating to seagoing shipping). Ministry of Finance, Directorate-General for Taxation, Board of Legislation for Direct Taxes, No WDB95/166, The Hague, 13 June 1995: for consideration by the Council of Ministers.

([7]) Explanatory memorandum on the Amendment to the Income Tax Act 1964, the Corporate Tax Act 1969 and the Tax and National Insurance Credit for Shipping Act 1995 (amendment to some of the tax laws relating to seagoing shipping).

2.3.3. *Information provided in Case NN 89/97*

(27) The documentation provided for the reapproval of the tonnage tax focuses essentially on the effectiveness of the measure and contains no new conditions for qualification for the aid.

2.3.4. *Notification in Case N 8/98*

(28) The aid notified in Case N 8/98 concerns an increase in aid intensity for the 'fiscal facility' notified under Case N 738/95 (from 38 % to 40 %).

2.4. **Grounds for initiating the procedure**

(29) The Commission opened the formal investigation procedure in this case (Case C 56/01) on the grounds that it considered that it had not approved maritime transport State aid to operations by Dutch tugboats in ports and on inland waterways in the Community neither in Cases N 738/95 and NN 89/97 nor in any other related decision ([8]).

(30) This Commission decision was based, inter alia, on the information provided by the Dutch authorities (letter of 8 November 2000), according to which a certain number of the abovementioned port towage operations were granted or could be granted maritime transport aid under the schemes in Cases N 738/95 and NN 89/97.

(31) In decision C 56/01, the aid in question (tugboat operations in and around ports and on inland waterways in the Community) was therefore classified as new aid, which *a priori* was not considered compatible with the Treaty. The Netherlands was further requested to suspend such aid payments with a view to limiting potential damage caused to competitors by such illegal grants.

3. **COMMENTS FROM INTERESTED PARTIES**

(32) In the course of the procedure the Commission received (a) initial comments from the Netherlands, (b) comments from 51 other interested parties and (c) comments from the Netherlands on the comments from the 51 interested parties.

([8]) This decision was challenged by the Netherlands before the European Court of Justice (Case C-368/01).

3.1. **Initial comments from the Netherlands**

(33) By letter of 7 August 2001, the Netherlands replied to the opening of the procedure in Case C 56/01. The Dutch authorities essentially disagree with the Commission's decision to classify the subsidies in question as 'new' aid, since they consider that: (a) the 'fiscal facility' and the 'tonnage tax' were both approved or reapproved by Commission decisions; (b) the notification in Case N 738/95 provided for the 'tonnage tax' to apply to ships used for the provision of towage services or assistance to seagoing ships, qualification should be based on the construction and equipment of the tugboat and does not necessarily result from its activities being carried out at sea; (c) the letter of 8 November 2000 mentioned in paragraph 30 merely reiterates this point.

(34) The Dutch authorities further point out that inland waterway towage takes place in areas distinct from seaports and that inland waterway tugs are not qualified to operate at sea. Unlike inland waterway tugs, maritime law applies to tugs as from the moment they provide assistance to a seagoing ship, wherever such assistance is provided.

(35) It is also mentioned that the recent withdrawal of a Dutch tugboat operator from the port of Hamburg shows that the fiscal arrangements are not decisive factors as regards competitive position. The Dutch authorities also note that a number of other countries apply the same fiscal regime as the Netherlands.

3.2. **Comments from 51 other interested parties**

(36) The comments from the 51 other interested parties are summarised below, grouped together by type of comment.

(37) Parties

1. Arnold Ritscher; 2. Bremer Reederverein; 3. Freie Hansestadt Bremen; 4. Freie und Hansestadt Hamburg; 5. Handelskammer Hamburg; 6. Johanssen & Son; 7. […] (*); 8. Rhenus AG & Co.; 9. Ständige Vertretung der Bundesrepublik Deutschland; 10. Unternehmensverband Hafen; 11. Hamburg Unterweser Reederei GmbH; 12. Verband Deutscher Reeder; 13. Wirtschaftsverband Weser; 14. Zentralverband der Deutschen Seehafenbetriebe; 15 and 16 (names confidential)

provided separate and independent comments which can be summarised as follows ([9]):

(38) It is argued that the Dutch beneficiaries of the aid have a substantial competitive advantage (arguments backed up by a study from Price, Waterhouse Cooper (PWC) submitted by the German Government) allowing them to take a strong position on the German port towage market. This situation is reflected by asset sales and job shedding by German companies. The aid favours not only Dutch towage companies but also Dutch ports. Moreover, the aid cannot be in line with the Community guidelines on State aid for maritime transport when it is applied to national traffic on inland waterways and/or in ports and is not related to competition between Community and non-Community registers. The aid should therefore be recovered.

(39) On behalf of a German tugboat company, party 17, White & Case, made the following comments: in summary White & Case argued, *inter alia*, that there is a distinction to make between (deep) sea towage and port towage, since these represent different markets with different contract length and often managed by separate entities of the same company. There is basically no competition between Community port tugs and port tugs under third county flags. However, Dutch port towage operators have a competitive advantage over their counterparts in the Community since they receive illegal aid which enables them to adopt aggressive market behaviour.

(40) On the specific issue of which tugboats would qualify, White & Case argues that even if technical criteria are to be used to establish eligibility for aid, that does not necessarily mean that a seagoing tug operating mainly in port would be eligible for aid, since that would be contrary to the reiterated principle of the law stating that eligible operations must be carried out mainly at sea. White & Case refers to Dutch national court cases in which the government (fiscal authorities) argued that port towage is not eligible for the aid in question and where the government was overruled by the National Court which considered port towage to be eligible.

(*) Business secret.

([9]) Not every individual interested party made all the comments summarised. Nevertheless, since there are a number of similarities, their comments have been grouped together.

(41) Furthermore the maritime transport aid granted to Dutch port towage operations is to be considered new aid basically since the 1995 notification and at least since 5 January 1999, the date on which the Dutch authorities agreed to adapt all earlier legislation to the 'new' 1997 Community guidelines on State aid to maritime transport. This is backed up by the argument that any doubt as regards a notified text works to the detriment of the Member State which notified it, since it is the Member State which is responsible for the completeness and clarity of the content of a notification. In this sense the Member State has to be considered as the guarantor of legal certainty. The aid in question is also contrary to the Community guidelines on State aid to maritime transport which focus on competition aspects between Community and non-Community registers, whereas port towage is basically not subject to that type of competition. In the light of the foregoing and in the absence of legitimate expectations by the Netherlands, White & Case concludes that the Commission should recover any such illegal aid from which the operators concerned benefited even under schemes prior to the 1995 notification.

(42) Undertakings

18. Birger Gran; 19. Hual; 20. Hydro Belgium SA; 21. Krogstads Shippings; 22. Minerva Marine Inc.; 23. Mitsui OSK Shipping (Europe) Ltd; 24. NYK Bulkship (Europe) Ltd; 25. Rotterdam Municipal Port Management; 26. Sanko Kisen (Europe) BV; 27. Simpson, Spence & Young Ltd; 28. Stolt-Nielsen Transportation Group BV; 29. Thenamaris (Ships Management) Inc.; 30. Vopak; and 31. Wallenius Wilhelmsen

provided separate and independent comments which can be summarised as follows ([10]):

(43) The companies underline that the aid in question was approved by the Commission, that any attempt to interfere in a well regulated but free market would have serious consequences, that a really free market can only be achieved when there is an open market which companies are free to enter, that the entry of Dutch companies into the German towage market is in accordance with the idea of free provision of services, as advocated in a Commission legislative proposal concerning ports, and that only a free market situation would ensure the most efficient price/quality/performance ratio. The market in question will consequently work in such a way that high safety and quality standards will be maintained along with competitive long-term prices.

([10]) See footnote 9.

(44) Undertakings

32. Cape Reefers; 33. Coerclerici Armatori; 34. Maritime Services Aleuropa GmbH; 35. Pan Ocean Shipping Co Ltd.; and 36. Polsteam (Benelux)

provided separate and independent comments which can be summarised as follows ([11]):

(45) They argued that the aid in question was approved and is thus in line with the Community guidelines on State aid to maritime transport. In this way tugowners from a Member State can compete at the same cost level with tugowners operating under open registers, although with higher safety and quality standards.

(46) The complaint triggering this case is based merely on the fact that a German towage company cannot benefit from tax advantages similar to those in the Netherlands since Germany apparently refuses to implement similar fiscal advantages.

(47) The approach by the complainant, according to which towage operations may qualify or not depending where the towage services are provided, is too limited and fails to reflect the economic and operational reality. The only relevant distinction can be made on the basis of the technical criteria for different types of tugboat.

(48) A protectionist attitude in favour of the German towage market will result in less competition and higher towage rates.

(49) The towage market is international with competition between international ports.

(50) Undertakings

37. Kotug Europe BV; 38. Kotug Schleppreederei GmbH; 39. Adriaan Kooren BV; 40. Bais Maritiem BV; 41. Belgische Redersvereniging; 42. Corus Services; 43. Multraship BV; 44. Nissan Carrier Europe BV; 45. Scheepvaart & Industrie Vereniging Noordzee-kanaalgebied; 46. Koninklijke Vereniging van Nederlandse Reders; 47. Smit International NV; 48. Unie van Redding- en Sleepdienst in Nederland BV; 49. Wagenborg Sleepdienst BV; 50. Wijsmuller Marine Service BV; 51. Zeeland Seaports

provided separate and independent comments which can be summarised as follows ([12]):

([11]) See footnote 9.
([12]) See footnote 9.

(51) It is argued that the aid constitutes 'existing aid' since the Commission approved it. Existing aid cannot be recovered. Considering the approved aid as 'new aid' is in breach of the principle of legitimate expectations and legal certainty. The approved aid is in line with the aims of the rules on State aid for maritime transport, the aim being to create a level playing field for all shipping companies exposed to international competition.

(52) The number of Dutch tugboats which qualify as seagoing tugs is still below 10 % and not all of them make use of the measures.

(53) Ports have now an open market structure where tugboats under the flags of non-Community countries operate. The fact that tugboats providing assistance to seagoing vessels in ports are covered by the arrangement is perfectly appropriate since the markets are open. Consequently, the same level playing field must be created both within the ports and beyond. A purely geographic criterion, in particular the area of activity, should not be used to exclude tugboats which are seaworthy and have a crew holding the certificates required to work onboard seagoing vessels. If, however, the State aid for tugs is abolished, tariffs will increase. Such aid measures ensure maritime quality standards and limit the comparative disadvantage over tugboats operated under open registers and employing low-wage crews.

(54) The comments state that a recovery order should be avoided. An order to adapt the existing rules to the new rules should provide for sufficient time to adjust the current business arrangements to the new rules.

4. DUTCH COMMENTS ON THE COMMENTS FROM THE 51 OTHER INTERESTED PARTIES

(55) By letter of 18 April 2002, the Netherlands provided comments which can be summarised as follows:

(56) The Dutch authorities argue that the aid has made only a small contribution to the success of Dutch towage operations in German ports. The measure is at the same time effective in that it allows the employment of Community seafarers and the strengthening of Community shipping companies. Other Community tug operators can also benefit from fiscal aid to be more competitive internationally.

(57) Furthermore, the Dutch authorities argue that towage assistance to seagoing vessels must be in line with the guidelines independently of where the service is carried out. Community port towage companies/activities would be internationally disadvantaged if they could not benefit from the aid. The fact that Germany has chosen not to allow its tax facilities to apply in Germany but only in European ports cannot be used as an argument against the Dutch tax facilities applied in German ports. The Dutch authorities do not agree with White & Case's argument that towage operations must be provided at sea in order to qualify for the tax facility or with the findings of the PWC study on the extent of the tax facility. The Netherlands commented that it is very common for different kinds of services, such as sea and port towage, to be managed by different companies. It also commented that tugs have three to four assignments a day, sometimes in the harbour sometimes at sea, so they will never fulfil a criterion of 'mainly at sea'.

(58) The Netherlands further submitted a report from JBR focusing mainly on the market situation and stating that the access of Kotug to the German towage market is essentially due to its strategy and experience. After the entry of Dutch firms into the German towage market prices went down and quality went up. Furthermore, it is argued that the German companies underestimated the effects of competition and were too slow to react.

(59) According to a second report from Loyens & Loeff, submitted by the Netherlands, the PWC report sent by the German government is not based on the right assumptions nor on the local market situation.

5. ASSESSMENT OF THE AID

5.1. Existence of aid under Article 87(1) of the EC Treaty

(60) Under Article 87(1) of the EC 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'.

(61) The application of subsidies by the Dutch authorities through State resources in favour of operations by Dutch tugboats in ports and on inland waterways in the

Community favours certain undertakings since the measure is specific to certain towage operations ([13]). Subsidies granted in this context threaten to distort competition and could affect trade between Member States since they can be carried out by companies registered in a country different from the country where the service is carried out ([14]). For these reasons, subsidies granted to port and inland waterway towage operations constitute State aid within the meaning of Article 87(1) of the Treaty.

5.2. **Legal basis for the assessment**

(62) The 1997 Community guidelines on State aid to maritime transport ([15]) (hereinafter referred to as 'the guidelines') give details of which aid to maritime transport may be considered compatible with the common market.

(63) Regulation (EC) No 659/1999.

5.3. **'Unlawful' aid (aid not notified)**

(64) Since the Dutch authorities confirmed that the aid in question has been granted, it has to be clarified whether this aid was notified or if it constitutes unlawful aid.

5.3.1. *Scope of the notification(s)*

(65) In the notification and information provided on Cases N 738/95 and NN 89/97, the Netherlands notified aid schemes which focused almost exclusively on activities carried out at sea. This is clear from analysis of both the general scope and the different elements of the notified schemes as summarised above. The sole derogation to the condition that the operations must be performed at sea is that a ship which is used both at sea and in ports or on inland waterways is considered as being used for activities at sea if the main focus of the activities is at sea.

(66) It should be added that the act notified in Case N 738/95 is entitled 'Wijziging van enige belastingwetten in het belang van de zeescheepvaart' (Amendment to certain tax laws relating to seagoing shipping).

(67) The general and specific details notified by the Netherlands contain nothing which should have led the Commission to doubt that the aid would be granted only to seagoing vessels operating exclusively or at least predominantly at sea.

(68) The following relevant information came to light as a result of the appeal lodged by the Netherlands against the decision by the Commission to open the Article 88(2) procedure. A phrase in the explanatory memorandum on the law approved by the Commission under Case N 384/91, as presented to the Dutch parliament by the Dutch government, clarified, in order to avoid misunderstandings, that tugboats which are suitable and licensed for towing at sea do not actually need to perform such activities at sea in order to benefit from the aid. However, this phrase was not contained in the version of the explanatory memorandum submitted to the Commission. It is therefore clear that the Commission was not properly informed by the Netherlands of its plan to provide the aid in such cases as well.

5.3.2. *Interpretation in the Netherlands: Government versus Court*

(69) Concerning the argument raised by the Dutch authorities that the notification of Case N 738/95 gave an indication that tugboats would qualify for the aid in question on the basis of technical criteria rather than the location where activities are carried out, the Commission notes that this was not the position officially defended by the Dutch government before the Dutch courts.

During the Article 88(2) procedure the following information was brought to the attention of the Commission. The application of the aid schemes (i.e. the Dutch laws) approved by the Commission to activities in ports and on inland waterways was the object of litigation in the Dutch courts. In that litigation, the Dutch authorities took the position that the aid was not available if the vessels concerned were not, or were hardly, used at sea ([16]). In fact, in one of these cases the Dutch authorities even appealed to the Dutch Supreme Court, defending this position. It appears that the Dutch Supreme Court overruled the government and ruled that port towage services qualify for the aid ([17]).

([13]) Even if considered part of a package such as the 'tonnage tax' or 'fiscal facility', such a subsidy would still be sector specific since it affects one particular activity in the seaports sector.

([14]) In the particular case under assessment, Dutch towage companies have been carrying out port towage operations in German ports (Hamburg and Bremen).

([15]) OJ C 205, 5.7.1997, p. 5.

([16]) Judgment of the Court of Justice in The Hague No 96/0195 of 5 June 1997, Case 23850.

([17]) Judgment dated 17 February 1999 by the Supreme Court (LJN-number: AA2667, Case 33504).

(70) The foregoing shows that the Dutch authorities themselves officially defended the view that the aid should not be available to the situations covered by this decision. Moreover, they never informed the Commission of the outcome of the Dutch court cases and did not even mention them in the course of the Article 88(2) proceedings.

It follows from this that (a) the interpretation of the relevant Dutch law at national level was changed without informing the Commission and (b) the Dutch government clearly notified aid which it did not originally intend to include port towage. The abovementioned remark (see paragraph 68) in the explanatory memorandum on the law, which might indicate a change of position, was not included in the text notified to the Commission ([18]).

(71) Taking the foregoing into account, the Commission concludes on this point that it has not been notified by the Dutch authorities of aid in favour of towage operations in and around ports and on inland waterways in the Community and that, therefore, no such aid has been approved by the Commission.

5.4. **Classification as 'new aid'**

(72) It has further to be clarified whether this aid constitutes 'existing' or 'new' aid within the meaning of Article 1 of Regulation (EC) No 659/1999.

(73) For the period after 12 September 1990 (see paragraph 74) the subsidy cannot be classified as 'existing aid' under Article 1(b) of Regulation (EC) No 659/1999 for the following reasons:

(a) the aid was not put into effect prior to the entry into force of the Treaty,

(b) the aid has not been authorised by the Commission,

(c) the subsidy was not duly notified and was therefore not, after preliminary examination by the Commission, considered as aid, as compatible aid or as having been object of a formal investigation procedure within the appropriate periods. It cannot, therefore, be deemed to have been authorised by the Commission,

(d) the subsidy did not become State aid due to the evolution of the common market or following the liberalisation of the sector by Community law.

(74) It is possible that the aid had already been granted to tugboats not operating mainly at sea for more than ten years before the Commission addressed its first questions to the Dutch authorities (letter of 12 September 2000). To that extent in the light of Article 1(b)(iv) of Regulation (EC) No 659/1999 such aid would have to be considered as existing and non-recoverable aid.

(75) The aid granted after 12 September 1990 to tugboats not operating mainly at sea constitutes 'new aid', as provided for by Article 1(c) of Regulation (EC) No 659/1999, which covers all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid. In particular, due to the interpretations provided by the Dutch government to the Dutch Parliament and/or the rulings by the Dutch courts, the aid scheme presented to the Commission was, in practice, altered without the Commission being informed thereof.

5.5. **Compatibility of the aid**

(76) The guidelines focus essentially on measures to preserve and improve the competitiveness of the Community shipping industry against non-Community shipping and registers while keeping distortion of competition between Member States to the minimum.

5.5.1. *Maritime transport*

(77) The guidelines ([19]), when discussing the philosophy behind Community policy in the field of sea transport, refer to Council Regulation (EEC) No 4055/86 ([20]) and Council Regulation (EEC) No 3577/92 ([21]), which define

([18]) The ports sector or the (inland) waterway sector are distinct from the maritime transport sector in that the Community guidelines on State aid to maritime transport do not apply to them.

([19]) Paragraph 1.1, second subparagraph.

([20]) OJ L 378, 31.12.1986, p. 4.

([21]) OJ L 364, 12.12.1992, p. 7.

maritime transport services as 'the carriage of passengers or goods by sea' ([22]) (underlining added by the Commission).

5.5.2. *Deep sea towage*

(78) Deep sea towage is usually characterised by the fact that the tug operator alone is in charge of the towage operation, since the object towed (a vessel, an oilrig or an empty hull) is inert and incapable of influencing the manoeuvre. Deep-sea towage can thus be considered to constitute transport of goods (and perhaps of persons) by sea. It can therefore be argued that deep-sea towage should qualify as 'maritime transport' activity according to the Community legislation referred to in the guidelines.

5.5.3. *Port towage*

(79) Port towage clearly does not fall under those definitions since it does not take place at sea. Moreover, the guidelines are clearly limited to approving aid in order to improve the competitive position of Community Member States' fleets on the global maritime transport market. State aid to port towage does not fit within that policy.

5.5.4. *Rules on State aid for port towage and maritime transport*

(80) The guidelines 'cover any aid granted by EC Member States or through State resources in favour of maritime transport'.

Also because the complaint which triggered this procedure made the Commission aware that Member States might grant aid to port towage activities, the Commission has started explicitly to remind Member States, in individual decisions, that the guidelines do not in any way provide that State aid to port towage would be compatible with the common market. In the decision concerning the United Kingdom's tonnage tax (Case N 790/99) ([23]), commercial services provided to third parties within the port area, such as towing vessels in ports, are specifically excluded.

In a decision concerning Belgium (Case N 142/00) ([24]) the application of a fiscal facility was assessed, *inter alia* as regards towage. In this same decision the Commission approved the fiscal facility for towage activities at sea but excluded application of the fiscal facility to port towage.

(81) Taking account of the above analysis leading to the conclusion that tugboat operations in ports and on inland waterways in the Community cannot be considered as maritime transport within the meaning of Regulation (EEC) No 4055/86 and Regulation (EEC) No 3577/92 and taking account of the abovementioned Commission decisions, the Commission concludes that maritime transport State aid cannot be approved for towage services in ports and on inland waterways in the Community.

5.5.5. *Incompatibility with other provisions in the Treaty*

(82) It must also be assessed whether maritime transport aid to tugboat operations in ports and on inland waterways in the Community is compatible with the other provisions in the Treaty.

(83) While the aid falls under Article 87(1) of the Treaty, it must also be examined whether the measure comes under consideration for derogation or exception under Articles 87(2), 87(3) and 86(2) of the Treaty.

(84) The aid in question cannot be considered under Article 87(2) of the Treaty as it is not aid of a social character

([22]) Regulation (EEC) No 4055/86, Article 1(4):'For the purpose of this Regulation, the following shall be considered 'maritime transport services between Member States and between Member States and third countries' where they are normally provided for remuneration:
(a) intra-Community shipping services: the carriage of passengers or goods by sea between any port of a Member State and any port or off shore installation of another Member State;
(b) third country-traffic: the carriage of passengers or goods by sea between the ports of a Member State and ports or offshore installations of a third country.'

Regulation (EEC) No 3577/92, Article 2:'For the purpose of this Regulation "maritime transport services within a Member State (maritime cabotage)" shall mean services normally provided for remuneration and shall in particular include:
(a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands;
(b) off-shore supply services: the carriage of passengers or goods by sea between any port in a Member State and installations of structures situated on the continental shelf of that Member State;
(c) island cabotage: the carriage of passengers or goods by sea between:
— ports situated on the mainland and on one or more of the islands of one and the same Member State,
— ports situated on the islands of one and the same Member State.'

([23]) Letter to the United Kingdom of 2 August 2000 (No SG(2000) D/105768).

([24]) Letter to Belgium of 27 July 2000 (No SG(2000) D/105460).

granted to individual consumers, nor was it put in place to alleviate the damage caused by a natural disaster or granted to compensate for the effects of the division of Germany.

(85) However, Article 87(3)(a) may exempt aid which promotes the development of areas where the standard of living is abnormally low or where there is serious underemployment. The aid in question was, however, not granted under an aid scheme designed primarily to promote regional development. In any case, even if it had been, Article 87(3)(a) does not exempt an aid scheme which, like the one in question, is not in line with Community guidelines on aid to specific sensitive sectors such as maritime transport.

(86) With regard to the possibility of derogation under Article 87(3)(b), the aid at issue is not intended to promote the execution of an important project of common interest nor to remedy a serious disturbance in the Dutch economy, nor does it have any of the features of such projects.

(87) As to the possibility of derogation under Article 87(3)(c) relating to aid to facilitate the development of certain economic activities, it is found that operating aid for towage services in ports and on inland waterways in the Community could adversely affect trading conditions to an extent contrary to the common interest and that no specific Community provisions allow the subsidies to be granted. In particular, the situation which gave rise to this decision shows that the aid clearly leads to undesirable effects on competition between undertakings in the Member States without being adequately justified by competition from vessels from non-Community States.

(88) Furthermore, Article 86(2) of the Treaty would not apply to the case in point since the aid is part of a scheme for a particular industry operating, *inter alia*, in another Member State and does not appear to be a service of general economic interest. Also, the Netherlands has not invoked Article 86(2).

(89) The Commission therefore considers that the aid under examination does not meet any of the requirements related to the abovementioned derogations and notes that the Dutch authorities have invoked no such derogations in their contacts with the Commission.

(90) The Commission has also investigated, on the basis of Article 14(1) of Regulation (EC) No 659/1999, whether general principles of Community law would warrant non-recovery of the aid. In this context, it has noted in particular that the undertakings which have benefited from the aid when performing towage activities in German ports, were most likely aware of the fact that the Dutch authorities had defended up to the Dutch Supreme Court the view that the aid schemes approved by the Commission were not intended to cover such activities. In any case, they could have been aware of this fact since such information is publicly available. Moreover, they should have been aware of the fact that the guidelines concern sea transport.

6. **CONCLUSION**

(91) The Commission concludes that the measures in question constitute State aid within the meaning of Article 87(1) of the Treaty and that the aid is unlawful since this 'new aid' has been put into effect without having been notified in accordance with Article 88(3) of the Treaty.

(92) The Commission further finds that the maritime transport State aid granted by the Netherlands in favour of operations by Dutch tugboats in and around Community ports and on Community inland waterways is not in conformity with the guidelines and is incompatible with Article 87 of the EC Treaty.

(93) As a result of its incompatibility with the Treaty and in accordance with Article 14 of Regulation (EC) No 659/1999 the unlawful aid granted by the Netherlands in favour of operations by Dutch tugboats in and around Community ports and on Community inland waterways must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

Application by the Netherlands of the 'fiscal facility' and 'tonnage tax' to Dutch tugboat operations carried out mainly in and around Community ports and on Community inland waterways, which are not carried out mainly at sea, is incompatible with the common market.

Article 2

The Netherlands shall withdraw the relevant elements of the scheme referred to in Article 1.

Article 3

1. The Netherlands shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to the beneficiaries. Aid granted before 12 September 1990 shall not be recovered.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was placed at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

The Netherlands shall inform the Commission, within two months of 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, 19 June 2002.

For the Commission

Loyola DE PALACIO

Vice-President