

COMMISSION DECISION

of 15 December 2009

on an aid measure which the Netherlands proposes to implement, granting ceramic producers exemption from an environmental tax C 5/09 (ex N 210/08)

(notified under document C(2009) 9972)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2010/402/EU)

THE EUROPEAN COMMISSION,

European Union⁽³⁾. The Commission asked interested parties to submit their comments on the measure.

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

(4) On 26 May 2009 the Netherlands submitted its observations on the decision to initiate the procedure.

Having called on interested parties to submit their comments pursuant that provision⁽¹⁾, and having regard to their comments,

(5) The Commission also received comments from other interested parties. It forwarded them to the Netherlands, giving it the opportunity to react; the Netherlands replied by letter dated 7 July 2009.

Whereas:

(6) On 7 October 2009 the Commission wrote to the Netherlands in order to clarify the procedural status of the case, and out of courtesy asked the Netherlands to submit by 13 October 2009 any observations that it wished the Commission to consider before its final decision.

I. PROCEDURE

(1) By letter dated 24 April 2008, the Netherlands notified a plan to exempt ceramic products from the energy tax on natural gas. On 6 June 2008 the Commission requested further information; the Netherlands replied by letter dated 16 September 2008. A meeting between Commission staff and representatives of the Netherlands took place on 16 October 2008. On 17 November 2008 the Commission asked a number of further questions; the Netherlands replied by letter dated 19 December 2008.

(7) The Netherlands asked for more time, and by letter of 16 October 2009 the deadline was postponed until 1 November 2009. The Netherlands answered by letter of 30 October 2009.

(2) By letter dated 11 February 2009, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the aid⁽²⁾.

II. DETAILED DESCRIPTION OF THE AID

(8) The Netherlands taxes the consumption of energy products under the Environmental Taxes Act⁽⁴⁾, whereby a degressive rate applies based on the level of consumption of the business⁽⁵⁾.

(3) On 25 April 2009 the Commission's decision to initiate the procedure was published in the *Official Journal of the*

⁽³⁾ See footnote 1.

⁽⁴⁾ The energy tax has been provided for in the Environmental Taxes Act (*Wet belastingen op milieugrondslag*) since 1 January 1996, and is levied on natural gas, electricity and mineral oils. The rates are set in terms of the amounts of energy used.

⁽¹⁾ OJ C 96, 25.4.2009, p. 16.

⁽²⁾ From 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 of the TFEU. The substance of the two articles has not changed. For the purposes of this Decision, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 of the EC Treaty where appropriate.

⁽⁵⁾ The Netherlands has submitted the following rates for the energy tax on the natural gas consumed by a representative brick producer in the Netherlands (2009 data): 0–5 000 m³: 0,1580 EUR/m³; 5 000–170 000 m³: 0,1385 EUR/m³; 170 000–1 000 000 m³: 0,0384 EUR/m³; 1 000 000–10 000 000 m³: 0,0122 EUR/m³; > 10 000 000 m³: 0,0080 EUR/m³.

- (9) Under the aid measure at issue here the Netherlands would grant an exemption from tax for the delivery of natural gas used in installations for the production of ceramic products. The proposed exemption would apply only to natural gas used for production purposes by the Dutch ceramic industry, and not to gas used for other mineralogical processes carried out in the Netherlands ⁽⁶⁾.
- (10) The proposed exemption would be introduced by an amendment to the Environmental Taxes Act currently in force.
- (11) According to the notification, the budget for the years 2008–2013 amounts to EUR 4 million annually.
- (12) The duration of the measure is unlimited, as the Netherlands considers that it does not give rise to State aid (see further section IV below).
- (13) The beneficiaries of the measure would be undertakings operating in the ceramic industry in the Netherlands ⁽⁷⁾.
- (14) The Netherlands considers that the exemption is needed in order to restore a level playing field for the Dutch ceramic industry in the internal market. The Netherlands refers to the unique position of the Dutch ceramic sector compared with the position of competitors in the neighbouring countries. Owing to its geographical location, the Dutch ceramic industry makes use of wet clay, as opposed to the dry clay used in the surrounding countries, and wet clay requires more energy to achieve the same end result. Additionally, the Netherlands argues that competing producers in Belgium, Germany or Sweden, for example, are exempt from any similar energy tax.

⁽⁶⁾ 'Mineralogical processes' here means the processes which in accordance with Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1) are classified under NACE nomenclature code DI 26, 'manufacture of other non-metallic mineral products'. Apart from the ceramic process, such processes include for instance the production of glass or cement.

⁽⁷⁾ The Netherlands reports that the ceramic industry in the Netherlands is composed mainly of large-scale, sometimes multinational, companies, with an estimated total turnover of approximately EUR 650–700 million and a labour force of around 3 000 (in 2008). There are more than 60 production locations in the Netherlands. Products include bricks, roof tiles, ceramic wall and floor tiles, sanitary products, decorative earthenware and porcelain, and fireproof bricks for applications in the steel and aluminium industry. Many production locations are situated in the regions bordering Germany and Belgium, and a large part of these belong to industrial groups with branch offices in other European countries.

- (15) The Netherlands has confirmed that the measure will enter into force only once it has been authorised by the Commission.

III. THE OPENING DECISION

- (16) The Commission doubted whether the proposed aid was compatible with the internal market, because it took the preliminary view that the tax exemption for the Dutch ceramic industry was not justified by the nature and overall structure of the national tax system. The measure was selective, since only the ceramic industry in the Netherlands would benefit from it, and the exemption would be financed through state resources. The measure also distorted or threatened to distort competition, and affected trade between Member States, as the proposed tax exemption would have a direct impact on production costs and would therefore improve the recipients' competitive position on the relevant ceramic product markets where they operated, which were open to trade between Member States. The Commission took the view that the measure would confer State aid on the Dutch ceramic industry, and concluded that such aid could be approved only if it satisfied the tests of Chapter 4 ('aid in the form of reductions of or exemptions from environmental taxes') of the Community guidelines on State aid for environmental protection ⁽⁸⁾ (hereinafter 'the environmental aid guidelines' or 'the guidelines'). As the Netherlands had not provided the information required for an assessment on this basis, the Commission was unable to confirm that the measure was compatible, and accordingly decided to initiate the formal investigation procedure.

IV. OBSERVATIONS SUBMITTED BY THE NETHERLANDS

- (17) The Netherlands said that it was notifying the case primarily for the sake of legal certainty, and asked the Commission to find that no State aid was involved.
- (18) The Netherlands took the view that the selective character of the exemption was justified by the nature and overall structure of the national tax system.
- (19) The purpose of the energy tax was to tax electricity and energy products which were used as heating fuel or motor fuel. To include in the energy tax system an exemption for a process in which natural gas was not used as a heating or motor fuel, therefore, was in accordance with the nature and overall structure of the underlying frame of reference, namely the scheme of energy taxation in force. The energy tax legislation exempted the delivery of natural gas used for purposes other than as fuel ⁽⁹⁾. The delivery of electricity for

⁽⁸⁾ OJ C 82, 1.4.2008, p. 1.

⁽⁹⁾ Article 64(4) of the Environmental Taxes Act.

processes in which it had a dual use, such as for chemical reduction and in electrolytic and metallurgical processes, was likewise exempt from the energy tax ⁽¹⁰⁾. In the legislation on the taxation of coal, too, there was an exemption for coal used for purposes other than as fuel and for coal with a dual use ⁽¹¹⁾. It was appropriate to add a tax exemption for the delivery of natural gas used in installations for the production of ceramic products. The ceramic process was comparable to a dual-use process, because natural gas was not being used solely as heating fuel or motor fuel. The Netherlands pointed out that the exemption from tax on the delivery of natural gas used in installations for the production of ceramic products was to be included in an amended version of Article 64 of the Environmental Taxes Act, which was the provision that exempted other forms of dual use.

- (20) The Netherlands referred to Article 2(4)(b) of the Energy Taxation Directive, and to the Council minutes on that Directive ⁽¹²⁾, and submitted that it was in accordance with the nature and overall structure of the Dutch energy taxation system to add a provision granting exemption for the delivery of natural gas used for the mineralogical process concerned here, that is to say the production of ceramics.
- (21) It was appropriate to exempt only ceramic processes, and not all mineralogical processes, because unlike other mineralogical processes the traditional ceramic process was irreversible (clay was changed into ceramic).
- (22) The Netherlands further referred to the unique position of the Dutch ceramic industry compared with the position of competitors in the surrounding countries. Owing to its geographical location, the Dutch ceramic industry made use of wet clay (which originated in the Alps and was deposited in the rivers in the Netherlands), as opposed to the dry clay used in the surrounding countries, and wet clay required more energy to achieve the same end result ⁽¹³⁾.
- (23) Additionally, competing producers in Belgium, Germany or Sweden, for example, were exempt from any similar energy tax. And prices for the use of natural gas in the Netherlands were high. Here too the Dutch ceramic

industry was at a disadvantage compared to ceramic production in neighbouring countries.

- (24) In the Netherlands' view these factors showed that the selectivity of the measure was justified on the basis of the nature and overall structure of the Dutch energy tax scheme. The Netherlands therefore considered that the tax exemption did not constitute State aid within the meaning of Article 107(1) TFEU.
- (25) The proposed tax exemption would eliminate the disadvantage to the Dutch ceramic industry to some extent, thereby partially restoring a level playing field for the industry in the internal market.
- (26) In the alternative, the Netherlands asked the Commission to authorise the aid on the basis of Article 107(3)(c) TFEU. The aid was necessary because of the unequal terms of competition in the internal market. It was proportionate, because the measure would apply only to natural gas used in the installations, and not to the electricity used in the production of ceramic products. It would offset only a part of the disadvantage to the industry, and consequently had to be considered proportionate. Finally, it would not lead to incompatible distortion of competition in the internal market.
- (27) Besides, the Netherlands submitted that the Energy Taxation Directive did not apply to mineralogical processes, because it was in line with the nature and overall structure of the tax system to exclude mineralogical processes from the scope of the Directive. Member States were consequently free to decide whether or not to tax these forms of energy use. The proposed measure would not result in distortion of competition, but rather to greater harmonisation of the taxation of energy products, and would be in the Community interest.

⁽¹⁰⁾ Article 64(3) of the Environmental Taxes Act.

⁽¹¹⁾ Article 44(1) and (3) of the Environmental Taxes Act. Under Article 2(4)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51, 'the Energy Taxation Directive'), coal has a 'dual use' when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel.

⁽¹²⁾ Council document 8084/03 ADD 1 Fisc 59, 3 April 2003.

⁽¹³⁾ An interested party, the VKO (see also section V below), stated that production in the Netherlands was based entirely on the processing of wet clay. Replacement of wet clay by dry clay from abroad was not a real option, even if the environmental effects of transporting the clay were to be ignored. The VKO confirmed that owing to the specific geographical location the production of ceramics needed more energy in the Netherlands than it did in surrounding countries.

V. OBSERVATIONS SUBMITTED BY INTERESTED PARTIES

- (28) Observations on the Commission's decision to initiate the procedure were submitted by a trade organisation, the VKO (*Stichting Verenigde Keramische Organisaties*). The VKO shared the view of the Netherlands that the tax exemption was justified by the nature and overall structure of the national tax system, and that the measure consequently did not comprise State aid. The

VKO's comments were similar to those of the Netherlands. Like the Netherlands, the VKO considered that the tax exemption could not be regarded as an environmental measure, since it did not pursue any environmental objective. It would not be right, therefore, to judge the measure on the basis of the environmental aid guidelines.

VI. ASSESSMENT

EXISTENCE OF AID

- (29) Article 107(1) TFEU states that '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, insofar as it affects trade between Member States, be incompatible with the internal market.'

ADVANTAGE

- (30) In the view of the Netherlands the measure does not confer any advantage, but instead offsets a disadvantage to the Dutch ceramic industry.
- (31) The Commission is of the opinion that the tax exemption confers an advantage on undertakings operating in the ceramic industry in the Netherlands, which would benefit as a result of the tax relief because it would reduce the charges that would otherwise be included in their operating costs ⁽¹⁴⁾.

STATE RESOURCES AND IMPUTABILITY TO THE STATE

- (32) The Netherlands considers that the measure would not be not financed through state resources, because the financing of the exemption is budget neutral ⁽¹⁵⁾. Thus no state resources would be involved. The VKO puts forward a similar argument.
- (33) The Commission takes the view that the measure concerns a tax benefit that would be financed by the Dutch State, so that state resources are being forgone. Put differently, the proposed tax exemption results in a loss of tax revenue to the Dutch State. Even if the financing of the exemption were indeed to be offset indirectly by an increased rate of energy tax on natural gas in the highest tranche, that conclusion would remain unchanged. The Commission notes that the Netherlands has acknowledged that, compared with the current tax system, the measure gives rise to an advantage of an

estimated EUR 4 million annually, without any quid pro quo on the part of the recipients ⁽¹⁶⁾. The proposed measure is imputable to the Netherlands, as it derives directly from an amendment to the national legislation in force.

SELECTIVITY

- (34) Article 2(1) of the Energy Taxation Directive states that the Directive does not apply to the consumption of energy in mineralogical processes and certain other uses of energy products and electricity; it is left to the Member State, therefore, to decide whether or not to tax such processes and if so whether to tax them in their entirety or only in part. Irrespective of the Directive, however, Member States are in any event bound by the Community *acquis* in matters of State aid. This means that the selectivity of the measure at hand, and hence the existence of State aid, must be assessed by reference to the domestic energy tax system.
- (35) There is recent case-law on the interpretation of selectivity. The *Gibraltar* judgment accepted a standard State aid analysis for tax cases ⁽¹⁷⁾. The Court said that there had to be an analysis consisting of: (i) a determination of the reference framework, (ii) a determination of the derogation from that reference framework, and (iii) a determination of whether the derogation was justified by the nature and general scheme of the system (that is to say whether the derogation derived directly from the basic or guiding principles of the tax system in the Member State concerned).
- (36) The Netherlands has explained that the Dutch energy tax system — which is the reference framework — aims at the taxation of electricity and of energy products which are used as heating fuel or motor fuel. The Netherlands therefore considers that it is in line with the nature and overall structure of the Dutch energy tax system that certain kinds of use should be exempt from taxation, as already explained in recital 19. According to the Netherlands, the additional exemption now being introduced for ceramic process fits into this general scheme.
- (37) The Netherlands further argues that the departure from the reference framework, i.e. the different tax treatment benefiting the ceramic industry, is justified by the objective distinction between the raw material that is used for the production of ceramics and material that is used in other mineralogical processes. Contrary to other mineralogical processes, the traditional ceramic process is irreversible.

⁽¹⁴⁾ See the decision on State aid measure N 820/06, 7 February 2007, section 4.

⁽¹⁵⁾ The explanatory memorandum to the parliamentary amendment providing for this tax exemption states that the exemption is to be financed by increasing the rate of energy tax on natural gas in the highest tranche by EUR 0,08.

⁽¹⁶⁾ Annex 1 to the notification.

⁽¹⁷⁾ Judgment of the Court of First Instance in Joined Cases T-211/04 and T-215/04 *Gibraltar*, 18 December 2008, not yet reported (an appeal has been brought against the judgment, but does not concern the steps in the standard State aid analysis followed above).

- (38) This is not the first time that the Commission has assessed exemptions from energy taxes for mineralogical processes: it did so notably in its decision of 7 February 2007 in case N 820/06 regarding tax exemptions for certain energy-intensive processes in Germany. The Commission there decided that the measure did not comprise State aid. It looked in particular at the internal logic of the German energy taxation system, which was in line with the approach taken in the Energy Taxation Directive that fuel would be taxed only when it was used as heating or motor fuel. Germany consistently exempted all dual use and any workable mineralogical processes covered by the Directive, and thereby followed the same approach throughout its energy tax system. The Commission concluded that the tax exemption was in line with the nature and overall structure of the national energy taxation system.
- (39) The tax exemption notified here applies only to the Dutch ceramic industry, and unlike the German measure does not cover all mineralogical processes; the Commission is not satisfied, therefore, that the proposed exemption derives directly from the basic or guiding principles of the Dutch energy taxation system. The Netherlands and the VKO argue that there is an objective distinction between the raw material that is used for the production of ceramics and the material used in other mineralogical processes⁽¹⁸⁾, the ceramic processes being irreversible; but this reasoning does not in fact explain, in terms of the structure of the underlying domestic energy taxation system, why other mineralogical processes that also use natural gas in their production processes, such as the manufacture of glass, should not be eligible for exemption. In addition, as explained in recital 22 to the Energy Taxation Directive, energy products should be subject to a Community framework essentially when used as heating fuel or motor fuel. It was in this spirit that Article 2(4) of the Directive excluded mineralogical processes. In those processes fuel is considered to be used not as motor fuel or heating fuel, but to support the chemical process. The common element in the exclusion of all mineralogical processes from the scope of the Energy Taxation Directive, therefore, is that fuel is being used for the chemical process rather than as heating or motor fuel. A tax exemption for the processes concerned here⁽¹⁹⁾ would be justified only if it applied to all mineralogical processes across the board, thus ensuring that all mineralogical processes were being treated consistently⁽²⁰⁾. As indicated, this would be in line with the Commission's reasoning in case N 820/06. That different mineralogical processes may use different raw materials, and that the ceramic process may be

irreversible, are considerations which are irrelevant in this context.

- (40) Moreover, from the parliamentary history of the Act it emerges that the objective of the intended measure is to improve the international competitive position of the ceramic industry in the Netherlands⁽²¹⁾. The case-law of the Court of Justice makes it clear that the fact that a measure may bring charges in a particular sector more closely into line with those of competitors in other Member States does not alter the fact that it constitutes aid⁽²²⁾.
- (41) The Commission therefore finds that the tax exemption is selective, in that it favours the production of certain goods and, de facto, certain undertakings, and cannot be justified on the basis of the overall structure of the domestic energy taxation system.

DISTORTION OF COMPETITION AND EFFECT ON TRADE

- (42) The VKO has disputed the Commission's conclusion that because the proposed measure would cover a significant part of operating costs, and would thus allow recipients to charge a lower price for their ceramic products, it would distort competition or threaten to distort competition in the relevant ceramics markets. According to the VKO, the costs of the delivery and use of energy are a multiple of the cost of the energy tax.
- (43) The Commission considers this argument irrelevant. According to the case-law of the Court of Justice, an improvement in the competitive position of an undertaking resulting from a State aid measure will usually indicate that there is a distortion of competition with other competing undertakings not receiving such assistance⁽²³⁾. Moreover, a measure is caught by Article 107(1) TFEU once it 'threatens to distort competition'. The tax exemption at issue has the potential to distort competition in the ceramics markets given that it leads to a decrease in the recipients' operating costs. Furthermore, the objective of the proposed measure is in fact to improve the international competitive position of the ceramic industry in the Netherlands. The Netherlands has stated that the tax exemption would, at least to some degree, restore a level playing field for the industry in the internal market. Logically it must be concluded, even without detailed data to substantiate the competitive effect of the measure in the ceramic sector, that the measure has the potential to distort competition in the relevant ceramics markets.

⁽¹⁸⁾ The Netherlands lists glass, mortar, concrete, plaster and sand lime.

⁽¹⁹⁾ In the notification the Netherlands classifies these under NACE code DI 26, 'manufacture of other non-metallic mineral products'.

⁽²⁰⁾ In the German case N 820/06 this consistency was reinforced by the fact that Germany explicitly undertook to treat any further dual use or mineralogical processes that came to its notice equally, thereby ensuring that all mineralogical processes would be treated consistently.

⁽²¹⁾ Amendment put forward by Jules Kortenhorst, Member of the Lower House, and others, dated 21 November 2007, *Tweede Kamer, vergaderjaar 2007-2008*, 31 205, nr.35.

⁽²²⁾ Case C-173/73 *Commission v Italy* [1974] ECR 709.

⁽²³⁾ Case C-730/79 *Philip Morris Holland v Commission* [1980] 2671, paragraphs 11 and 12.

(44) The Netherlands has explained that the brick industry in the Netherlands, which accounts for 85–90 % of natural gas and energy consumption in the Dutch ceramic industry, employs approximately 1 500 people. In 2008 this subsector had a turnover of around EUR 370 million. The Dutch brick industry exports around 20 % of its annual output, whereas the level of imports equals 8 % of annual Dutch production. Because of the weight of bricks, the relevant market is defined as extending about 250 km from the brickworks where they are produced. Therefore the relevant competing markets for this subsector are the United Kingdom, Germany and Belgium.

(45) In the letter of 26 May 2009 the Netherlands asked the Commission to quantify and substantiate its conclusion that the proposed measure distorted competition or threatened to distort competition in the relevant markets in the ceramic sector with reference to data from the Dutch Central Statistics Office (*Centraal Bureau voor de Statistiek*) which the Netherlands had submitted to the Commission in the preliminary investigation phase, and in particular the import and export figures for bricks which are shown in Tables 1 and 2.

Table 1

Exports of Dutch bricks to Germany and Belgium

Year	Percentage	Share in EUR
2007	59 % of a total of EUR 255 million	150 million
2006	64 % of a total of EUR 234 million	150 million
2005	68 % of a total of EUR 213 million	145 million
2004	74 % of a total of EUR 242 million	180 million
2003	82 % of a total of EUR 234 million	191 million
2002	80 % of a total of EUR 183 million	146 million
2001	95 % of a total of EUR 189 million	180 million

(46) The figures in Table 1, according to the Netherlands, have to be read in the light of the following circumstances. At the beginning of the present century there was severe stagnation in the markets for the construction of housing in Germany and the Netherlands (in 2000/2001 the German brick industry experienced a loss of almost 20 % of turnover and sales). Afterwards, the situation on the Dutch and German housing market improved, with peaks in 2006 and 2007. According to the Netherlands, data from the German Tiles Federation (*Ziegelverband*) show that the German industry recovered from 2004/2005 onwards. Nevertheless, the Netherlands observes that the figures from the Dutch Central Statistics Office that have been submitted show that since then the export of Dutch bricks to Germany has lagged behind. In short, at the beginning of the century both the German

and the Dutch industry made heavy losses on the German market, but the German brick sector has gained as a result of the recovery of the housing market in Germany, and the Dutch brick producers have not. According to the Netherlands, this is confirmed by the figures for imports from Germany shown in Table 2.

Table 2

Imports from Germany into the Netherlands

Year	Percentage	Share in EUR
2007	42 % of a total of EUR 91 million	36 million
2006	25 % of a total of EUR 101 million	25 million
2005	22 % of a total of EUR 82 million	18 million
2004	17 % of a total of EUR 121 million	21 million
2003	16 % of a total of EUR 110 million	18 million
2002	18 % of a total of EUR 107 million	20 million
2001	11 % of a total of EUR 124 million	14 million
2000	12 % of a total of EUR 155 million	19 million

(47) The Netherlands points out that the figures in Table 2 show strong growth in imports of German brick into the Netherlands from 2006/2007 onward. The figures submitted by the Netherlands for the first quarter of 2008 show that this trend continued. According to the Netherlands, the German ceramic industry has enjoyed exemption from energy tax since August 2006, an exemption that entered into force on 1 January 2004.

Table 3

Exports from the Netherlands to Member States other than Belgium and Germany (mainly the UK and Ireland)

Year	Percentage	Share in EUR
2007	40 % of a total of EUR 255 million	102 million
2006	37 % of a total of EUR 234 million	86 million
2005	32 % of a total of EUR 213 million	68 million
2004	17 % of a total of EUR 242 million	41 million
2003	10 % of a total of EUR 234 million	23 million
2002	18 % of a total of EUR 183 million	32 million
2001	12 % of a total of EUR 189 million	23 million

- (48) On these figures the Netherlands has commented that an important factor helping to explain the increased exports to these countries is the very advantageous exchange rate between sterling and the euro. This factor, they argue, compensates for the high transport costs.
- (49) The Commission accepts that the information shows that Germany and Belgium declined in importance as export destinations for Dutch bricks over the years 1998–2007, that imports of German bricks into the Netherlands increased in the years 2000–2007, and that exports to countries other than Germany and Belgium (mainly the UK and Ireland) increased in the period 2001–2007. As regards the figures presented for other countries, in particular the United Kingdom and Ireland, the increase in exports is due mainly to the favourable exchange rate.
- (50) These figures are informative regarding trade flows in the brick segment between the Netherlands and its surrounding countries Germany, Belgium and the United Kingdom, but they do not allow the conclusion to be drawn that the tax measure is incapable of distorting competition in the relevant markets in the ceramic industry. For a measure to fall within the scope of Article 107(1) TFEU, as has been said, it is enough that there should be the potential for such distortion.
- (51) The measure will probably affect trade between Member States, because ceramic products are bought and sold internationally, as can be seen from the statistical information provided by the Netherlands which is set out in Tables 1, 2 and 3.

CONCLUSION

- (52) In light of the foregoing the Commission is of the opinion that the notified measure constitutes State aid which is caught by Article 107(1) TFEU.

LAWFULNESS OF THE AID

- (53) The Netherlands has complied with the obligation imposed by Article 108(3) TFEU by notifying the aid measure before implementing it.

COMPATIBILITY OF THE AID

INTRODUCTION

- (54) The Commission takes the view that the proposed exemption should be assessed in the light of the environmental aid guidelines. The kind of environmental tax exemption which is the subject of this notification is addressed expressly in Chapter 4 of the environmental

aid guidelines, 'Aid in the form of reductions or of exemptions from environmental taxes'. For the assessment of the tax exemption at issue, Chapter 4 of the environmental aid guidelines must be considered exhaustive. Consequently, the measure cannot be assessed on the basis of Article 107(3)(c) TFEU, as the Netherlands has argued.

- (55) The Netherlands agrees with the Commission that the proposed measure must be regarded as an 'exemption from an environmental tax' within the meaning of the environmental aid guidelines⁽²⁴⁾. However, the Netherlands does not consider this sufficient to bring the measure within the scope of the guidelines. In the view of the Netherlands, the measure does not meet the requirement in point 151 of the guidelines, which speaks of a measure that 'contributes at least indirectly to an improvement of the level of environmental protection', because the proposed exemption does not have this objective.
- (56) This reasoning cannot be accepted. Both the title of Chapter 4 of the environmental aid guidelines ('Aid in the form of reductions of or exemptions from environmental taxes') and the first part of point 151 — which is identical — make it clear that this chapter does apply to the proposed aid. The chapter contains detailed provisions explaining the circumstances under which exemptions from environmental taxes are considered to be compatible with the internal market. Point 151 of the guidelines sets out a general condition for the compatibility of exemptions from environmental taxes under Chapter 4. It states that aid can be declared compatible only if it 'contributes at least indirectly to an improvement of the level of environmental protection'.
- (57) To clarify the rationale of point 151 of the environmental aid guidelines, the Commission would observe that a proposed exemption from an environmental tax may make it feasible to set or maintain higher rates of domestic environmental taxation for other undertakings, so that it may have a positive environmental effect, at least indirectly⁽²⁵⁾. The Commission does not understand any of the arguments put forward by the Netherlands or the VKO to show that the proposed exemption would contribute to the continued application of the Dutch environmental tax at issue. The Netherlands does submit that the rate of tax in the highest band would be increased at the same time as the exemption entered into force, but it does so in order to argue that the proposed exemption would not lead to a loss of state resources, and does not appear to allege even that the proposed exemption is needed in order to make such an increase feasible. Thus it has not been shown that point 151 of the environmental aid guidelines is satisfied.

⁽²⁴⁾ As confirmed in the letter of 19 December 2008.

⁽²⁵⁾ In this context see also point 57 of the environmental aid guidelines, which states that 'this type of aid may be necessary to target negative externalities indirectly by facilitating the introduction or maintenance of relatively high national environmental taxation'.

- (58) The Commission sought information from the Netherlands in order to enable it to assess the compatibility of the aid on the basis of the criteria laid down in Chapter 4 of the environmental aid guidelines, with special reference to the necessity and proportionality of the aid and its effects on the ceramic sector, as required by points 155–159 of the guidelines ⁽²⁶⁾.
- (59) Regarding the necessity of the aid, the Commission asked a number of specific questions in order to be able to assess whether any substantial increase in the production costs of the Dutch ceramic industry (due to the environmental tax) could be passed on to customers without resulting in a substantial loss of sales. Information was also requested on the following points in particular: the sales figures of the ceramic industry in the relevant markets over the last 10 years; the rate of the energy tax and the total amount of tax paid; total energy costs per undertaking over the last 10 years; estimates of the elasticity of the prices of the industry's products in the relevant markets; estimates of lost sales or reduced profits or both; information on the development of trade flows in the Dutch ceramic industry in and out of the Netherlands to and from the relevant geographic markets; the market shares of the recipients in the relevant geographic markets; and any other factor which might play a role in the assessment of the scope for passing on costs. The Commission also put questions to the Netherlands regarding the proportionality of the aid, with reference to point 159 in the environmental aid guidelines.

ASSESSMENT

Preliminary remarks

- (60) In response to the Commission's letter of 7 October 2009, the Netherlands provided information with regard to a hypothetical average brick producer in the Netherlands ⁽²⁷⁾. The Netherlands said it was not possible to answer the Commission's questions for all subsectors of the Dutch ceramic industry, because in some subsectors, such as tiles, ceramic pipes, and sanitary ceramic products, there was only one Dutch supplier. A representative situation could be described for brick producers, as there were currently 13 of them in the Netherlands, with around 40 production locations. In other cases, such as decorative earthenware, the Netherlands considered that it was not possible to gain

sufficient insight into the relevant subsector within the tight deadline.

- (61) The Commission would point out that in the opening decision of 11 February 2009 it stated that it had already requested this additional information — including the information on the various segments of the ceramic industry as identified by the Netherlands — during the preliminary investigation phase, but that the information had not been forthcoming.
- (62) The Commission does not consider that information on one hypothetical average brick manufacturer is sufficient for an assessment of the compatibility of the proposed tax exemption with regard to the ceramic industry in the Netherlands as a whole, because one particular average producer cannot be considered representative of the whole industry. As emphasised by the Netherlands itself in relation to the import and export data submitted to the Commission, the relevant information relates only to the brick segment and cannot automatically be used as a model for trends in other ceramic segments, because each ceramic segment has specific product/market combinations in which other economic factors play a role. In its statement of 24 May 2009 the VKO came to a similar conclusion ⁽²⁸⁾. The argument that no information can be provided on subsectors where only one recipient is operating is not convincing. Quite the reverse, it might have been easier to obtain information on an individual firm (as recently shown in a Danish case ⁽²⁹⁾).
- (63) In addition, part of the information sought was not provided. For instance, as indicated in recital 59, the Commission asked for information regarding the necessity and proportionality of the aid. As regards the necessity of the aid, the Commission requested estimates of the elasticity of the prices of the industry's products in the relevant markets, estimates of lost sales or reduced profits or both, the market shares of the recipients in the relevant geographic markets, and the development of the Dutch manufacturers' shares of those markets. The Commission's letter of 9 October 2009 gave the Netherlands an extra opportunity to provide the missing information, but it was never supplied.

⁽²⁶⁾ These questions were put in the second request for information addressed to the Netherlands on 17 November 2008 (D/54544).

⁽²⁷⁾ The Netherlands stated that it considered this information to be applicable to the other distinct segments of the ceramic industry; it said that the method had been used in other contexts, such as European legislation (e.g. for E-PRTR, the European Pollutant Release and Transfer Register) and national management studies (e.g. for NL-BAT best available techniques). For purposes of a competitive analysis, however, the Commission does not consider that information for one average undertaking in the brick segment can be regarded as being representative of the whole ceramic industry.

(64) On the basis of the information available, the following analysis can be made of the brick segment.

⁽²⁸⁾ The environmental aid guidelines do not expressly say whether the assessment is to be made at the level of the industry or of the subsector. Here, however, the Netherlands itself has indicated that the different subsectors face different competitive conditions. For purposes of this case, therefore, an assessment had to be made at subsector level.

⁽²⁹⁾ State aid case N 327/08, 29 October 2009, not yet published.

Necessity of the aid

- (65) Point 155 of the environmental aid guidelines states that when analysing tax schemes which include elements of State aid in the form of reductions of or exemptions from an environmental tax, the Commission will analyse in particular the necessity and proportionality of the aid and its effects at the level of the economic sectors concerned.
- (66) Point 158 of the environmental aid guidelines states that the Commission will consider the aid to be necessary if the following three conditions are all met. First, the choice of beneficiaries must be based on objective and transparent criteria, and the aid must be granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation (point 158(a) of the guidelines). Second, the tax without reduction must lead to a substantial increase in production costs (point 158(b)). Third, there must be an assurance that the substantial increase in production costs cannot be passed on to customers without leading to important sales reductions (point 158(c)). In this respect, the Member State may provide estimates, *inter alia* of the product price elasticity of the sector concerned in the relevant geographic market and of lost sales or reduced profits for the companies in the sector or category concerned.

Point 158(a) of the environmental aid guidelines

- (67) The Netherlands has argued that the exemption is directed at the ceramic process: all producers of ceramic products, and all competitors in the ceramic sector (or in the same relevant market when they are in a similar factual situation), are eligible for the exemption provided they satisfy the following tests:
- there must be supply of natural gas,
 - the natural gas must be used in installations for the manufacture of products by heating,
 - the products must consist of at least 90 % clay.
- (68) These tests are set out in the draft legislation⁽³⁰⁾. It appears, therefore, that the criteria determining the choice of recipients are both objective and transparent.

Point 158(b) of the environmental aid guidelines

- (69) The requirement that in the absence of the reduction the tax would lead to a substantial increase in production

⁽³⁰⁾ The draft legislation (the provision is to be included in Article 64 of the Environmental Taxes Act) refers to ceramic products that consist exclusively or almost exclusively of clay.

costs will be regarded as fulfilled, as explained in footnote 55 to the guidelines, if the recipient is an 'energy-intensive business' as defined in Article 17(1)(a) of the Energy Taxation Directive, i.e. one where either the purchases of energy products and electricity amount to at least 3,0 % of the production value⁽³¹⁾ or the national energy tax payable amounts to at least 0,5 % of the added value.

- (70) The Netherlands has submitted that brick producers belong to the group of energy-intensive users, because their energy costs amount to 20–30 % of their total production costs. The Netherlands has not specified how the total production costs stand in proportion to the production value; but it can be assumed that in normal business circumstances, i.e. when goods are sold at a price above production costs, the production costs will be lower than the production value, because production value is linked to turnover and thus to the price of the product sold. Assuming that the business circumstances are normal, therefore, the share of energy costs in the production value will be lower than the share of energy costs in the production costs submitted by the Netherlands. And the production value will not be so far above production costs, it can also be assumed, as to drive the share of energy costs from 20–30 % when the denominator is production costs to below 3 % when the denominator is production value. The Commission consequently accepts that the undertakings in the Dutch ceramic industry are 'energy-intensive businesses' as defined in the aforementioned Directive, so that the requirement of a substantial cost increase in point 158(b) is fulfilled. The Commission is thus basing its assessment on the legal presumption in footnote 55 to the environmental aid guidelines.

Point 158(b) of the environmental aid guidelines

- (71) Turning to the criterion in point 158(c) of the environmental aid guidelines, detailed questions were asked in order to assess whether a substantial increase in production costs could be passed on to customers without resulting in a significant loss of sales. In particular, the Netherlands was asked to provide information on the sales figures of the ceramic industry in the relevant markets over the last 10 years; the rate of the energy tax and the total amount of tax paid; total energy costs per undertaking over the last 10 years; estimates of the elasticity of the prices of the industry's products in the relevant markets; estimates of lost sales or reduced profits or both; information on the development of trade flows in the Dutch ceramic industry in and out of the Netherlands to and from the relevant

⁽³¹⁾ Article 17(1)(a) of the Energy Taxation Directive states that "Production value" shall mean turnover, including subsidies directly linked to the price of the product, plus or minus the changes in stocks of finished products, work in progress and goods and services purchased for resale, minus the purchases of goods and services for resale.'

- geographic markets; the market shares of the recipients in the relevant geographic markets; and any other factor which might play a role in the assessment of the scope for passing on costs (see recitals 59 and 63).
- (72) The Netherlands has confirmed that in principle the relevant costs can be passed on, but says that it is becoming more and more difficult to do so. In recent years producers that have not been able to pass on their costs have closed or been declared insolvent. However, the Netherlands has not provided any evidence in order to demonstrate a causal link between the cost of the tax and the fact that these firms have gone out of business. The Commission observes that it is for the Member State to provide the necessary information in support of its claims.
- (73) The Netherlands has also indicated that the price elasticity of demand for bricks is low, but has not substantiated this by reference to actual data.
- (74) The Netherlands has explained that competition in the brick sector is steadily increasing, owing to imports of similar bricks produced by competitors in other Member States, and that the market share of the Dutch-made brick is in decline. In an annex to the letter of 30 October 2009 the Netherlands submitted import and export data showing that imports from Germany into the Netherlands had increased over recent years and that exports from the Netherlands to Germany and Belgium had decreased⁽³²⁾. The main reason, according to the Netherlands, is that the foreign producers of bricks enjoy exemption from energy tax, whereas Dutch producers do not.
- (75) As a matter of principle, however, State aid, including exemption from an environmental tax, cannot be justified solely by the existence of comparable measures in other Member States. To accept such a justification would be to accept that the existence of state measures in one Member State allows other Member States to take compensatory measures in order to mitigate the detrimental effect on their own industry. From a State aid perspective, retaliation of this kind cannot be accepted. The true remedy to the harm caused by State aid is not a subsidy race but the enforcement of the State aid rules, including the environmental aid guidelines. Thus, the notified measure cannot in any way be justified solely as a legitimate remedy to aid that is suspected to exist elsewhere: if it is to be approved, it must be shown that there is a substantial increase in costs, and that the costs cannot be passed on to customers.
- (76) Despite the limitations imposed by transport costs, which reduce the geographical market for bricks to 250 km, from the information submitted the Commission can conclude that the brick industry is exposed to trade between Member States. The Netherlands has submitted that 20 % of the bricks produced annually are exported. From the data provided the Commission has been able to calculate an approximate value for trade intensity⁽³³⁾, which amounts to 75 %. Owing to a lack of consistent data, however, this figure for trade intensity had to be calculated on the basis of 2007 data for trade flows and 2008 data for turnover. These circumstances might suggest that the industry is experiencing difficulty in passing on the tax burden imposed by the Netherlands. However, the allegation that it is difficult to pass on the cost increase is contradicted by the Netherlands' statement that the tax has been passed on so far, and by the fact that over the period for which the data are submitted exports by the Dutch brick sector increased, from EUR 189 million in 2001 to EUR 225 million in 2007. Owing to the lack of further information and data, no more conclusive analysis is possible.
- (77) Additionally, and in spite of the Commission's express request that the recipients' market shares in the relevant geographic markets should also be provided, no multi-annual market data has been submitted in support of the Netherlands' statement that the market share of the Dutch-made brick is in decline.
- (78) The following information was also requested for purposes of an assessment of the possibility of passing on costs, but was not supplied: sales figures for ceramics, in volume and value per year, for an average undertaking in each relevant market over the last 10 years (it was indeed submitted that the brick segment had an annual turnover of EUR 370 million in the Netherlands, but no information on volume was given; on the basis of historical information it was also estimated that the decorative earthenware segment had an annual turnover of EUR 7–10 million); the total figure paid per year in energy tax by an undertaking in the relevant market over the last 10 years (the Netherlands provided data only for an average brick company in 2009); energy costs for an undertaking in the relevant market over the last 10 years (the Netherlands provided data only for an average brick undertaking in 2009); estimates of price elasticity for products in the relevant product and geographic markets; estimates of decreasing turnover or profit, or both, for undertakings in these markets; and the development of the market shares of Dutch producers in the relevant geographic markets. The Commission also asked for data on changing trade flows in the Dutch ceramic industry, i.e. imports into the Netherlands from the relevant geographic markets and exports from the Netherlands to these markets, but no multiannual information was submitted with regard to the total imports and exports of the ceramic industry (nor on changes in the total turnover of the industry over

⁽³²⁾ The same data were supplied with the letter dated 16 September 2008.

⁽³³⁾ 'Trade intensity' means the total value of exports and imports divided by the total value of turnover and imports in the respective market.

changes in the total turnover of the industry over the years). Hence, it is not possible to draw any meaningful conclusion with regard to the level of trade intensity in the ceramic industry, and for the brick industry there is only the approximate value referred to in recital 76.

- (79) For the other segments identified by the Netherlands, notably roof tiles, sewage pipes, sanitary products, ceramic wall and floor tiles, fireproof material and porcelain and decorative earthenware, the Netherlands refers to the information provided for an average undertaking in the brick segment. Moreover, only very limited information was provided on the separate segments. In the letter of 16 September 2008 the Netherlands stated the size of the relevant geographic market for each segment and the share of national output imported or exported, in percentage points, specifying the various different export destinations⁽³⁴⁾. However, the detailed information per segment that the Commission had requested, outlined in paragraph 78, has not been provided.

⁽³⁴⁾ With the letter of 16 September 2008 the Netherlands provided the following specific information on the ceramic industry subsectors identified; it is unclear to what year the data relates: from the general description of the ceramic industry it might be inferred that the data per segment likewise relates to 2008. Bricks: The segment has a turnover of around EUR [...] (*) and employs about [...] persons. The Dutch brick industry exports around [...] % of its annual output. Imports amount to around [...] % of annual Dutch output. Owing to the weight of bricks, the geographic market is bounded by a circle of [...] km around the business producing them, and thus includes [...], [...] and [...]. Ceramic roof tiles: No turnover figure was provided. This segment employs around [...] persons. It exports around [...] % of its annual output, mainly to directly surrounding countries. Imports amount to [...] %, and come from the same neighbouring countries. Owing to the weight of the products, the geographic market is bounded by a circle of [...] km around the business producing them, and thus includes [...] and [...]. Ceramic sewage pipes: There is one producer, which has two production locations. Owing to the weight of the products, the geographic market is bounded by a circle of [...] km around the business producing them, although it was stated that the company concerned exports throughout Europe. Sanitary products: No turnover figure was provided; the segment employs about [...] persons. Around [...] % of annual Dutch output is exported, whereas around [...] % is imported. The relevant geographic market is bounded by a circle of [...] km around the business producing the products. The producer is part of a European group. Fireproof materials: This segment is almost exclusively internationally oriented. It employs around [...] persons. It exports around [...] % of its annual output, and imports about [...] %. Ceramic tiles: The segment employs around [...] persons, and exports [...] % of its annual output. Imports equal [...] % of annual output. The biggest importing countries in the EU are [...], [...] and [...]. The biggest importing countries outside the EU are [...] and [...]. Decorative earthenware: This segment has four production locations and employs around [...] persons. It exports [...] % of its annual output, and imports are equal to about [...] % of Dutch annual output. On the basis of historical data, the turnover of this segment is estimated at around EUR [...] million (broadly [...] % of the estimated total turnover of the ceramic industry in the Netherlands).

(*) Confidential information.

- (80) On the basis of the information available, the Commission is not able to make a finding that an increase in the production costs of Dutch ceramic producers cannot be passed on to customers without leading to important sales reductions. It must therefore be concluded that the Netherlands has not shown that the criterion laid down in point 58(c) of the environmental aid guidelines is fulfilled.

CONCLUSION REGARDING THE NECESSITY OF THE PROPOSED AID

- (81) The Commission therefore considers that the information provided does not show that the proposed aid to the Dutch ceramic industry is necessary. For this reason alone it must be concluded that the aid measure is incompatible with the internal market.

Proportionality of the aid

- (82) Turning to the question of proportionality, point 159 of the environmental aid guidelines states that every beneficiary must satisfy one of the following tests:
- The beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. The beneficiary can benefit, at most, from a reduction corresponding to the increase in production costs from the tax, using the best performing technique, and which cannot be passed on to customers.
 - The beneficiary pays at least 20 % of the national tax, unless a lower rate can be justified.
 - The beneficiary can enter into agreements with the Member State whereby it commits itself to achieve environmental protection objectives which have the same effect as if point (a) or (b) or the Community minimum tax level were applied.
- (83) The Netherlands has confirmed that the test in point (a) is not satisfied. The Netherlands has not discussed the test in point (c). As regards the test in point (b), i.e. that the beneficiary should pay at least 20 % of the national tax unless a lower rate can be justified, the Netherlands has submitted that all the beneficiaries together do not pay at least 20 % of the national (energy) tax (the revenue stemming from e.g. the electricity tax that companies do still pay). According to the Netherlands, the size of the sector means that the proportion in fact paid is much less. The Netherlands has reiterated in this context that the application of the exemption for ceramic products from the energy tax on natural gas removes a distortion of competition, as it creates a level playing field for all ceramic works in the internal market.

- (84) Point (b) refers to the national energy tax rate, and not to a 20 % proportion of the total amount of tax borne by the taxpayers in respect of different energy products. The notified measure involves a complete exemption from the national tax rate on natural gas, which means that the percentage threshold set out in point 159(b) of the environmental aid guidelines is not met. Furthermore, the Netherlands has not demonstrated that there is only a 'limited distortion of competition', which might justify a lower rate: this is simply because the market data requested on the competitive position of the industry have not been provided. From the information that has been provided, therefore, it cannot be concluded that this criterion is fulfilled.

CONCLUSION REGARDING THE PROPORTIONALITY OF THE PROPOSED AID

- (85) The Commission therefore considers that the information provided does not show that the proposed aid to the Dutch ceramic industry is proportional.

VII. CONCLUSION

- (86) The Commission finds that the proposed tax exemption, which constitutes operating aid, is not eligible for any of the exemptions from the general prohibition of State aid in the TFEU, and is therefore incompatible with the internal market. Consequently, the aid measure may not be put into effect,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of an exemption from the energy tax on natural gas which the Netherlands is planning to grant to the Dutch ceramic industry is incompatible with the internal market.

Consequently, the aid measure may not be put into effect.

Article 2

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

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 15 December 2009.

For the Commission

Neelie KROES

Member of the Commission