OPINION OF ADVOCATE GENERAL LÉGER
delivered on 12 June 2003 [1]

1. The Kingdom of the Netherlands has set up a system of levies designed to reduce the infiltration of nitrogen and phosphates into the ground as the result of the use of fertilisers on farms. Those levies are payable by farmers who cause losses into the environment of nitrogen and phosphates in excess of a given threshold. The Kingdom of the Netherlands has also established an exemption from those levies for small undertakings (referred to as 'hobby-undertakings') and for horticultural undertakings and garden centres which grow crops under glass or on substrate.

2. By Decision 2001/371/EC of 21 December 2000 on the exemption from mineral levies under the manure law which the Netherlands intends to grant, [2] the Commission found those tax exemptions to be State aid incompatible with the common market.

3. In the present action, brought under the first paragraph of Article 230 EC, the Kingdom of the Netherlands seeks partial annulment of the contested decision in so far as it relates to horticultural undertakings and garden centres which grow crops under glass or on substrate.

I — Legal framework

A — *Community provisions*

4. The provisions relevant to these proceedings are those governing State aid and the protection of waters from nitrate pollution.

1. The rules on State aid

5. Article 87(1) EC provides that:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or

1 — Original language: French.

2 — OJ 2001 L 130, p. 42 (hereinafter 'the contested decision').

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.'

6. The scope of that article in relation to taxation received clarification in the Commission Notice of 10 December 1998 on the application of the State aid rules to measures relating to direct business taxation. [3]

7. According to the notice, in order to be qualified as prohibited State aid within the meaning of Article 87 EC, a tax measure must meet the following four cumulative criteria. [4]

8. Firstly, the measure in question must confer on its beneficiaries an advantage which relieves them of charges normally borne from their budgets. Such an advantage may derive from a reduction in the firm's tax burden in various ways. There may be, in particular, a reduction in the tax base (a special deduction) or a total or partial reduction in the amount of tax (an exemption or tax credit).

9. Secondly, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.

10. Thirdly, the measure must affect competition and trade between Member States. That criterion presupposes that the beneficiary of the measure exercises an economic activity, regardless of its legal status or means of financing. According to settled case-law, the requirement of an effect on trade is met if the beneficiary undertaking carries on an economic activity involving trade between Member States.

11. Fourthly, the measure must be specific or selective in that it favours certain undertakings or the production of certain goods. That selectivity may, however, be justified by the nature and general scheme of the system. Where that occurs, the measure falls outside the designation as aid contained in Article 87 EC.

12. As regards the last criterion, paragraph 23 of the notice makes it clear that the differential basis of some measures does not necessarily cause them to be regarded as State aid. That is true of measures whose economic rationale makes them necessary to the functioning and effectiveness of the

3 — OJ 1998 C 384, p. 3 (hereinafter 'the notice').
4 — Paragraphs 9 to 12.

tax system. It is for the Member State to substantiate that fact.

13. From a procedural perspective, the notice observes that, under Article 88(3) EC, Member States are bound to notify the Commission of all their plans to grant or alter aid. Member States may not put such measures into effect without obtaining the Commission's prior approval. [5]

14. Regulation (EC) No 659/1999 [6] codifies the procedure for obtaining the Commission's approval. That regulation, which came into force on 16 April 1999, is applicable to the present case.

15. Pursuant to Article 2 of Regulation No 659/1999, the Member State concerned must, in principle, notify the Commission in sufficient time of any planned grant of new aid. That State must, in its notification, provide all necessary information in order to enable the Commission to take a decision as to whether there is aid and whether it is compatible with the common market.

5 — See paragraph 34.

6 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1). Article 93 of the Treaty is now Article 88 EC.

2. Provisions on the protection of waters from nitrate pollution

16. The aim of Directive 91/676/EEC, [7] according to Article 1, is that of 'reducing water pollution caused or induced by nitrates from agricultural sources [and] preventing further such pollution'.

17. Accordingly, Directive 91/676 requires Member States to adopt a number of measures. In particular, they must ensure that, for each farm or livestock unit, the amount of nitrogen contained in the livestock manure [8] spread each year does not exceed 170 kg per hectare. Member States may only authorise different amounts if those amounts are justified on the basis of objective criteria and do not prejudice the aims of the aforementioned directive. [9]

B — *National provisions*

1. The levy system

18. The levy system set up by the Kingdom of the Netherlands, known as the 'MINAS'

7 — Council Directive of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p.1).

8 — '[L]ivestock manure' is defined in Article 2(g) of Directive 91/676 as waste products excreted by livestock or a mixture of litter and waste products excreted by livestock, even in processed form.

9 — See Annex III, paragraph 2.

system, [10] is defined in the Wet van 27 november 1986 houdende regelen inzake het verhandelen van meststoffen en de afvoer van mestoverschotten. [11] Under that system, farmers must keep records of the quantities of minerals entering and leaving their farms. Those arrangements seek to ensure that the input of phosphates and nitrogen before production is no greater than the removal of those minerals after production, plus a 'tolerated loss'. Where, on a given farm, losses of phosphates and nitrogen exceed the tolerated loss norms, the farmer in question is liable to pay a levy on the surplus.

19. The levies in question are either fixed or proportional. The provisions governing them are set out in Chapter IV of the Meststoffenwet.

20. As regards the fixed levies, they are calculated according to the taxable amount of fertiliser for a calendar year, expressed in kilograms of phosphates and of nitrogen. [12] The taxable amount of fertiliser is the total of the 'input' quantity of fertiliser plus the quantity of animal manure produced, less the 'outgoing' quantity of manure, the amount of fertiliser absorbed by crops and the tolerated fertiliser loss. [13] The uptake of fertiliser by crops is set per hectare for the average area of agricultural land belonging to the farm over the year at 65 kg of phosphates and 300 kg of nitrogen for pasture, and 50 kg of phosphates and 125 kg of nitrogen for arable land. [14]

21. As regards the proportional levies, they too are calculated on the basis of mineral 'inputs' and 'outputs'. However, a greater number of factors is taken into account in determining mineral 'inputs' and 'outputs'. The 'output items' thus include fertilisers of animal origin, 'roughage' from the farm itself, certain types of animal, and animal products and agricultural and horticultural products other than roughage. [15] The quantity of phosphates and nitrogen in those agricultural or horticultural products other than roughage is set as a flat rate of 65 kg and 165 kg respectively per hectare of arable land of the area of agricultural land belonging to the farm used for agriculture and horticulture during the year in question. [16]

10 — The Mineralenaanfgiftesysteem (mineral levy system).

11 — Law of 27 November 1986 regulating trade in fertilisers and the removal of surplus fertiliser, as amended by the law of 16 September 1999 (Stbl. 1999, p. 406, hereinafter 'the Meststoffenwet').

12 — See Article 15 of the Meststoffenwet.

13 — Ibid., Article 16.

14 — Ibid., Article 18.

15 — See Annex D, Article D2, of the Meststoffenwet.

16 — Ibid., Annex D, Article D8.

22. The tolerated loss norms are set at the same amounts for both types of levy. [17]

2. Exemptions

23. The regulation of 12 January 1999 of the Minister for Agriculture, Nature Conservation and Fisheries [18] establishes three exemptions from the levies imposed by the Meststoffenwet.

24. The first exemption relates to small undertakings, known as 'hobby-undertakings'. [19] They enjoy a total exemption. [20]

25. The second exemption covers horticultural undertakings which grow crops under glass (indoor soil-bound horticulture) or on substrate (non-soil bound horticulture). Those enterprises are exempt to the extent of a maximum taxable quantity of fertiliser of 460 kg of phosphates and 800 kg of nitrogen per hectare of the average area of the growing medium or land effectively used by the undertaking for those types of production in the course of the calendar year. [21]

26. The third exemption is for garden centres which also perform horticultural activities under glass or on substrate. They enjoy the same partial exemption as the horticultural undertakings referred to above. [22]

27. The exemption regulation applies with retroactive effect from 1 January 1998, the date on which the levies imposed by Chapter IV of the Meststoffenwet came into force. [23]

II — The administrative procedure and the contested decision

28. By letter of 7 October 1999, the Kingdom of the Netherlands notified the exemption regulation to the Commission, at the latter's request, [24] in compliance with

17 — Ibid., Article 19 and Article 26.

18 — Stert 1999, No 9 (hereinafter 'the exemption regulation').

19 — These are undertakings where there are, on average during a calendar year, no more than three livestock units and three hectares of farmland. In addition, they must not obtain supplies of animal or organic fertilisers.

20 — See paragraph 2 of the exemption regulation.

21 — Ibid., Paragraph 3.

22 — Ibid., Paragraph 4.

23 — Ibid., Paragraph 5.

24 — In that letter, the Netherlands Government stated that it had notified the exemption regulation to the Commission on 5 January 1999 as a technical regulation. By letters of 20 May and 10 August 1999, the Commission intimated to that government that the regulation in question might contain terms constituting State aid.

Article 88(3) EC. The Kingdom of the Netherlands claimed that the exemptions established in that instrument were justified by the nature of the mineral levy system and did not therefore amount to State aid within the meaning of Article 87(1) EC.

29. By telex of 26 October 1999, the Commission requested further information from the Dutch permanent representative.

30. The Netherlands Government replied by letter of 10 January 2000.

31. Taking the view that the explanations given in that letter were inadequate, the Commission informed the Netherlands Government, by letter of 20 March 2000, of its decision to initiate the procedure laid down in Article 88(2) EC in respect of the exemptions in issue.

32. The Netherlands Government submitted its observations by letter of 17 May 2000.

33. On 21 December 2000, the Commission adopted the contested decision.

34. In the aforementioned decision, the Commission states that, in the absence of any further information, the doubts remain which led it to commence the formal investigation procedure in respect of the exemptions in issue. It sets out the following considerations.

35. As regards whether there is aid, the fact that the levies are comparable to fines does nothing to alter the fact that the MINAS system was conceived as a set of tax provisions. Exemptions from that system are therefore capable of being State aid liable to distort competition between Member States. Whenever some undertakings are subject to the levies in question, exempt undertakings are in a better position. The effect of the measure is therefore to confer an advantage on certain undertakings.

36. As for 'hobby-undertakings', the exemption laid down is not justified by the nature and general scheme of the system.

37. In respect of undertakings and garden centres performing horticultural activities under glass or on substrate, the Dutch authorities presented no new information. In view of the fact that the quantities exempted are well above the norms set for agricultural land and that the same rules apply to soil-bound and to non-soil-bound

horticulture, there is no reason inherent to the system to grant the proposed exemptions.

38. On the other hand, those exemptions do satisfy the four criteria referred to in the notice, which is applicable by analogy. Further, aid of that nature must be regarded as an operating subsidy and does not meet the requirements to be a permissible subsidy under Article 87(3) EC.

39. Lastly, the Commission rejects the argument that it is using or misusing the State aid procedure in order to enforce Directive 91/676. It states, none the less, that a State aid procedure may never produce a result contrary to the specific provisions of the Treaty. It draws attention to the fact that a specific infringement procedure has been commenced against the Kingdom of the Netherlands for failure to comply with that directive. [25]

40. The Commission infers from the foregoing that the tax exemptions established by the Kingdom of the Netherlands for 'hobby-undertakings' and for horticultural undertakings and garden centres which perform horticultural activities constitute State aid incompatible with the common market. [26]

25 — Case C-322/00, pending before the Court, in which proceedings also I delivered an Opinion, on 7 November 2002.

26 — See Article 1 of the contested decision.

III — Discussion

41. The Netherlands Government disputes the contested decision only to the extent that it relates to undertakings and garden centres which grow crops under glass or on substrate. It advances two pleas in support of its action. The first alleges an infringement of Article 87(1) EC. The second concerns failure to provide an adequate statement of reasons.

42. In the light of the arguments put forward by the applicant in support of those two pleas, I shall examine the latter in the order in which they are raised.

A — *Infringement of Article 87(1) EC*

43. There are two limbs to this plea. Firstly, the Netherlands Government argues that the Commission wrongly found the exemption for cultivation under glass or on substrate to be State aid within the meaning of Article 87(1) EC. Secondly, it criticises the Commission for basing that finding on the view that the exemption in dispute contravenes Directive 91/676.

1. On the classification of the exemption as State aid

(a) Arguments of the parties

44. The Netherlands Government asserts that the purpose of the exemption regulation is to offset the disadvantage at which the Meststoffenwet places horticultural undertakings which grow crops under glass or on substrate. In its view, the Meststoffenwet disregards the fact that much greater amounts of minerals are removed in those two methods of cultivation. That law therefore results in such undertakings having to pay undue levies. In order to rectify that error, the government claims, the exemption regulation therefore grants those undertakings a partial exemption to the extent of 460 kg of phosphates and 800 kg of nitrogen per hectare of cultivation under glass or on substrate.

45. The Netherlands Government contends that those flat-rate amounts are justified on the following grounds. Unlike outdoor soil-bound cultivation, cultivation under glass or on substrate is not linked to the seasons, with the effect that, on an annual basis, it requires a larger quantity of fertiliser. Further, plants grown under glass or on substrate have significantly higher yields than those of crops produced in outdoor soil-bound cultivation. The uptake of minerals by those plants is consequently eight times higher. Lastly, the flat-rate amounts in question are set on the basis of the average uptake of phosphates and nitrogen by several different plants.

46. It argues that, since the exemption in question merely rectifies a disadvantage, the four requirements of the notice are not satisfied.

47. Firstly, the exemption in issue is not in its view an advantage which reduces the charges of producers who grow crops under glass or on substrate. One would only be dealing with a reduction in those charges if those producers were able to apply more nitrogen and phosphates than is authorised by the loss norms without having to pay the corresponding levies. The exemption is designed, on the contrary, according to the Netherlands Government, to eliminate an unintended disadvantage suffered by those undertakings as a result of the fact that the Meststoffenwet does not take into account the absorption of minerals by the plants grown on the holding.

48. Secondly, the Netherlands Government denies there is any advantage conferred by the State or through State resources. Since it is not a question here of an exemption but of the rectification of an unfairness deriving from the Meststoffenwet, the exemption in question is not, inherently, an advantage conferred by the State or through State resources. Further, the MINAS system is, according to the government, prohibitive in nature. It is more advantageous to farmers to limit mineral wastage into the environ-

ment by adapting their production methods than to pay the levies. The intention behind the latter is, according to the Netherlands Government, to procure a reduction in the quantity of fertiliser which farmers use on their holdings. The system in question is, it claims, analogous in its nature, purpose and working to a system of administrative and criminal fines. It is therefore a tax regime only in appearance but does not in fact operate to generate income for the State.

49. Thirdly, the exemption in dispute does not, in the submission of the Netherlands Government, adversely affect trade between Member States. It would only affect trade or distort competition, both in relation to undertakings which grow crops under glass or on substrate in other Member States and in relation to other undertakings in the Community in general, if the undertakings which grow crops under glass or on substrate in the Netherlands were entitled to use more fertiliser than other farmers. Since the exemption in issue is based on the uptake of minerals by the crops produced on the holding it does not, the government contends, affect trade, or distort competition.

50. Fourthly, the fact that the exemption is selective is justified, the Netherlands Government asserts, by the nature of the mineral levy system. It contends that the situation under analysis is analogous to that given as an example in paragraph 25 of the notice, concerning the exemption from profit tax for associations or foundations. Since that tax cannot be levied if no profit is earned, the very nature of the system justifies the exemption of foundations and associations from the tax. Likewise, it argues, no levy should be payable on the input of minerals which are taken up by plants and do not pollute the ground.

51. In response to the Commission's argument that it must review the legality of a decision on State aid on the basis of the information available to it at the time the decision is made, the Netherlands Government asserts that the Commission had a duty to submit a clear request for information. At no time during the administrative procedure, according to the Netherlands Government, did the Commission make it aware of its precise objections to the exemption regulation. Nor did it ask the government to provide it with information which, according to the Commission, it was lacking for the purposes of forming a clear picture of the nature and consequences of the regulation in question.

52. Thus, the Netherlands Government submits, in the telex of 26 October 1999 the Commission merely stated that the norms under the exemption provisions were higher than those applying to agricultural land. The Netherlands Government provided explanations in its letter of 10 January 2000. In its view, the Commission has not indicated why those explanations were unsatisfactory. In its decision of 20 March 2000 to initiate the procedure under

Article 88(2) EC, the Commission merely repeated what it had already said in the abovementioned telex. Since it is plain that the mineral uptake by plants grown under glass or on substrate is greater than that of plants grown outdoors, the Netherlands Government then formed the view that the Commission was mistaken about the exemption provisions. For that reason, by letter of 17 May 2000, it again set out the purpose of the exemption in question and why it was necessary. The Commission then adopted the contested decision without making any response to that letter. Furthermore, the Netherlands Government claims that the Commission disputed the flat-rate basis of that exemption for the first time in the defence.

53. The Commission disputes all the foregoing arguments.

54. It asserts that, by virtue of Article 2 of Regulation No 659/1999 and paragraph 23 of the notice, it is for the Member States concerned to establish that an exemption from a levy is not a State aid measure on the ground that it is necessary to the functioning of the relevant tax system. If, in the course of the procedure, the Member State and the interested parties omitted to put forward the arguments or to provide the necessary information which would enable the Commission to allay the difficulties encountered in examination of the measure and would convince it that the measure is not incompatible State aid, the Commission has no option, it believes, but to refuse approval of that measure.

55. The Commission states that, from the outset of the procedure, it requested the Netherlands Government to explain why the nitrogen and phosphate loss norms were much more favourable to horticultural undertakings than to conventional farmers and why the tolerated quantities of minerals were much greater than those set by Directive 91/676. It claims that it reiterated its doubts in its decision to commence the formal investigation procedure. In that latter decision, it also asked the government to provide it with any information which might be helpful to it in assessing the aid measure. However, the Commission contends, that government confined itself to statements of a general import, including in its letter of 17 May 2000.

56. The Commission points out that the contested decision is based on the lack of any justification by the Netherlands Government of the proposed exemption in favour of horticultural undertakings. In particular, the Commission asserts, that government failed to demonstrate that the uptake of nitrogen and phosphates by plants grown under glass or on substrate is eight times higher than that of traditionally-grown crops.

57. On the basis of the foregoing considerations, the Commission takes the view that the four conditions laid down by the notice are satisfied.

58. Firstly, it contends, the exemption under analysis does reduce the charges which the beneficiaries normally have to bear. Secondly, it is an advantage granted by the State or through State resources in that it entails a loss of tax revenue. Thirdly, it does affect trade between Member States, since it strengthens the financial position of the beneficiaries. Fourthly, it is not justified by the nature of the mineral levy system.

61. According to the Netherlands Government, that exemption confers no advantage whatsoever on those undertakings but rectifies an error to their detriment in the MINAS system. The differentiation in their favour which the exemption regulation introduces, or even the fact that the measure is selective, is therefore justified, it contends, by the nature and general scheme of the system of manure levies. I shall start by examining that argument.

(b) Assessment

(i) Whether there is an advantage granted to certain undertakings or for the production of certain goods and whether the selective basis of the proposed exemption is justified by reason of the nature and general scheme of the system

59. It has been seen that Article 87(1) EC defines aid that is, in principle, prohibited under the Treaty as 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, in so far as it affects trade between Member States.

62. The Community Courts have interpreted the notion of aid as not covering measures which differentiate between undertakings in relation to charges where that differentiation is the result of the nature and general scheme of the system of levies in question.[27] In other words, the derogation from the general system estab-

60. It is common ground that the exemption regulation grants a partial exemption from the levies payable under the MINAS system on losses of phosphates and nitrogen into the environment for certain agricultural undertakings, namely those which grow crops under glass or on substrate.

27 — See Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33, Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 21, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 34.

lished by the measure under examination in favour of certain undertakings is not aid if that derogation is justified by the very objectives of the general regime. [28]

63. It is worthy of note that, by virtue of Article 10 EC, Member States have an obligation to cooperate in the implementation of Article 88 EC. [29] That obligation requires Member States to provide the Commission with all information necessary for it to carry out its duties. Accordingly, a Member State which seeks to be allowed to grant aid in derogation from the Treaty rules must provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled. [30] A Member State which fails to fulfil its duty of cooperation during the administrative procedure cannot, subsequently, charge the Commission with having manifestly erred in its assessment nor with having given insufficient reasons for its decision, [31] or with failing to seek assistance from an independent expert in making its decision. [32] The Court has also applied that requirement of proof where it is necessary to determine whether or not the measure in question is a consequence of the nature and general scheme of the relevant system of charges in order to preclude classification of that measure as aid. [33]

64. That obligation of cooperation, founded on Article 10 EC, is expressly referred to in the sixth recital in Regulation No 659/1999, which defines the Commission's procedures for monitoring State aid drawing on the practice of the Commission and the case-law of the Court of Justice. [34] That obligation is embodied, in Article 2(2) of that regulation, in the obligation imposed on the Member State concerned to provide all the information necessary in order to enable the Commission to take a decision on the existence of aid [35] and whether it is compatible with the common market.

65. It follows that it is for the Member State to demonstrate that the derogation in issue is justified by the nature and general

28 — That is true, for example, of the progressive nature of an income tax scale, which provides for more favourable terms for taxpayers with the lowest income, which is justified by the redistributive purpose of the tax. Similarly, it may be justified by the nature of the tax system that cooperatives which distribute all their profits to their members are not taxed when tax is collected from the latter (see paragraphs 24 and 25 of the notice).

29 — See, for example, Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 189 and the case-law cited.

30 — See Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20 and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 56 and the Opinion of Advocate General Saggio in that case (paragraph 25). See also the Opinion of Advocate General Jacobs in Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraph 86. According to the Advocate General, 'in the field of State aid control the Member States have a general obligation to provide the Commission in good faith with all the necessary and relevant information at their disposal'.

31 — See Case C-364/90 *Italy* v *Commission*, cited above (paragraph 22).

32 — Case T-72/98 *Astilleros Zamacona* v *Commission* [2000] ECR II-1683, paragraph 55.

33 — Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 43. See also, in that regard, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 27.

34 — The second recital of that regulation.

35 — According to Article 4(2) of that regulation, the Commission may find that the measure notified does not constitute aid.

scheme of the system and, consequently, that it is not aid within the meaning of Article 87 EC. [36] It is therefore necessary to examine whether, on the facts of the present case, the Netherlands Government has established that the quantities of nitrogen and phosphates exempted for horticultural undertakings and garden centres which grow crops under glass or on substrate are inherent in the nature and general scheme of the MINAS system.

66. To that end, the Netherlands Government has provided the following explanations in the course of the administrative procedure. In its reply of 10 January 2000 to the Commission's request for additional information, it explained that the quantities of 460 kg of phosphates and 800 kg of nitrogen were based on research data from the Proefstation voor de Bloemisterij en Glasgroenten (Research Station for Floriculture and Vegetables under Glass) and that the yields under glass are eight times higher than those of soil-bound outdoor crops. In its observations of 17 May 2000, in response to the commencement of the formal investigation procedure, the Netherlands Government repeated that the flat-rate figures of 460 kg of phosphates and 800 kg of nitrogen per hectare of crops under glass or on substrate derive from research by the aforementioned centre. It added that those amounts were justified because crops under glass or on substrate differ from outdoor crops in the following respects:

— 'unlike outdoor crops, crops grown under glass or on substrate are not dependent on the seasons, and fertilisers can therefore be applied and used throughout the year;

— with crops under glass or on substrate, the type of farming, measured by the number of plants per hectare, is much more intensive than outdoor cultivation. The uptake of fertilisers per hectare by the plants is consequently significantly above that in outdoor cultivation;

— the uptake of fertilisers by plants is on average eight times higher for plants grown under glass or on substrate than for outdoor crops, for the above two reasons;

— all the fertilisers applied are removed from the holding via the plants grown. There is therefore no discharge of fertilisers into the ground and no adverse effect on groundwater. As regards crops grown on substrate, there is in any event no contact with the ground.'

67. The Netherlands Government has submitted no documents in support of its statements.

36 — Paragraph 23 of the notice.

68. Admittedly, it seems undeniable that the yields of crops grown under glass or on substrate are higher than those from outdoor, soil-bound cultivation. It is therefore plausible to suggest that, over a comparable area of cultivation, crops grown under glass or on substrate allow a greater uptake of phosphates and nitrogen by plants, in the course of a year, than outdoor, soil-bound crops.

69. However, the foregoing explanations do not establish that the uptake of fertilisers by plants grown under glass or on substrate is on average eight times higher than that of outdoor, soil-bound crops. Nor do they warrant the conclusion that the uptake corresponds to average annual quantities of 460 kg of phosphates and 800 kg of nitrogen per hectare. Furthermore, they do not prove that the uptake of phosphates and nitrogen by crops grown under glass and those produced on substrate should be set at the same flat-rate amounts, when the Netherlands Government itself points out that the former are in direct contact with the ground and that the latter are not.

70. Evidently, therefore, by confining itself to mere assertions, the Netherlands Government has failed to show that the exemption in issue is justified by the nature and general scheme of the MINAS system. That finding is borne out by that government's assertions at the hearing, acknowledging that it had been unable to persuade the Commission that the exempted quantities of phosphates and nitrogen are correct, and stating that such justification could only be substantiated scientifically.

71. The Netherlands Government nevertheless contends that the justification which it did furnish to the Commission must be evaluated in the light of the fact that at no time did the Commission specify its criticisms of the exemption regulation. Nor, according to that government, did the Commission state precisely what information it needed on which to base its assessment, in particular after the letter of 17 May 2000. In the view of the Netherlands Government the Commission should, in the absence of adequate information, have reserved its approval and clearly formulated its request for information.

72. In my view that argument is untenable. I believe, on the contrary, that the Commission did make its criticisms of the exemption regulation sufficiently clear to the Netherlands Government.

73. Thus, as soon as it received notification of the regulation, pursuant to Article 88 EC, the Commission observed, in its telex of 26 October 1999, that the proposed norm for nitrogen was significantly higher than that permitted by Directive 91/676 and that there appeared to be no reason to

grant the proposed exemption for the horticulture sector. It requested additional clarifications from the Netherlands Government.

74. Subsequently, in its letter of 20 March 2000 informing the Netherlands Government of its intention to initiate the formal investigation procedure, the Commission stated that the explanations provided by that government in its letter of 10 January 2000 were not sufficient to conclude that the exemption in question was justified by the nature and general scheme of the system. The Commission observed that the authorised input of phosphates (460 kg) and of nitrogen (800 kg) appeared to be much higher than for soil-bound outdoor crops and that there appeared to be no reason inherent in the system to grant the proposed exemption. In respect of garden centres which carry on horticultural activities, the Commission indicated that there did not appear to be any reason to grant an exemption of that nature either, since the same rules should apply to soil-bound and to non-soil bound horticulture.

75. The Commission added that, at the stage then reached in the procedure, it took the view that, in the absence of justification, those exemptions should be treated as State aid. Further, since those exemptions appeared to meet all the criteria set out in paragraphs 9 to 12 of the notice, they had to be qualified as operating aid. Finally, the Commission expressed its reservations as to whether the Dutch legislation was compatible with Directive 91/676. It wrote, in particular, that, in the absence of data on the losses of nitrogen into water, it had doubts as to the possible environmental effects of the proposed exemptions.

76. In the light of the foregoing, I consider that the Commission did make it clear that the explanations provided by the Netherlands Government failed to justify exempting such large amounts of phosphates and nitrogen, bearing in mind, in particular, the fact that the same rules were proposed for horticulture under glass and for horticulture on substrate and that, under those circumstances, such exemption arrangements had to be treated as operating aid.

77. Similarly, I am of the view that, in the circumstances of the present case, the Commission cannot be criticised for not reacting to the letter of 17 May 2000 from the Dutch authorities otherwise than by adopting the contested decision or for not making a further request to those authorities for additional information. [37] Indeed, given the terms of the Commission's letter of 20 March 2000, the Netherlands Government could not have been unaware that

37 — The Commission in any event asked the Netherlands Government, by letter of 20 June 2000, if the letter of 17 May 2000 did in fact contain its official observations in the context of the formal investigation procedure. That government replied in the affirmative by letter of 3 July 2000.

a mere restatement of the explanations it had already given in its letter of 10 January 2000 would not be sufficient and that it bore the onus to submit scientific documents, in particular the studies it had already referred to in that letter.

78. To allow otherwise, in the circumstances of the present case, would lead to a reversal of the burden of proof which lies, as has been seen, with the Member State. Mindful of the fact that, in response to its letter of 20 March 2000, the Netherlands Government merely restated the information it had already set out, and submitted no document, not even the studies which it cited for the second time, the Commission could legitimately take the view that the Netherlands Government had failed to satisfy the requirement on it to provide proof and that it was, in consequence, in a position to make a definitive finding on the exemption regulation. [38]

79. In the light of the foregoing, I believe that the Commission correctly held that the proposed exemption is indeed an advantage in that it has the effect of making it possible for horticultural undertakings and garden centres which grow crops under glass or on substrate to use much greater quantities of fertilisers than other producers without paying the levies established by the MINAS system. On the same grounds, the selective nature of that exemption is not justified.

38 — Furthermore, it should be noted that the Netherlands Government did not, at the hearing, subsequently to adoption of the contested decision, proffer any scientific study in support of its statements as to the justification for the exempted quantities of nitrogen and phosphates.

(ii) The other conditions to be fulfilled under Article 87(1) EC

80. Since the criteria laid down by Article 87(1) EC are cumulative, the task remains of assessing the arguments of the Netherlands Government that, on the one hand, the exemption is not an advantage conferred by the State or through State resources and that, on the other, the exemption does not affect competition or trade between Member States.

— An advantage conferred by the State or through State resources

81. The Netherlands Government founded its line of argument in part on the premiss that the exemption does not confer any advantage but is justified by the nature and general scheme of the MINAS system. In so far as that is concerned, I refer to the foregoing considerations to refute that part

of the reasoning. I shall examine only the other arguments advanced by the Netherlands Government in relation to that criterion.

82. The Netherlands Government maintains, in essence, that the MINAS system is not a tax regime in that it seeks not to generate revenue but to minimise losses of minerals into the environment by means of prohibitive levies.

83. In the light of the case-law of the Court of Justice, those arguments must, it seems, be dismissed. It is apparent from settled case-law that the concept of aid encompasses not only positive benefits, such as subsidies themselves, but also interventions by public authorities which, in various forms, mitigate the charges which are normally borne from the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect.[39] In *Banco Exterior de España*,[40] the Court inferred from that case-law that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the beneficiaries in a more favourable financial situation than other taxpayers does constitute State aid within the meaning of Article 87(1) EC.[41]

84. 'State resources' can therefore be negative in form, and merely consist in the absence of a gain for the State in question. In consequence, it is not necessary that the purpose of the general scheme from which the disputed measures derogate is to generate income for the State. In that respect, the Court held in *Piaggio*,[42] that an exemption from the obligation to pay fines or other pecuniary penalties had to be regarded as an advantage within the meaning of Article 87(1) EC.

85. It follows from the foregoing that the Commission properly held in the contested decision that the Netherlands Government's analysis of the MINAS system as analogous to a system of administrative and criminal fines rather than to a tax system is not such as to cast doubt on the classification of the exemptions concerned as State aid.

39 — See Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, paragraph 39, Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34 and Case C-6/97 *Italy* v *Commission*, cited above (paragraph 15).

40 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14. In that case, the Court was addressing an exemption for public credit institutions from all forms of State, provincial and municipal taxes.

41 — See also the judgment in Case C-75/97 *Belgium* v *Commission*, cited above (paragraph 24), concerning a measure consisting of increased reductions in social security contributions.

42 — Case C-295/97 *Piaggio* v *Commission* [1999] ECR I-3735, paragraphs 41 to 43.

86. The same applies to the purported purpose of the MINAS system, which, according to the Netherlands Government, is to protect the environment. There is in fact established case-law that Article 87(1) EC makes no distinction according to the causes or aims of the measures of State intervention concerned but defines them according to their effects. [43]

87. The Commission was therefore entitled to find in the contested decision [44] that the advantage is granted by the State in the form of a 'loss of revenue' and falls within the scope of Article 87(1) EC, as interpreted by the case-law.

— The effects of the exemption regulation on trade and competition between Member States

88. The reasoning of the Netherlands Government on this point is founded on the same premiss as its assertion that the exemption concerned does not confer an advantage on undertakings which grow crops under glass or on substrate. Its arguments amount to saying that the proposed exemption corresponds to the quantities of minerals taken up by the plants produced under those conditions. However, as we have seen, the Netherlands Government has provided no evidence of that fact, and I have concluded that the exemption in question did confer an advantage on those undertakings.

89. What is more, the Netherlands Government does not deny that, as the Commission pointed out in the contested decision, [45] there is 'important' international trade in horticultural products and, consequently, there is trade with other Member States. In that regard I would merely observe that the Netherlands Government stated at the hearing that crops grown under glass or on substrate represent some 20% of total Netherlands production.

90. It follows that the Commission was entitled to take the view in the contested decision that the disputed exemption could adversely affect trade between Member States. [46]

43 — See Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 79, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20 and Case C-75/97 *Belgium* v *Commission*, cited above (paragraph 25). See also Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 53.

44 — See paragraph 40.

45 — See paragraph 36.

46 — See paragraph 40.

91. In view of the foregoing, I consider that the first limb of the first plea should be rejected as ill-founded.

2. Compatibility of the exemption in question with Directive 91/676

(a) Arguments of the parties

92. The Netherlands Government asserts, in a first head of claim, that the procedure under Article 88 EC has not been established in order to allow the Commission to ascertain whether or not the exemption in question is compatible with Directive 91/676. The contested decision is therefore based, in its view, on an incorrect procedural framework.

93. The Netherlands Government asserts, in a second head of claim, that the exemption regulation is compatible with the Directive 91/676. Accordingly, it asserts that the fertilisers used in cultivation under glass or on substrate contribute negligibly to direct ground pollution. As regards crops grown on substrate, the plants are placed on supports and do not come into direct contact with the ground. In the case of crops under glass, a very large proportion of the phosphates and nitrogen is taken up by the plants.

94. The Commission submits that it is not necessary for the Court to examine the second limb of the first plea because it can have no bearing on the legality of the contested decision. It is clear from that decision that the incompatibility of the exemption with Directive 91/676 is merely an additional reason to refuse approval of the aid measure.

(b) Assessment

95. In contrast to what the Netherlands Government seems to be asserting, the Commission did not classify the exemption as State aid incompatible with the common market on the basis that it was incompatible with Directive 91/676.

96. A careful reading of the contested decision reveals that the Commission based its finding that there is aid within the meaning of Article 87(1) EC on the provi-

sions of that article. [47] The Commission set out in what respects the exemption could constitute an advantage granted by the State to certain undertakings, even though that exemption were analogous to fines, and why it was liable to distort trade between Member States. [48] It reiterated its earlier objections and concluded that the measure was not justified by the nature and general scheme of the system. [49] It stated that, on the contrary, the measure met all the criteria contained in the notice. [50]

97. The Commission then stated that the type of aid in question had to be regarded as an operating subsidy and did not satisfy the requirements for it to fall within any of the exceptions established in Article 87(3) EC. [51] Lastly, it refuted the proposition that it used or misused the State aid procedure in order to enforce Directive 91/676. [52]

98. In addition, in its letter of 20 March 2000, the Commission expressed its doubts as to the compatibility of the exemption with Directive 91/676 only once it had indicated that, at that stage of the procedure, and since the Dutch authorities had not demonstrated that the exemption was justified by the nature and general scheme of the mineral levy system, it had to be regarded as State aid and classified as operating aid.

99. In the light of the above, the Netherlands Government is wrong to assert that the Commission's finding that the exemption is State aid incompatible with the common market rests on an incorrect legal framework.

100. As regards whether the exemption regulation is compatible with Directive 91/676, as the Netherlands Government claims it is, I do not believe that the issue is such as to call into question the legality of the contested decision and that it does not have to be examined in these proceedings. As has just been seen, the Commission based its finding that the exemption is incompatible with Community law not on that directive but on the basis that it must be considered to be an operating subsidy which does not meet the criteria for its authorisation. Accordingly, as the Commission stated in the contested decision, [53] whether or not the exemption regulation is compatible with that directive, it must for

47 — See paragraph 35.
48 — See paragraph 36.
49 — See paragraph 39.
50 — See paragraph 40.
51 — See paragraphs 41 and 42.
52 — See paragraph 43.
53 — See paragraph 43.

the reasons set out above be found to be incompatible with the common market. Furthermore, as already pointed out, the question as to whether the MINAS system as a whole is compatible with Directive 91/676 is the subject of a specific procedure, currently pending before the Commission.

101. Having regard for the foregoing, the second limb of the first plea should also be rejected.

B — *Failure to comply with the obligation to state reasons*

102. The Netherlands Government complains that the Commission failed to state its reasons for finding that the flat-rate amounts of 460 kg of phosphates and 800 kg of nitrogen per hectare are too high to be justified by the nature and general scheme of the MINAS system. It states that, both in its letter of 10 January 2000 and in paragraph 2 of the annex to the letter of 17 May 2000, it explained why it had to apply higher flat-rate amounts for the uptake of minerals by crops cultivated under glass or on substrate. According to the government, the Commission is basing its view on a false assumption that exemptions for that type of cultivation are significantly higher than those for other types of production.

103. The Commission claims that the contested decision does contain an adequate statement of reasons.

104. It seems to me that the reasoning put forward by the Netherlands Government in relation to the second plea seeks to call into question the burden of proof incumbent on it and, therefore, to dispute the substance of the contested decision. That allegation by the Netherlands Government of a failure to state reasons is in effect tantamount to challenging the finding that, on the one hand, it was for it to establish that the proposed exemption was justified by the nature and general scheme of the system as a whole and that, on the other, it has not discharged that obligation.

105. The obligation to state reasons is an essential procedural requirement which must be distinguished from the issue of whether or not the reasons are correct, which goes to the substantive legality of the measure at issue. There is consistent case-law that the statement of reasons required by Article 253 EC is intended to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. [54]

54 — See, for example, Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35.

106. As already seen, the contested decision sets out the reasons why the exemption is State aid incompatible with the common market. In particular, it states that, in the absence of any evidence produced by the Netherlands Government, the exemption is not justified by the nature and general scheme of the system and does meet the criteria required by the notice.

107. The plea alleging a failure to state reasons must therefore, in my view, be rejected as unfounded.

C — *Costs*

108. Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission has applied for such an order against the Kingdom of the Netherlands, the latter should be ordered to pay the costs.

IV — Conclusion

109. In view of all the foregoing I therefore propose that the Court should:

(1) dismiss the application brought by the Kingdom of the Netherlands;

(2) order the applicant to pay the costs.