OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 2 April 1987

My Lords,

By Decision 85/215/EEC (Official Journal 1985, L 97, p. 49), the Commission declared that the preferential tariff applying to natural gas sold to glasshouse growers in the Netherlands constituted aid incompatible with the common market within the meaning of Article 92 of the Treaty. It ordered the Dutch Government to discontinue the aid (Article 1) and to inform the Commission by 15 March 1985 of the action it had taken to comply (Article 2).

The applicants seek the annulment of that decision under Article 173 of the Treaty. They are, respectively, two horticultural undertakings, namely, Kwekerij Gebroeders Van der Kooy BV, a limited company, and Mr Van Vliet, an individual (Case 67/85; I shall refer to these applicants as 'Van der Kooy'), the Landbouwschap, a statutory body which is acting in these proceedings as a representative of the interests of the Dutch glasshouse horticulture sector (Case 68/85) and the Kingdom of the Netherlands to whom the decision was addressed (Case 70/85). The applicants submitted a request for interim measures including the suspension of the decision, which was refused by order of the President of the Court dated 3 May 1985. After that order was made, the gas tariff applying to glasshouse growers was increased but, in the Commission's estimation, not to a level which eliminated the aid element. The Commission accordingly applies to the Court in Case 213/85 under Article 93 (2) of the Treaty for a declaration that the Kingdom of the Netherlands is in breach of its Treaty obligations by not complying with Articles 1 and 2 of the contested decision. The Danish and United Kingdom Governments have intervened in support of the Commission in all four cases, the German Government in the three joined cases only.

The legality under Community law of the natural-gas tariff applying to the horticultural sector in the Netherlands has been in issue for several years and has been the subject of a previous decision by the Commission. The background is as follows.

The Netherlands has considerable reserves of natural gas. In the mid-1970s, partly for environmental reasons, it gave fiscal incentives for horticulturalists to convert from heavy fuel to natural gas. Now, according to the Commission's decision, over 95% of the energy consumed in horticulture in the Netherlands is obtained from natural gas.

NV Nederlandse Gasunie apparently enjoys a monopoly over natural gas produced off shore and on shore in the Netherlands. It is a private law company, the shares of which

are held as to 10% directly by the State and as to 40% by De Staatsmijnen ('DSM'), itself wholly owned by the State but said by the Commission to act 'solely on the basis of market forces'; Esso and Shell companies each hold 25%. Gasunie delivers gas directly to distribution companies and major consumers of gas. Small consumers are supplied by local distribution companies belonging to an association called Vegin.

The extent to which the Government is involved in the fixing of Gasunie's tariff levels is one of the major issues in the proceedings. It is, however, uncontested that, as stated in the decision, the tariff levels have to be approved by the board of Gasunie by a three-quarters majority of votes cast. The board currently has eight members, one appointed by the State, three by DSM and two each from the oil companies. Thus the State does not have a majority on the board and Shell and Esso can block proposals which do not suit them. The prices thus agreed are subject to approval by the Minister for Economic Affairs. The Minister's powers in this respect derive both from statute and from an agreement with Gasunie dating back to 1963.

Following an investigation into competition in the glasshouse horticulture sector, on 15 December 1981 the Commission issued Decision 82/73/EEC (Official Journal 1982, L 37, p. 29; the '1981 Decision'). The Commission found that there was a preferential tariff in favour of glasshouse growers which constituted State aid incompatible with the Treaty. It complained that the price level was lower than that charged to other industrial consumers and that the threshold for obtaining volume rebates was set much lower for glasshouse growers than for industrial consumers (30 000 m^3 as opposed to 170 000 m^3). Moreover, the review period was much less frequent for growers than for either industrial users or small consumers. Under the arrangements then in force, the horticultural price for gas was linked to the fuel oil price for the preceding 15-month period and adjusted once a year. The adjustment formula itself was to be renegotiated only once during the five-year period of the validity of the agreement between Gasunie, the Landbouwschap and Vegin. The industrial tariff, however, was adjusted quarterly on the basis of a notional 'parity' price for heavy fuel oil. The agreement provided that the disparity between the horticultural tariff and the industrial tariff would be progressively reduced over a two-and-a-half-year period starting in April 1982 and that from October 1982 onwards the horticultural tariff would be index-linked to the parity price.

By Article 1 of the 1981 Decision it was ordered that 'the aid consisting in a preferential tariff for horticulture shall be abolished by 1 October 1982 by alignment of the horticultural tariff on the industrial tariff' and that the disparity should not be increased beyond that existing on 1 December 1981.

The Dutch Government, the Landbouwschap and two growers, one of whom was Van der Kooy, lodged applications with the Court contesting the 1981 Decision (Cases 67, 68 and 70/82). However, discussions between the Commission and the Netherlands Government continued and a new contract was concluded between

Gasunie and the Landbouwschap. The Commission's understanding of the position is set out in its letter to the Dutch Government dated 29 July 1982.

Gasunie and the Landbouwschap agreed that the disparity between the horticultural and industrial tariff would be phased out in three steps between 1 April 1982 and 1 April 1983 and that on that date the horticultural tariff would be the same as the industrial tariff plus half a cent per cubic metre. Like the industrial tariff, the horticultural tariff was to be pegged to the parity price for heavy fuel oil, as determined by the Centraal Bureau voor de Statistiek (CBS), and likewise adjusted quarterly. The Commission was to be informed of the quarterly parity price and the resulting horticultural tariff, any modifications to the formula resulting from developments in heating techniques or changes in the economic situation and the method of calculation of any future adjustments.

On the basis of this agreement the Commission repealed the 1981 Decision by a new decision (82/518/EEC, Official Journal 1982, L 229, p. 38) and the applicants withdrew their actions. Although this settlement did not satisfy glasshouse growers in other Member States because of the period during which their Dutch competitors would continue to enjoy a preferential tariff, the Commission did not intervene again until October 1984.

By telex of 4 October 1984, the Dutch Government informed the Commission that Gasunie, Vegin and the Landbouwschap had agreed new arrangements to apply from 1 October 1984 to 1 October 1985. These arrangements, whilst retaining the principle that the horticultural tariff should be linked to the industrial tariff, put a ceiling on the horticultural tariff: it was not to exceed the average of the horticultural tariff, as adjusted by operation of the formula, charged in 1983 plus 10%, which worked out at a ceiling of 42.5 cents per cubic metre (cents/m^3). According to the contested decision, application of the formula valid from 1 April 1983 would have resulted in prices of 46.6 cents/m^3 in the fourth quarter of 1984 and 48 cents/m^3 in the first quarter of 1985. So, as a result of the new arrangements, horticulturalists were saving respectively 4.1 cents/m^3 and 5.5 cents/m^3 in those periods. If, however, the price fell below 42.5 cents in any period, adjustments were to be made in respect of prices for previous quarters when the price would otherwise have been above the ceiling price.

The Dutch Government expressly said in its telex of 4 October 1984 that it was informing the Commission of this new contract pursuant to the understanding contained in the Commission's letter of 29 July 1982 to the Dutch Government. The Dutch Government has consistently maintained the position that the tariff did not constitute an aid and therefore did not have to be notified to the Commission under Article 93 (3). At all events, it is clear that the new tariff was in force before the Commission was informed of it. Nevertheless, in acknowledging the Dutch Government's telex, the Commission stated that it was taking that telex as a notification under Article 93 (3) and reminded the Dutch Government that a notified plan may

not be implemented until the Commission has completed its examination. It also asked for further information, which the Dutch Government supplied.

The Commission then opened the Article 93 (2) procedure in the usual way by publishing a notice in the Official Journal and by writing to the Member States. In its letter to the Dutch Government of 27 November 1984 seeking its comments, the Commission again criticized that Government for implementing the measure without notifying it in accordance with Article 93 (3), reminded it that illegal implementation of aid could lead to recovery orders or withholding of EAGGF payments and requested it to take all necessary measures to suspend the operation of the alleged aid.

The Commission received comments from various Member States and interested parties, including the Landbouwschap, the only interested party to comment favourably on the preferential tariff. All the other Member States and parties who submitted observations to the Commission apparently stated that they considered the measure to be an aid within the meaning of Article 92 (1) which was incompatible with the common market and distorted competition in the horticultural sector. Several Member States expressed their concern on this score at Council meetings between October 1984 and January 1985, saying that they were coming under pressure from horticulturalists in their country to do something about what they saw as unfair competition from Dutch growers.

Having considered the observations received and the results of its investigations, the Commission was confirmed in its original view that the new tariff constituted an aid for Dutch glasshouse growers which was not compatible with the common market and took the contested decision.

The Commission first challenges the admissibility of the actions brought by Van der Kooy and by the Landbouwschap.

Since the close of written pleadings in these cases, the Court has delivered its judgment in Case 169/84 *Compagnie française de l'Azote (Cofaz)* v *Commission* (judgment of 28 January 1986, [1986] ECR 391) holding admissible an action brought in the context of the State aid provisions by private parties under Article 173 (2) of the Treaty, the questions of substance in that case remaining to be decided.

That case also concerned the tariff for natural gas in the Netherlands. After the Commission began Article 93 (2) proceedings in relation to allegedly preferential rates granted to the producers of ammonia used to make nitrate fertilizer, a new rate was adopted for major industrial users of which ammonia producers were able to take advantage. The Commission considered that this was not a State aid and closed the Article 93 (2) proceedings, since the tariff was applied without sectoral distinction and was commercially justified on the basis that the revenue from the lower tariff was made up by other savings. Three French nitrate fertilizer producers sought, pursuant to Article 173 of the EEC Treaty, to annul the decision to close the Article 93 (2) proceedings.

In its judgment, the Court stressed that where a regulation gives procedural guarantees entitling them to request the Commission to find an infringement of Cmmunity rules, those undertakings should be able to institute proceedings to protect their legitimate expectations. Where undertakings have played a role in the administrative procedure they were entitled to resort to Article 173 so long as their position on the market is significantly affected by the aid which is the subject of the contested decision (paragraphs 23 to 25).

In that case, the applicants had shown that the Commission's decision might seriously jeopardize their position on the market in view of the allegedly substantial aid to Dutch producers, the fact that natural gas represented 80% of the ex-works price of ammonia and the great increase of the Dutch share of the French market.

These factors led the Court to hold that the decision was of individual concern to the applicants. As for direct concern, the Court held that it was 'sufficient to observe that the decision had left intact all the effects of the tariff system set up, whilst the procedure sought by the applicants would lead to the adoption of a decision to abolish or amend that system' (paragraph 30 of the judgment).

As to the admissibility of Van der Kooy's action, the Commission makes two points. The first is that a distinction is to be drawn between what it calls an individual aid (that is, an aid with a single ascertained beneficiary) and aids applied to a whole class or sector, as in the present case where all glasshouse growers benefit from the aid. The Commission submits that the applicant in the present case cannot accordingly rely on the Court's decisions in Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671 or Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, in each of which the Court allowed the beneficiary of an individual aid measure to challenge the Commission's negative decision.

The Commission's second argument is that certain legal consequences flow from the fact that the preferential tariff was implemented without prior notification to the Commission under Article 93 (3). This illegal implementation before the Commission had reached a decision must not put the recipients of the aid in a better position than they would have been if the Dutch Government had complied with its duty to notify. Thus the situation is to be distinguished from that of a challenge to a Commission decision ordering the abolition or amendment of an existing aid legally in force, which the Commission doubts would in any event be admissible. The Commission's requirement that the Dutch Government should not implement an aid which it had illegally implemented cannot be validly challenged by Dutch growers or their representatives. Since Member States were not obliged to introduce aid schemes, there was no corresponding right to receive aid and it could not be said that a negative decision by the Commission affected the potential recipient's market position within the meaning of the test laid down by the Court in *Cofaz*.

Van der Kooy argues that it was affected by the contested decision which abolished the preferential tariffs. It expected the tariff

agreed between Gasunie and the Landbouwschap to be applicable from 1 October 1984 to 1 October 1985 and made plans accordingly. Nowhere in *Philip Morris* was it said that the admissibility of the action resulted from the fact that an individual aid was at stake. The Court did not in *Cofaz* accept the Commission's submission that a general measure, rather than an individual aid, was in question and therefore could not be challenged by the applicants.

It seems to me that an undertaking, which will clearly be affected if an 'aid' already introduced is ordered to be withdrawn since it will no longer be a beneficiary of the aid, is entitled to challenge the *vires* of such an order before the Court. It would be wrong to allow materially affected competitors the right to challenge the grant of an aid whilst denying disappointed recipients, who must be taken to be at least as materially affected by the withdrawal of the anticipated benefit, the right to challenge the Commission's negative decision.

On the arguments adduced I am not satisfied that any absolute distinction is to be drawn for present purposes between individual aids and aid measures of more general application. In *Philip Morris* and *Intermills*, where individual aid measures were undoubtedly in question, the Commission did not contest the admissibility of the actions and the Court's judgments merely record that fact. I do not see why in principle the intended beneficiary of an individual aid should be in a better position as regards access to this Court than an intended beneficiary of a measure destined to benefit two, 10 or more undertakings. An individual aid need not be qualitatively different from aids benefiting a larger number. It does not necessarily have a greater or lesser impact on competition and trade within the common market. One of the features of aid-giving by the Member States is that a wide variety of techniques has been developed and it would be artificial and undesirable in my view to distinguish a priori between those which benefit one undertaking and those which benefit several, so long as the factors indicated in, for example, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 are satisfied.

As to the Commission's argument that different considerations apply when the aid concerned was implemented before notification, two points call for comment. The first is that the Commission has a wide range of powers dealing with the illegal implementation of aid. In this case the Commission chose not to rely solely on that illegal implementation but to review the aid for compatibility with the common market as if it had been duly notified. It did not bring proceedings against the Dutch Government for breach of Article 93 (3); it did not seek interim measures from the Court; it did not make a recovery order in the decision itself and, although it reserved the possibility of seeking recovery at a later stage in the last recital of the decision, it informed the Court at the oral hearing that no such steps had been taken. I do not consider that the Commission can challenge the admissibility of the proceedings on this ground once the merits have been put in issue. Second, beneficiaries of illegally implemented aids have previously brought

actions before this Court which have been held not only to be admissible but also to be well founded on the merits (for example *Intermills* and Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV* v *Commission* (the '*LPF*' case, judgment of 13 March 1985, [1985] 809). In both of those cases, the applicant failed to show that the State measure in question was not State aid but the decisions were annulled on other grounds. Thus it is not determinative that the aid was introduced without notification to the Commission.

In my opinion Van der Kooy's application is admissible. The decision was of direct and individual concern to the applicants.

The position of the Landbouwschap raises different issues. By a declaration of 13 October 1967 representatives of employers and workers in the agricultural and horticultural sectors entrusted the Landbouwschap with the representation of their interests in certain matters including the negotiation of gas tariffs. The Commission first raises a query as to whether under Dutch law the Landbouwschap is under a duty to represent horticulturalists' interests. There is no doubt, however, that in fact it has done so in discussions with the Commission as to gas tariffs as prior to the 1981 Decision and that the latter has treated it as doing so. Moreover, it seems to me (whatever the position as to its duties under national law) that there was ample material on which the Court could accept the Landbouwschap's claim to represent the growers. However, that is not decisive of the question whether the decision is of direct and individual concern to the Landbouwschap for the purposes of Article 173.

Associations such as the Landbouwschap may have a valuable role to play in the administrative proceedings under Article 93. They are in a better position than their individual members to put the sector's case to the Commission. They can be expected to have or to be able to get up-to-date information and statistics; they should be able to present in a more coordinated fashion than any one of their members the particular circumstances of the sector and differences applying within the sector as a whole. It is clear that the Landbouwschap here played such a role. There is obviously some advantage to the administration of justice to allow such an association to present the case.

On the other hand, it is quite clear that the Landbouwschap is not a direct recipient of the alleged aid. It is not itself engaged in horticulture nor does it take gas at the preferential horticultural rate. Moreover, it does not seem to me on earlier decisions of the Court that it can derive its right to come to the Court from the mere fact that the persons it represents would have been beneficiaries of the reduced tariff and could establish that the Commission decision is of direct and individual concern to them. The Court has previously held that 'an organization formed for the protection of the collective interests of a category of persons cannot be considered as being directly and individually concerned by a measure affecting the general interests of that category' (Case 72/74 *Union syndicale* v *Council* [1975] ECR 401, at p. 410: see also Joined Cases 16 and 17/62 *Confédération nationale des producteurs de fruits et légumes* v *Council* [1962] ECR 471, at p. 479, Case

135/81 *Groupement des agences de voyages* v *Commission* [1982] ECR 3799 and Case 250/81 *Greek Canners Association* v *Commission* [1982] ECR 3535). The Landbouwschap has not shown that its position is materially distinguishable from the associations considered in those judgments.

This does not preclude a finding that the Landbouwschap is directly and individually concerned by the contested decision in a different manner from the horticulturalists. The Landbouwschap sought to show that it was so concerned in two respects. First, it sought to rely on paragraph 24 of the *Cofaz* judgment to show that participation in the Article 93 (2) procedure was sufficient to establish direct and individual concern. This is clearly mistaken, given the proviso in paragraph 25 that participants in the proceedings must also show that 'their position on the market is significantly affected by the aid'. It is clear from the remainder of the judgment, as well as from the Opinion of Advocate General VerLoren van Themaat, that the Court was envisaging a position on the same market as the aid recipients. Thus I do not consider that *Cofaz* assists the Landbouwschap. Secondly, the Landbouwschap alleges that it would be affected by the withdrawal of the preferential tariff in a variety of ways: it would lose credibility as a negotiator for the horticultural sector, which might in turn lead to growers withholding the subscriptions or levies which they pay to the Landbouwschap and, more importantly, would lead to the bankruptcy of many horticulturalists, again entailing a significant reduction of revenue for the Landbouwschap; finally, it would be obliged to enter into a new contract with Gasunie which shows that its legal position is affected by the contested decision.

Possible loss of revenue is obviously a matter of concern to the Landbouwschap but it seems to me that it is too remote a matter to ground a right of challenge to the contested decision under Article 173. Although it is perhaps more debatable, I do not consider that the need to negotiate a new contract establishes the Landbouwschap's right to bring these proceedings either. It negotiates such a contract on behalf of the horticulturalists who will gain or lose by the new terms agreed.

Despite the advantages of allowing an association such as the Landbouwschap to bring proceedings I do not consider that there is any prejudice in this case for it in not being able to do so. The applications of the Landbouwschap and Van der Kooy are to all intents and purposes identical; they have been represented by the same lawyer. They submitted a joint reply. It is quite clear that what has been said in Van der Kooy's name has drawn heavily on the know-how and resources of the Landbouwschap. It seems to me that the Landbouwschap is not deprived of the possibility of defending its members' interests by not being able to bring an appeal in its own name, when it can stand behind one or other of its members and when the issues on the merits can be fully dealt with. Accordingly, in my opinion, the Landbouwschap's application should, following earlier authorities, be held inadmissible. Even if a case may arise where justice requires that an association should be allowed to bring proceedings it seems to me that in this case the principle established in the earlier decisions should be followed.

I turn to the substance of the case.

In its decision the Commission approached its task on the basis that a preferential tariff (which the horticulturalists' gas price was found to be) is incompatible with the common market for the purposes of Article 92 (1) when it (1) 'favours certain undertakings or the production of certain goods competing with the undertakings or production of other Member States and the products in question are traded within the Community'; (2) 'it has been imposed by a public authority'; (3) 'the tariff results in compensation from the State being paid to the distribution company or to the State receiving less revenue.'

It concluded that the price charged by Gasunie to Dutch glasshouse growers was an aid which favoured those growers in comparison with other gas consumers in the Netherlands, which distorted competition between those growers and glasshouse growers in other Member States and which affected intra-Community trade. It was accordingly incompatible with the common market by virtue of Article 92 (1) of the Treaty; none of the exceptions under Article 92 (2) or (3) was established.

Since the Dutch Government insists that it did not notify the preferential tariff under Article 93 (3) (because it did not consider that it constituted an aid) and in any event put it into effect (if it was an aid) before the final decision of the Commission, it is at first glance curious that the Commission did not simply declare that the implemented measure was illegal and should be withdrawn, if necessary resorting to the Court (Cases 31/77R *Commission* v *United Kingdom* [1977] ECR 921 and 171/83R *Commission* v *France* [1983] ECR 2621). The sole question then would have been whether this was an aid, and not whether it was compatible with the common market.

However, the Article 93 (2) procedure was undertaken and the applicants attack the actual decision on three main grounds — infringement of Article 92, infringement of essential procedural requirements and failure to give proper reasons as required by Article 190 of the Treaty.

So far as Article 92 is concerned, it is said that the Commission made a fundamental error in finding that, even if aid was given, it was 'granted by a Member State or through State resources in any form whatever'.

The Commission, as already indicated, defined the question as being whether the alleged aid was 'imposed by a public authority'. It accepted that the State did not have a controlling interest in Gasunie nor a majority of votes on pricing decisions, but found that it could block any such decisions of which it disapproved. Moreover, any tariffs could only be applied after the approval of the Minister for Economic Affairs, and Gasunie had undertaken not to apply price levels different from those approved previously by the Minister for the relevant group of users. It points to statutory powers vested in the Minister for Economic Affairs under a law of 19 December 1974 to prohibit the delivery of

gas below the price fixed by the Minister if he considers that gas is supplied at a price below its value, and to fix different prices for different categories of gas, whilst recalling that on the information given by the Government this law had not been applied (Decision paragraph I 5). The Commission concludes that the Government has 'a dominant influence', 'even if only in the form of a right of veto when determining the advantage which growers receive' and that in fixing the horticultural tariff, 'Gasunie takes into consideration the economic guidelines suggested to it by the Netherlands Government'. This conclusion was confirmed by the fact that there were no 'sound and economic reasons' to justify the differential tariff adopted.

As to the State's involvement, Van der Kooy and the Dutch Government stress the shareholding and voting structure in Gasunie which they say shows that what was done was not in any event done by the State. The latter cannot impose the tariff as a shareholder. Moreover, such supervisory powers as the Minister had are principally to check a posteriori that the Government's energy policy is being implemented and to ensure that prices are neither too high for ultimate consumers nor set at less than the value of the gas sold. The Minister did not initiate this price structure nor exercise any of his powers in this case. It was a purely private law contract made on commercial grounds in which DSM acted as an independent commercial unit not dictated to by the State in matters of policy. The Commission, therefore, totally misunderstood the situation and had no power to order the Dutch Government to interfere in a private law contract to which it was not a party.

There is force in these latter comments but I am not satisfied that they rule out a finding that what was done here is capable of constituting an aid within the meaning of Article 92. In Cases 78/76 *Steinike & Weinlig* [1977] ECR 595 and 290/83 *Commission* v *France* [1985] ECR 439 the Court, as I read the judgments, recognized that in deciding whether a benefit granted to a given sector otherwise than directly by the State constitutes State aid, the surrounding circumstances can be looked at. Indeed, if it were not so, it would be too easy to avoid the intention of Articles 92 and 93 of the Treaty. Those cases are not on all fours with the present cases, but it is to be noted that in Case 290/83 the failure of the Minister for Agriculture to intervene in the making of a solidarity grant, when he had power to intervene, and the need for the approval of the public authorities as to what was done, were accepted as relevant factors.

As I understand it, it is not for the Court to decide as a fact whether there was here sufficient State involvement but to consider whether the Commission has misdirected itself as to what is capable of being State involvement or has acted unlawfully in reaching a conclusion that there was such involvement on material which could not justify such a finding. In this case DSM was

wholly owned by the State. DSM's 40% shareholding added to the State's direct holding of 10%, and the voting percentages, may not have enabled the combined vote to put through independently a preferential tariff; they did, however, make it possible to block any proposal of which they disapproved and to exercise a considerable influence on decisions of Gasunie. Even accepting that the powers of the Minister for Economic Affairs were to be exercised *ex post facto* it seems to me unreal to assume that Gasunie would proceed with tariffs and policies which were not going to be approved by the Minister. Moreover, it is to be observed that the Government was involved in negotiating a settlement with the Commission following the 1981 Decision and that Gasunie and the Landbouwschap amended their arrangements to give effect to that settlement. The Government was also involved, as I see it, in the negotiations following the 1985 Decision in issue to produce an alternative plan. Taking the picture as a whole it seems to me that it cannot be said that all the State did was to proffer ineffectual encouragement. What happened was at the behest or under the influence of the State and in my opinion there was material upon which the Commission could conclude that there was here State involvement which, if the prices fixed were low and not commercially justified and if directly or indirectly State resources were involved, could constitute a State aid. I do not accept that the Commission misdirected itself in referring to the 'dominant influence' of the State. It began by requiring that the tariff be 'imposed' by a public authority. If the State exercised a dominant influence in the fixing of the tariff, that is capable of amounting to the imposing of the tariff for these purposes.

It seems to me that the Commission was also entitled to find that State resources were involved. The State surrendered its share of the profits which would have been made by Gasunie had prices been higher and it seems to be accepted as the recipient of corporate taxes, even if the other shareholders also lose money in the result. This is obviously not to say that every time a commercial concern in which the State has a shareholding reduces its prices or fails to maximize its profits the loss is to be regarded as a State aid. It is only when that happens at the behest or under the dominant or effective influence of the State that it is capable of being a State aid.

The question then arises as to whether the fixing of this preferential tariff, even if under State influence and causing loss to the State, was necessitated by commercial considerations incompatible with it being 'an aid'. Was the Commission entitled to find that there were no 'sound and economic reasons' to justify the differential tariff adopted?

I do not read the decision, as the Dutch Government appears to argue, as propounding that if a tariff set is lower for one sector than for others, it is automatically an aid. That is not the Commission's position. A lower tariff is only an aid if it is not commercially justifiable.

The Commission's approach is that sectoral distinctions must be based on objective, verifiable criteria and be the result of normal economic factors.

I consider this approach to be correct. It is of the essence of a State aid that it is non-commercial in the sense that the State steps in where the market would not. The State may have its reasons for doing so but they are not commercial in the ordinary sense of the word. Thus the State may subscribe for shares in a company or lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting aid which falls within Article 92 if the tests of that provision are satisfied. Thus in Case 40/85 *Belgium* v *Commission* (judgment of 10 July 1986 [1986] ECR 2321) the Court upheld the Commission's finding that two substantial capital injections of public funds into a company whose annual losses had run into hundreds of millions of Belgian francs over the relevant period constituted a State aid because no private investor or shareholder would have provided such sums in the absence of a viable improvement plan.

The question of the commercial justification of the tariff has been examined from two angles. Were there good reasons for differentiating between horticulturalists and other industrial sectors? Was the actual level of the tariff justified in the light of the alleged risk of conversion to coal?

The Dutch Government has contended that this differential was justified by the steep rises in heavy fuel oil prices and the likelihood of fluctuations which would lead to instability in the gas price and to the increasing competitiveness of coal as an alternative source of fuel which had increased in use in neighbouring States and which in the four years following the 1980/81 season had led to 22 out of 8 000 Dutch horticultural holdings switching to coal. Coal became an attractive option for some Dutch growers at a price of 37 to 38 cents/m^3 and for many at a price above 42 to 43 cents/m^3. Horticultural use was different from industrial use in, for example, the higher percentage of fuel as part of its costs, the need of 60% of growers to replace their boilers in the near future and the greater energy-saving measures already adopted by growers which made it more difficult for them to adopt new saving measures as gas prices increased, and in the longer period of depreciation adopted in horticulture (five years as opposed to between two and three years for industry).

In the decision, the Commission took a different view as to these matters. The switch from aligning the gas price on the heavy fuel oil price to the coal price was both temporary and partial, since it was only to last in the first place for one year and the parity price for fuel oil was not wholly abandoned. Thus its influence on growers considering whether to convert to coal could only be limited. Furthermore, whilst the Government's ostensible desire to ensure price stability and to limit the risk of conversion to coal was understandable (although Gasunie might have been expected to take advantage of market conditions operating in its favour), it is not explained why a similar approach was not taken to comparable sectors of industry. Furthermore, the Commission claims that it is more expensive to deliver gas to horticul-

turalists (presumably because they tend to be smaller consumers) than to industrialists, thus further detracting from the justification of the differential tariff.

An examination of the most recent data — the size of holdings (average holdings being 15 000 m^2, consuming 650 000 m^3 of gas a year; large holdings being 40 000 m^2, consuming 1 600 000 m^3 of gas a year), investment costs between gas-fired and coal-fired facilities, price differentials, running costs and performance between gas and coal:

'leads to the conclusion that the equilibrium price, i.e. the price at which competition between gas and coal is in balance without either being advantaged or disadvantaged is between 43 and 44.3 cents/m^3. At that price, undertakings would stay with natural gas for the following main reasons: because it is easy to use, the basic investment is lower and there are no storage or environmental problems. The lowest price which would cause a significant switch to coal is 46.5 cents/m^3 for an average-sized holding and 47.5 cents/m^3 for a larger holding. With prices in the latter range, which is calculated on the basis of a repayment period of five years, it is estimated that 30% of the natural gas consumed by the horticultural sector would be replaced by coal in less than three years. Therefore the price in force since 1 October 1984 confers an appreciable advantage on natural gas. It is below the equilibrium price and well below the threshold from which an appreciable switch to coal would begin to take place. The price for gas for horticulture is therefore too low and is discriminatory.'

Accordingly, the Commission concluded that the 1984 agreement was designed to reduce the price of gas for horticulture, which was a political and economic requirement of the State rather than something arising from the normal management of a private undertaking.

The Commission recognized that the differentiated Tariffs A to F can properly apply to industrial users based on the volume of consumption. Moreover, it accepted in the settlement following the 1981 Decision that a preferential tariff could be applied to horticulture. Until 1984, Tariff D (normally applied to users of between 10 and 50 million m^3) plus 0.5 cents/m^3 was used despite the considerably smaller consumption by both average and large horticultural holdings (650 000 m^3 and 1 600 000 m^3 respectively).

On the other hand, the Commission took the view that the horticultural tariff should bear an appropriate relationship to the industrial tariff looked at broadly. When prices were frozen for the first quarter of 1985 what happened was that the industrial tariff effectively was reduced by approximately 3% whereas the horticultural tariff was reduced by 10% for one year. Even if, as the applicants argue, there was less likelihood that industrial users would convert to coal, some plainly would and the preference in favour of horticulturalists was substantial and has not been shown to be justified.

The figures accepted by the Commission as to what was the equilibrium price (between

43 and 44.3 cents/m³) and as to the price at which average and large holdings would be likely to convert to coal (46.5 and 47.5 cents/m³ respectively) have been strongly challenged.

The applicants base their argument on the equilibrium price on two reports, one prepared in 1984 by a group of bodies including the Landbouw Economische Instituut (LEI) and by a further LEI report dated January 1985. The Dutch Government claims that it gave the Commission a copy of the former report at the opening of the Article 93 (2) proceedings in January 1985. This is denied by the Commission, which claims that it had not seen the report before it was annexed to the Dutch Government's application in this case. Be that as it may, I do not accept Van der Kooy's contention that the Commission should have asked for the report because it was mentioned in correspondence. It was for the Commission to consider whether there was an aid on the basis of its investigation and of material actually submitted to it. Nor in the present proceedings is the onus on the Commission to show that the reports relied on by the applicants are incorrect (as the applicants contend); it is rather for the applicants to show that the report of Société belge de gestion d'énergie SA ('the GFE report') prepared for and adopted by the Commission was so inaccurate or so wrong that the Commission could not reasonably have relied upon it to conclude as it did.

Van der Kooy considers that the GFE report is too narrowly based. The 1984 and 1985 reports on which the applicants rely consider the position of a greater range of horticultural undertakings and come to more refined conclusions, notably that it is not true to talk of a single equilibrium price since the price at which an undertaking will be tempted to convert to coal depends on a combination of technical factors. The Commission, in its pleadings, quotes the equilibrium price of 46.9 cents/m³ calculated in the LEI 1985 report for just one group of undertakings, namely those with a so-called combined condenser incorporated in their heating system. However, only 892 out of 8 174 horticultural undertakings, or 11%, in the Netherlands have such equipment. According to Van der Kooy, over half of Dutch horticultural holdings are not equipped with a condenser at all and the equilibrium price set out in the LEI 1985 report for such holdings is 37.9 cents/m³ for a holding having 25 000 m² under glass and 38.3 cents/m³ for an undertaking having 12 500 m² under glass. Van der Kooy, whilst considering that the GFE report concentrates on a representative holding, namely one of 15 000 m² consuming 650 000 m³ of gas per year, criticises it for three technical reasons (namely that it overestimates the efficiency of a boiler with a simple condenser connected to the return circuit, fails to reflect the higher calorific value of coal and overestimates the amount of extra work caused by coal) and derives from that the conclusion that the equilibrium prices calculated by GFE should be reduced by 4.1 cents/m³.

The Dutch Government makes similar points. It observes that the LEI report divides holdings into four categories, those with a combined condenser, those with a simple condenser connected to a separate circuit, those with a simple condenser

connected to the return circuit and those without condensers and gives a different equilibrium price for each of them (respectively 46.9, 45.3, 42.9 and 41 cents/m^3 for a holding of 12 500 m^2 under glass). The Dutch Government claims that these categories represent respectively 18%, 37%, 6% and 39% of holdings consuming at least 50 m^3 of energy per m^2. The Dutch Government also considers that GFE overestimates boiler efficiency and extra work caused by coal.

It seems that the applicants have to some extent misunderstood the GFE report. It did not simply consider the likelihood of holdings converting from gas to coal. It considered whether a holding needing to replace its boiler or add extra capacity to it would choose gas or coal. GFE's view, not contested by the applicants, is that in the present state of the art, a gas boiler with a simple condenser connected to the return circuit can be installed on virtually every smallholding and it is likely that a grower who presently has no condenser would install such equipment if he had to replace his boiler, especially since it costs little more than a boiler with no condenser. Thus, the applicants' contention that GFE took a statistically unrepresentative case does not seem to be founded. There was no statistical evidence in the LEI 1985 report but in the decision the Commission quoted the Dutch Government as saying that boilers would have to be replaced on about 60% of Dutch holdings in the near future. Thus it seems to me that the GFE report is more widely relevant than the applicants contend.

The report on which they rely seems to assume that the choice is between converting to coal or renewing existing equipment of exactly the same nature. It was only in the case of holdings not equipped with a condenser that the LEI report established an equilibrium price below 42.5 cents/m^3 irrespective of whether the theoretical coverage of holdings' calorific needs by coal could be achieved. On this point Van der Kooy refers to the lower equilibrium price achievable if full theoretical coverage is achieved and the Dutch Government, more prudently, assumes that full theoretical coverage cannot be obtained. As to other factors, such as the extra work allegedly necessary for coal (Van der Kooy suggests 125 hours per year as against 250 put forward in the GFE report), these consist of bare assertions and costings on each side on which the Court cannot adjudicate.

However, I do not think that the applicants' contentions have shown that the GFE report is so inaccurate or wrong in a material particular or based on erroneous considerations as to make it unreasonable for the Commission to rely on it. The mere fact that LEI came to different conclusions does not prove the contrary; experts, like lawyers, frequently come to different conclusions as to the deductions to be drawn from the facts. Even if it be accepted that GFE erred in some matters of detail, the overall thrust of the report has not been

undermined. The hypothetical case which GFE takes as its starting point, namely the grower who, when renewing his equipment, buys the most advanced and economical equipment available seems more convincing to me than the case of the grower who chooses between converting to a different fuel source or renewing his existing equipment without upgrading it.

I thus consider that there was evidence on which the Commission was entitled to rely that the horticultural tariff had been set at a level significantly below that necessary to take account of the risk of conversion to coal or, in other words, a level which was not commercially justified. For the reasons already given, I also conclude that it was open to the Commission to draw the inference that the Dutch Government had played a significant role in setting that tariff. The Commission was entitled to decide that the tariff was a State aid within the meaning of Article 92 (1) which should have been notified to the Commission before implementation.

Strictly speaking, it is not necessary to consider either whether such aid distorts competition and affects trade between Member States or whether it is compatible with the common market. I agree with the submission made by the Commission in its rejoinder that the scope of Article 93 is wider than that of Article 92 (1) in that Article 93 does not limit the scope of the obligation to notify to aid which distorts or threatens to distort competition and affects trade between Member States. As the Commission says, those are matters to be examined by the Commission during its review of the aid plan.

However, having reviewed the aid plan under the Article 93 (2) procedure the correctness of its conclusions that the preferential tariff distorted competition and affected trade between Member States and was incompatible with the common market is now challenged.

In the decision, the Commission gave some statistics on Dutch exports which I quote:

'The Netherlands:

(a) supplies at present:

75% of Community production of gherkins and cucumbers in heated glasshouses,

40% of lettuces and

65% of tomatoes;

(b) exports:

91% of the tomatoes it produces,

68% of the gherkins and cucumbers it produces,

84% of the cut flowers it produces.

The Federal Republic of Germany alone absorbs:

55% of tomato exports,

73% of gherkin and cucumber exports,

62% of exports of flowers and flowers in bud.

Dutch flower exports have been generating increasing pressure on the German market since 1975. Exports of these products to the United Kingdom, Denmark, Belgium and France have increased substantially since 1974.'

The Commission's conclusion was as follows:

'The impact of this aid on competition and intra-Community trade derives both from the comparison between Dutch horticultural production in heated greenhouses and Community horticultural production in heated greenhouses as a whole, and from the effect of even a slight advantage in heating costs. Although heating costs vary widely from product to product and from one Member State to another, Dutch production is sufficiently large for even a slight cost advantage to have an effect on producer prices. Dutch horticultural production therefore enjoys an advantage which necessarily affects intra-Community trade, especially as a major part of Dutch produce is exported to other Member States.'

This conclusion was firmly supported by the three intervening Member States. In particular, the Kingdom of Denmark and the United Kingdom emphasized that they had repeatedly pressed the Commission to take proceedings in respect of the Dutch tariff since it conferred such a significant advantage on Dutch growers. Indeed, the United Kingdom observes that the settlement agreement between the Commission and the Netherlands Government in 1982 amounted to a compromise under which most Dutch growers continued to receive a significant margin of preference over other users because of the alignment of the horticultural tariff on tariff D. The further advantage afforded to Dutch growers under the tariff introduced in October 1984 represented a reduction in heating costs for the last quarter of 1984 of 10%, over 11% for the first quarter of 1985 and nearly 16% for the second quarter of 1985. Given that heating costs amount to between 25 and 30% of production costs, the significance of the savings is obvious. The United Kingdom quantifies it as 50 to 100% of the profits of a reasonably efficient United Kingdom grower in 1984 and stated at the oral hearing that a reasonably efficient grower in the United Kingdom would have only broken even in 1985. Similarly, the Danish Government calculates that, if Danish growers had enjoyed the advantage conferred on Dutch growers during the 1984/85 heating season, they would have saved on average DKR 6.83 per m^2. The intervening Member States also point out the consequences for growers in their States of not being shielded from rises in fuel costs (which in the United Kingdom, where 80% of growers use heavy fuel oil, rose by 43% between 1 April 1983 and 1 January 1985 during which period the horticultural gas tariff in the Netherlands rose by only 8%). This clearly gives Dutch growers a significant advantage in terms of planning and investment. The uncertainty facing growers in other Member States leads them, in the medium term, to scale down their output or even withdraw from the market, in the United Kingdom's submission, and deprives them of the necessary funds for

restructuring, in the Danish Government's submission. The interveners also point out that the Dutch are the price leaders and that price movements on the domestic market reflect Dutch and not domestic trends. Nevertheless, they do admit that Dutch success is not entirely due to the preferential tariff: efficient marketing has also played its part, as have external factors such as exchange-rate fluctuations. However, the preferential tariff is undoubtedly the most significant component of Dutch success.

I do not think that the applicants' attempts to meet these points are convincing. Van der Kooy emphasizes the other factors going to Dutch success, such as specialization, rigorous application of quality standards, packaging and so on. These are met by two of the interveners' argument already mentioned, namely that such factors, whilst important, would not be enough without the cost advantage represented by the tariff and that specialization only becomes a possibility when the necessary forward planning and investment can be made with confidence. Secondly, Van der Kooy alleges that production costs have no short-term influence on selling prices when dealing with live products whose growing cycles cannot be altered and which must be marketed as soon as they are ready. Whilst admitting that, in the very short term, a grower cannot suddenly increase or reduce his output, stable and low production costs will enable him to plan ahead and to grow more than he would otherwise have done, leading to higher availability and lower prices in the market.

The observations of the intervening Member States seem to me to amplify and illustrate the Commission's view that a reduction in production costs granted to producers in one Member State who export significant quantities of their output to other Member States necessarily distorts competition and affects intra-Community trade. Thus it seems to me that the Commission came to the right conclusion on that point in its decision; in any event it was entitled to conclude as it did.

Having found that the preferential tariff was aid within the meaning of Article 92 (1), the Commission considered in the decision whether it could qualify for exemption under Article 92 (3). It found that no Community objective was furthered by the aid; in particular, it could not be considered a measure intended to promote the execution of an important project of common European interest within the meaning of Article 92 (3) (b) 'since this pricing system runs counter to the objectives of the common energy policy which aims at energy saving and a rational use of energy'. The Commission also held that the tests set out in Article 92 (3) (a) and (c) were not satisfied since the aid was granted 'only in terms of the quantities of gas purchased, without reference to the adjustment or improvement of firms' structures or of energy saving or development in the regional context' and was therefore to be considered as an operating aid.

The applicants have not been able to suggest a reason why the preferential tariff, if an aid, should be considered compatible with the common market. Van der Kooy asserts that, for the last 10 years, the Commission has accepted that *ex post facto* alignment of the horticultural tariff on the parity price for heavy fuel oil is not an aid incompatible with the common market and that the contested decision comes to the opposite conclusion, thus withdrawing the benefit of Article 92 (3) in breach of (unspecified) general principles of Community law and State aids policy. This argument seems to me wrong. The Commission has not found, except in the repealed 1981 Decision, that the preferential horticultural tariff constituted aid within the meaning of Article 92 (1) and therefore had no occasion to pronounce on the tariff's compatibility with the common market under Article 92 (2) and (3). Thus it is inappropriate to speak of the Commission changing its mind on the compatibility of the tariff with the common market. Therefore I reject Van der Kooy's submission.

It remains to consider the arguments concerning reasoning and breach of essential procedural requirements. As to reasoning, the question is whether the decision satisfies the requirements of Article 190 in the sense that it allows the Court to review its legality and provide the applicant with the information necessary to enable them to ascertain whether or not the decision is well founded. That is the test which the Court has consistently applied (for instance in *LPF*) and which derives from Case 24/62 *Germany* v *Commission* [1963] ECR 63 in which the Court said:

'In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty. To attain these objectives, it is sufficient for the decision to set out, in a concise but clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood.'

As regards the findings previously discussed (namely, that the preferential tariff constituted a State aid granted through State resources which distorted competition and affected inter-State trade), the passages to which I have referred seem to me to show that the Commission has done what Article 190 as interpreted by the Court requires of it. One of the Dutch Government's specific criticisms was that the reasoning was defective because the Commission had not shown why the calculations contained in the two reports on which the applicants rely were erroneous. As already indicated, the Commission was not in my view required to do this.

Thus this decision can be distinguished from the one in issue in *LPF* which the Court struck down for failure to give an adequate statement of reasons concerning the aid's effect on competition and inter-State trade. In that decision, the Commission simply recited that two Member States and two trade associations were concerned by the distortion of competition and reproduced the wording of Article 92 (1), but failed to

explain why it did not consider that the aid qualified for exemption under Article 92 (3), in particular by not indicating that it had taken the proposed restructuring plan which accompanied the aid into consideration. In Case 40/85 *Belgium* v *Commission* the Court found acceptable a decision's succinct reasoning, partially due to the Belgian Government's refusal to cooperate in the Commission's investigation of the illegal aid, showing that the beneficiary undertaking exported over 70% of its production to other Member States and that, without the aid, it would have had to close down, thus allowing its competitors to increase their sales in an over-supplied market. That reasoning was sufficient to entitle the Commission to conclude that the aid affected inter-State trade and distorted or threatened to distort competition within the meaning of Article 92 (1). The reasoning in the decision contested in the present proceedings goes well beyond that, despite the protestations by the Commission that the Dutch Government did not fully cooperate.

The last argument concerns, not the Commission's reasoning, but its alleged failure to make explicit in the decision exactly what the aid was and how and by when the Dutch Goverment was to eliminate it. On the one hand, it is said, the Commission sees no objection in principle to differentiation of tariffs as such, on the other it considers that the horticultural tariff should be that charged to comparable sectors of industry. This inconsistency and the failure to specify the obligation imposed on the Dutch Government by the decision constitutes a breach of essential procedural requirements, contrary to Article 189 of the Treaty.

In that respect, the Dutch Government refers to Case 70/72 *Commission* v *Germany* [1973] ECR 813 (the '*Kohlegesetz*' case). There the Commission sought a declaration that Germany had failed to comply with a Commission Decision of 17 February 1971 ordering the Federal Republic to 'take without delay all necessary measures to put an end, in the mining regions of North Rhine-Westphalia, to the non-selective award of investment grants' under the applicable German legislation. The German Government was late in notifying the aid measures, but the Commission took no point on that. Its decision was taken some 18 months after notification. Subsequent to the taking of the decision, there were discussions between the Commission and the German Government to establish the criteria for the selective award of subsidies. Geographical criteria were agreed, but no agreement was reached on the timing of the implementation of the decision. The German Government adopted transitional provisions which were the subject of the Commission's application to the Court. In particular, the Commission asked for a declaration that the German Government was obliged to require repayment from the recipients of certain grants awarded in disregard of the decision.

The Court held that the operative part of the decision did not specify the time by which, or the criteria on the basis of which, the German Government was to abolish or alter the aid. It held that the background to the decision and its preamble gave 'grounds

for finding at the most that the criteria of selection were to be of a territorial nature, in the sense that the extension of the system of aid was to benefit only certain regions which had been particularly affected by the coal crisis.' Only in the subsequent bilateral discussions did the geographical criteria begin to emerge. 'It was only in a communication of 16 December 1971 that the Commission set out the geographical criteria for selection in the granting of aid by laying down certain rules of an economic nature which could be used to that end, and by enumerating the territorial divisions within which the continued award of investment grants might be considered as compatible with the Treaty.' Furthermore, the final list of those territorial divisions, wider than that communication, only appeared in the Commission's pleadings. The Court therefore held that 'in the absence of sufficient details with regard to one of the essential factors in the decision taken under Article 93 (2), the subject matter of the obligation imposed on the Federal Republic of Germany remained indeterminate until, on the completion of the work carried out in collaboration with the representatives of the German Government, the Commission was in a position to specify to the latter, with the required precision, the scope of the aid referred to by the law extending that of 15 May 1968 and correspondingly, the limits within which this extension was not applicable. Faced with this uncertainty regarding one of the essential factors of the prohibition declared by the Commission, the German authorities cannot be blamed for having taken the necessary steps to take account of the legitimate interests of investors operating within areas which are ultimately to be excluded from benefiting from the aid in question'.

In the *LPF* case the Court, having held that the decision was inadequately reasoned on the questions of effect on trade and competition and grounds for refusing exemption, made the following statement:

'The Commission had a particular duty to provide a full statement of the reasons for its decision in this case because Article 2 of its decision requires the Kingdom of the Netherlands to take measures "to ensure that the aid granted does not continue to distort competition in the future, notably competition with undertakings in other Member States" and because the content and scope of that obligation must be defined in the light of the elements of fact and law which led the Commission to conclude that the aid had such effect. Moreover, if the Commission adopted the aforementioned wording precisely in order to allow the Netherlands Government some latitude in deciding what measures were to be taken to bring to an end the breach of Community law which it had established, it was obliged to provide the Government with the information necessary to enable the latter to ascertain what measures might be considered appropriate.'

Van der Kooy echoes these arguments, saying also that the decision gave the Dutch Government until 15 March, or roughly three weeks, in order to abolish the aid. It considers this excessively short and an infringement of the legitimate rights of horticulturalists benefiting from the aid.

In attempting to meet these arguments, the Commission insists on the distinction between illegally implemented aid and duly notified aid plans. In the case of plans, there is no sense in fixing a time-limit for abolition or amendment since the plan cannot be put into operation if it is incompatible. Discussions on how the plan

might be rendered compatible can take place after such a decision. In the case of an illegal aid, such as the present, it is important to put an end to the grant as soon as possible to reduce problems, not only for the beneficiaries from whom the aid may have to be recovered, but also for competitors in other Member States. The Commission deliberately refrained from indicating what measures the Dutch Government should take to abolish the incompatibility with the common market. According to the Commission, that was a proper use of Article 93 (2) which authorizes it to decide that the State concerned 'shall abolish or alter' the aid. Nevertheless, the decision indicated in figures how the tariff was incompatible, whilst leaving the Dutch Government to choose the appropriate means to abolish that incompatibility. The Commission goes so far as to suggest that the decision creates or rather confirms a duty on the part of the Dutch Government to put an end to the grant of the aid as quickly as possible and to cancel its effects so far as possible by recovering it from the beneficiaries if necessary.

The Commission's position seems to me confused. On the one hand, it talks of the illegality of the aid and on the other, as if it were possible to render it compatible by modifying it. This confusion stems, as I see it, from the Commission's failure to take action against the tariff on the grounds of its illegality and instead opening Article 93 (2) proceedings to review its effect on trade and competition and compatibility with the common market. The Dutch Government's failure to notify the aid rendered the whole of it illegal. Furthermore, the Commission established, superfluously but correctly, that there were no grounds for holding that the measure was compatible with the common market. The aid consisted of the preferential element of the tariff. The Dutch Government's duty was to abolish the aid. That required a modification of the tariff. However, such modification of the tariff is not modification of the aid but its abolition. Once the preferential element has been removed, it is misleading to say the tariff is compatible with the common market. It then contains no aid element and the question of compatibility does not arise.

On the question of the deadline, Article 2 provides that the Dutch Government was to inform the Commission before 15 March 1985 of the action it had taken to comply with Article 1, which required it to discontinue the aid. This does not imply a retroactive element, and that impression is reinforced by the last recital, already quoted, which states that the decision is without prejudice to the consequences the Commission might draw as regards recovery of the aid from the recipients. I consider that the Commission cannot now be heard to say that the decision created or confirmed a duty on the Dutch Government to recover the aid. It seems to me that such an obligation should be specified in the operative part of the decision.

However, it does not follow that the applicants' arguments are to be accepted. It seems to me that the *Kohlegesetz* case and *LPF* can be distinguished. The decision clearly identified the aid as the preferential element in the horticultural tariff. Figures were given: the equilibrium price was said

to be between 43 and 44.3 cents/m³ and the lowest prices at which a significant switch to coal would take place was identified as 46.5 cents/m³ for an average-sized holding and 47.5 cents/m³ for a larger holding. It is true that the Commission did not identify precisely what tariff would be appropriate to remove the preferential element. I think it is not obliged to do so since there are several ways of achieving that objective and it is entitled to leave it to the parties to choose the appropriate way. Gasunie might have wanted to lay down a more subtly differentiated tariff to cater for the differing propensity of classes of grower to convert to coal. Nor should it be forgotten that the tariff was indeed illegally introduced and that the problems which would have been caused by its total abolition were of the Government's own making. The Commission was available to discuss implementation of the decision, and indeed measures were taken in purported implementation, the subject of the proceedings in Case 213/85 *Commission* v *Netherlands*. Thus, whilst this case shares features with the *Kohlegesetz* case, in that the Commission has caused some difficulties by not restricting itself to the illegal implementation of aid, this case can be distinguished in that the Dutch Government could not reasonably be said to be at a loss concerning the nature or extent of the aid identified in the decision or the measures required of it to implement the decision. In other words, to adopt the wording used in the *Kohlegesetz* case, the subject matter of the obligation imposed on the Dutch Government was not left indeterminate by the decision. Similarly, to adopt the wording used in the *LPF* judgment, the Commission did provide the Dutch Government with the 'information necessary to enable the latter to ascertain what measures might be considered appropriate'.

The appropriateness of the measures actually taken is the issue in Case 213/85.

In summary, my opinion concerning the present applications is that the Landbouwschap's action should be declared inadmissible and the applications brought by Van der Kooy and the Dutch Government should be rejected. As to costs, an appropriate order seems to be that the Dutch Government should pay one half, the Landbouwschap one quarter and Van der Kooy BV and Van Vliet one eighth each of the costs of the Commission and of the intervening Member States.