# ORDER OF THE PRESIDENT OF THE COURT
3 May 1985 *

In Joined Cases 67, 68 and 70/85 R

**Kwekerij Gebroeders van der Kooy BV,** a limited liability company incorporated under Netherlands law, whose registered office is at Zevenhuizen,

and

**Johannes Wilhelmus van Vliet,** a horticulturist, residing at 27 Vuurlijn, Uithoorn,

both represented by A. J. Braakman of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Lambert H. Dupong, 14 A Rue des Bains (Case 67/85 R),

**Landbouwschap** [Agricultural Board], whose offices are in The Hague, represented by A. J. Braakman of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Lambert H. Dupong, 14 A Rue des Bains (Case 68/85 R),

and

**Kingdom of the Netherlands,** represented by D. J. Keur, Deputy Legal Adviser at the Ministry of Foreign Affairs in The Hague, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C.-M.-Spoo (Case 70/85 R),

applicants,

v

**Commission of the European Communities,** represented by R. C. Fischer, its Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by:

**Federal Republic of Germany,** represented by M. Seidel, Ministerialrat, with an address for service in Luxembourg at the Registry of the Federal German Embassy, Luxembourg,

**Kingdom of Denmark,** represented by L. Mikaelsen, Legal Adviser, with an address for service in Luxembourg at the office of the Chargé d'Affaires, Ib Bodenhagen, the Embassy of Denmark, 11 B Boulevard Joseph-II,

* Language of the Case: Dutch.

and

**United Kingdom of Great Britain and Northern Ireland,** represented by R. N. Ricks of the Treasury Solicitor's Department, acting as Agent, with an address for service in Luxembourg at the British Embassy, 28 Boulevard Royal,

interveners,

APPLICATION for an order suspending the operation of Commission Decision No C(85) 284 DF of 13 February 1985 addressed to the Kingdom of the Netherlands on the preferential tariff charged to glasshouse-growers for natural gas in the Netherlands (Official Journal 1985, L 97, p. 49),

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application lodged at the Court Registry on 14 March 1985 (Case 70/85 R), the Government of the Kingdom of the Netherlands sought an order suspending the operation of Commission Decision No C (85) 284 DF of 13 February 1985, addressed to the Kingdom of the Netherlands, on the preferential tariff charged to glasshouse-growers for natural gas in the Netherlands, until the Court has given judgment in Case 70/85 or, in the alternative, fixing a new period of two months from the date of the order for the implementation of the contested decision. On the same day the Government of the Kingdom of the Netherlands lodged an application for a declaration that that decision was void.

2 By applications lodged at the Court Registry on 15 March 1985, Kwekerij Gebroeders Van der Kooy and Mr van Vliet, both horticulturists (Case 67/85 R), and the Landbouwschap [Agricultural Board], an organization representing the interests of horticulturists in the Netherlands (Case 68/85 R) also sought orders suspending operation of the decision of 13 February 1985 until the Court has

given judgment in Cases 67/85 and 68/85. On the same day they lodged applications for a declaration that that decision was void. In the event that the President should refuse to suspend the operation of the decision, the applicants claim that the Court should order the Commission to maintain its decision, even if it is complied with in any respect by the Netherlands Government. The applicants have an interest in ensuring that the procedure pursuant to Article 173 of the EEC Treaty is concluded.

3 It appears that the subject-matter of Cases 67/85 R, 68/85 R and 70/85 R is related, and the parties and the Advocate General have raised no objection to their being joined. The three cases must therefore be joined for the purposes of the interim order.

4 By orders of 25 April 1985, the Governments of the United Kingdom, the Federal Republic of Germany and Denmark were allowed to intervene in Case 70/85 R in support of the defendant's conclusions. By an order of the same date, the Government of Denmark was also allowed to intervene in Cases 67/85 R and 68/85 R in support of the defendant's conclusions.

5 Article 1 of the Commission decision at issue provides that the tariff charged to glasshouse-growers for natural gas in the Netherlands from 1 October 1984 is incompatible with the common market within the meaning of Article 92 of the EEC Treaty and must be discontinued. Article 2 provides that the Kingdom of the Netherlands must inform the Commission before 15 March 1985 of the action which it has taken to comply with Article 1.

6 The Commission was notified of the horticultural tariff for natural gas applicable from 1 October 1984 to 1 October 1985 by a telex message dated 4 October 1984 from the Netherlands Permanent Representation. Subsequently, on 11 October 1984, the Commission requested the Netherlands Ministry of Agriculture for additional information and stated that according to Article 93 (3) of the Treaty the Member States should not put the proposed measures into effect until the review procedure had resulted in a final decision.

7 On 27 November 1984 the Commission initiated the procedure provided for in Article 93 (2) of the Treaty and requested the Netherlands Government to submit its comments within a period of three weeks. At the same time it requested the Netherlands Government to adopt the measures necessary to suspend the operation of the aid measure concerned and stated that it had applied that measure in breach of Article 93 (3). It pointed out that steps could be taken to recover the resulting financial benefits. The parties concerned were given notice to submit their comments in a communication published in the Official Journal. That communication again stated that the procedure under Article 93 (2) had the effect of suspending operation of the aid and expressly stated that any aid granted prior to a final decision under that procedure might be subject to claims for reimbursement (Official Journal 1984, C 326, p. 3).

8 In that connection it should be recalled that the Commission, after conducting lengthy inquiries in the course of the 1970s, had adopted a decision as early as 15 December 1981 on the preferential tariff charged to glasshouse-growers for natural gas in the Netherlands (Official Journal 1982, L 37, p. 29). That decision required the Netherlands Government to abolish the preferential tariff for horticulture by 1 October 1982 by alignment of the horticultural tariff on the industrial tariff. While that decision was being contested in an action before the Court, negotiations took place between the Netherlands Government and representatives of the horticultural sector within the Landbouwschap. These resulted in an agreement on the progressive alignment from 1 April 1983 of the horticultural tariff on the industrial tariff.

9 In September 1984, negotiations between the Landbouwschap and the Netherlands company distributing gas, Gasunie, resulted in a new contract applicable from 1 October 1984 to 1 October 1985. The decision at issue in these proceedings prohibited the implementation of that contract.

10 According to the applicants in Cases 67/85 R and 68/85 R, it is clear from the content of the decision that, although formally addressed to the Kingdom of the Netherlands, it is of direct and individual concern to them. The Landbouwschap also stresses that, since it signed the agreement referred to in the contested decision, it must be individually concerned by that decision.

11 As regards the substance, all the applicants stress that Gasunie is a company incorporated under private law, and the public authorities have no legal means of influencing, either in advance or *ex post facto*, the result of the negotiations on the price of natural gas to which the agreement challenged by the Commission relates. By adopting the contested decision, the Commission has thus exceeded its powers by compelling the Netherlands authorities to adopt the measures referred to in the operative part of the decision. Moreover, the Commission does not state on what basis the Netherlands must adopt the measures referred to in the operative part of the decision and has thus failed to comply with its obligation to provide a statement of reasons.

12 Secondly, the applicants submit that, when examining the matter on previous occasions, the Commission has always taken into account the special position of glasshouse-growers in the Netherlands and considered that in view of that position there was justification for allowing the tariff for natural gas used in horticulture to vary considerably in the long term from the equivalent price of heavy fuel oil. Thus in a communication of 30 October 1984 on natural gas, addressed to the Council (COM (84) 583), the Commission acknowledged that 'natural gas is increasingly facing inter-fuel competition and transmission companies need greater flexibility in price and delivery conditions *vis-à-vis* their suppliers'.

13 The applicants submit that the special horticultural tariff is entirely defensible in economic terms and is in any event necessary to prevent a large number of growers from converting to coal. For various reasons, conversion to coal as an economically viable alternative could be envisaged much more readily in that sector than for other categories of industrial consumers. In so far as the contested decision does not take those considerations into account, it is incompatible with Article 92 of the Treaty, or at least with Article 190, since the Commission does not clearly state the grounds on which the tariff for natural gas used in horticulture constitutes aid. The Commission simply reproduces the results of its own calculations, without indicating the method applied, and so prevents any review of its decision.

14 The market for the consumption of gas by glasshouse-growers must be regarded as a separate 'relevant market', and it is therefore impossible to base the finding of the existence of aid on a comparison between the horticultural tariff for natural gas and the industrial tariff. Moreover, there is not a single industrial tariff, but a number of different tariffs for different consumers, a fact which is not taken into account by the decision. Lastly, any comparison of the horticultural tariff for

natural gas should refer to the categories of industrial consumers for whom a special tariff is also fixed by Gasunie. By failing to examine those aspects, the Commission infringed the principles that all due care should be taken and that legitimate expectations should be protected and the principle of proportionality, or at least Article 190 of the Treaty. Furthermore, Article 92 does not confer upon the Commission power to intervene generally in the policy relating to natural gas tariffs, and its intervention thus amounts to a misuse of power.

15 The applicants claim that a sudden rise of about 5 cents per cubic metre in the price of natural gas, such as the Commission seems to require, would cause irreversible damage to glasshouse-growers in the Netherlands and result in their operating at a permanent loss. At present, 25% of holdings are already no longer able to meet all their obligations. If the price of gas were to rise by 5 cents, 30 to 35% of holdings would be in that position. For Mr van Vliet, the proposed increase would lead to bankruptcy. Serious difficulties would be caused to about 3 000 other holdings, a number of which would inevitably disappear.

16 If the point at which growers will convert to coal is raised by about 5 cents per cubic metre and if, as is required by the Commission, the price of heavy fuel oil is taken into account, the parties will, as a result of the implementation of the Commission's decision, be compelled to negotiate the price of natural gas applicable to horticulture from 1 October 1985 within those limits. Thus the decision restricts their negotiating freedom and will therefore result in the fixing of higher prices. Moreover, it is not at all clear who would be obliged to compensate those growers who suffer serious but not irreversible damage as a result of the price rise which the Commission is seeking to impose. The implementation of the contested decision would mean that about a thousand growers would convert to coal, with all the harmful consequences for the environment that that would entail. A large number of growers, including Mr van Kooy, are technically and economically capable of converting to coal fairly quickly.

17 If the price of natural gas had to be changed suddenly, growers would be unable to change their existing growing plan and would reduce their consumption of gas to the minimum, thus damaging the quality of their products. They would also

have to plant later. That would lead to cash-flow problems for growers, as a result of:

— serious shortages in market provision between February and May;

— considerable surplus supplies on the market between May and November;

— the fact that the Netherlands harvest would coincide with the harvest in other countries, which would result in a greater fall in prices and would therefore create socio-economic problems for all similar holdings in the Community, especially those established in the Mediterranean regions;

— the closure of businesses and more unemployment in the growing sector and in marketing and transport companies and suppliers. Every person who works in horticulture provides employment for at least one person outside that sector;

— a reduction in the return on capital goods, *inter alia* on investments for saving energy;

— loss of sales for Gasunie and higher costs for those growers who survive, to whom the capital expenses will be passed on.

18 The final reason for which the order is urgently required is that Article 2 of the contested decision requires the Netherlands Government to inform the Commission by 15 March 1985 of the action it has taken to discontinue the aid.

19 The Commission claims that the applications in Cases 67/85 R and 68/85 R are inadmissible. The aid condemned in the contested decision benefits all growers using natural gas in the Netherlands. It is therefore not an individual aid, benefiting a particular undertaking. It is doubtful whether the application is admissible particularly because the recipients of the aid, that is to say growers, are apparently bound to accept the tariffs approved by the Minister.

20 The Landbouwschap does not derive any economic benefit from the aid in question; therefore, *a fortiori*, its application must be inadmissible. The mere fact that the Landbouwschap will have to enter into fresh negotiations on the natural gas tariff, the result of which is in any event subject to ministerial approval, cannot in itself render the application admissible. It follows from Article 71 of the Netherlands Law on Economic Organizations, as interpreted by the Hoge Raad, that the Landbouwschap is not entitled as a 'Bedrijfschap' to apply to the civil courts in the Netherlands as the representative of the interests of individual undertakings which are not cited by name. Moreover, it follows from the judgments of the Court of Justice that an organization formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned by a measure affecting the general interests of that category (judgment of 18 March 1975 in Case 72/74 *Union Syndicale and Others* v *Council* [1975] ECR 401).

21 As regards the substance, the Commission points out that it explained in detail in its decision why it considers that the State is capable of exerting a decisive influence on the fixing of tariffs. Directly and indirectly, the State holds 50% of the capital of Gasunie. Under the instrument by which Gasunie is constituted and governed, the State cannot impose its decisions directly but it can block decisions with which it does not agree. Furthermore, the prices fixed by Gasunie must be approved by the Minister before they may be applied. Gasunie could undoubtedly grant a favourable rate to a particular group of purchasers such as horticulturists if required by the Government, especially as between 85 and 90% of the resulting loss of profit is borne by the State. For the purposes of Article 92, it is essentially the effect of aid which must be taken into account and not the position of the agencies distributing the aid (judgments of the Court of 22 March 1977 in Case 78/76 *Steinike & Weinlig* v *Federal Republic of Germany* [1977] ECR 595, and 30 January 1985 in Case 290/83 *Commission* v *France* [1985] ECR 440).

22 The argument relating to the possibility that coal may be substituted for natural gas was not put forward until late in the proceedings, and it has not been shown that the tariff was fixed on the basis of the competitive relationship between natural gas and coal in horticulture. The Commission considers that the question as to how far the tariff for natural gas used in horticulture may be regarded as a tariff intended to compete with coal, in view of the technical considerations which

it involves, can only be examined in the main proceedings and that consequently for purposes of the interlocutory proceedings it should be assumed that the Commission was entitled to initiate the procedure under Article 93 (2) challenging that tariff.

23 The Netherlands Government was not entitled to authorize the application of a new tariff for horticulture before the Commission could initiate the procedure provided for in Article 93 (2) and before that procedure had resulted in a final decision. The interim measure applied for is therefore clearly incompatible with the last sentence of Article 93 (3). It would place the Netherlands measure, which was introduced in breach of that provision, on an equal footing with existing aid which was lawfully introduced and would thus deprive that provision of its binding force or even encourage disregard of it. It is in fact the Commission which could in this case have applied for an interim measure to compel the Netherlands to suspend the application of the new tariff pending the conclusion of the procedure under Article 93 (2).

24 As regards the allegation that the operative part of the decision is not clear, the Commission stresses the difference between a negative decision concerning existing aid and a negative decision with regard to a plan to grant or alter aid. The Commission deliberately avoided stating what measures the Netherlands Government should take in order to terminate the incompatibility with the common market, as it is expressly authorized to do by the first subparagraph of Article 93 (2).

25 As regards the allegation that the decision does not contain an adequate statement of reasons, the Commission states that it took due account of the characteristics of horticulture in so far as they appeared relevant to an evaluation of the competitive position of coal and natural gas in that sector.

26 The Commission decision concerns aid which is already being unlawfully applied, and it is not appropriate in a decision to grant a Member State a period of time in which to abolish or alter such aid (judgment of the Court of 2 July 1974 in Case 173/73 *Italy* v *Commission* [1974] ECR 709). The purpose of the decision is not to authorize the Netherlands to retain the contested tariff until 15 March 1985; on the contrary, it requires the Netherlands to inform the Commission before that date of the action which it has taken to comply with the prohibition on the application of that tariff. A negative decision under Article 93 (2) and (3) must always be acted upon as quickly as possible. However, that does not prevent

consultations from being undertaken, after the decision has been adopted, on the way in which the aid may be altered.

27 As for the serious and irreversible damage alleged by the applicants, the Commission observes that a Member State which fails to fulfil some of its obligations under the Treaty must not be placed in a more advantageous position than Member States which comply with the Treaty. The requirement that proposed aid is not to be put into effect until the Commission has taken a final decision is imposed by the Treaty itself and therefore cannot be removed by an interim order under Article 185 of the EEC Treaty. The damage incurred by growers in this case is negligible, as long as there is a possibility that the favourable tariff will be approved by the Commission or by the Court. In this case, the tariff fixed for horticulture, unlike the horticultural tariff under the previous system, which was aligned on the industrial tariff, is clearly more favourable than the industrial tariff.

28 It is impossible, in assessing the loss suffered by growers in the Netherlands as a result of the application of the decision, to overlook the fact that, during the winter of 1984/85, that sector was granted an unlawful benefit and was fully aware that the Commission had reserved the right to recover the aid granted. Consequently, growers in the Netherlands ought, in drawing up their growing plans, to have taken into account the fact that the preferential tariff was not a reliable factor on which they could base their decisions. Moreover, the growing plans for the winter season of 1984/85 were apparently still based on the tariff applicable prior to 1 October 1984, so that from that point of view the application of the new preferential tariff amounted to an unforeseen advantage. Aid provisionally authorized by means of an interim order cannot provide growers with a solid foundation for their decisions and is rather in the nature of a temporary reduction of costs.

29 The Commission also asks whether it is compatible with the scheme laid down in the Treaty, which authorizes only the Council, acting unanimously, to derogate from Community rules in exceptional cases, for the operation of a Commission decision to be suspended by interim order and for the Netherlands thus to be authorized to introduce fresh aid, albeit provisionally.

30 The Netherlands Government's calculations on the consequences which an increase in the tariff would have for the costs structure of the Netherlands horticultural sector provide, according to the Commission, striking evidence of the extent to which the preferential tariff improves, and has over the past winter already unlawfully improved, the latter's competitive position in the common market at the expense of horticulture in the other Member States.

31 As regards the alleged risk of conversion to coal, with its resulting undesirable consequences for the environment and the profitability of Gasunie, the Commission's decision does not prevent such conversion from being made unattractive by means of competitive rates; it merely prohibits the preferential tariff in its present form, namely that of a subsidy.

32 The *intervening States* stress that suspension of the operation of the decision would cause them serious and irreversible damage. The United Kingdom in particular states that the aid granted to Dutch growers represents between one-third and three-quarters of the total profits of an average producer. Since its introduction in 1978, the preferential tariff has enabled Dutch growers to double their share of the United Kingdom market for tomatoes and cucumbers. Dutch growers have also doubled their sales of tomatoes throughout the Community, and their share of the market has increased from 31% to 65%. That development led to a simultaneous and substantial reduction in the area of tomatoes under glass in the United Kingdom, which declined from 582 hectares in 1978 to 394 hectares in 1984. It was also stated that Dutch growers could, in the medium term, pass on the rise in the price of gas, since they determine prices on the European market.

33 According to Article 185 of the EEC Treaty actions brought before the Court of Justice do not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested decision be suspended and prescribe any necessary interim measures in accordance with Articles 185 and 186 of the Treaty.

34 The Court has consistently held that measures of this nature cannot be considered unless the factual and legal grounds relied on to obtain them establish a *prima facie*

case for granting them. In addition there must be urgency in the sense that it is necessary for the measures to be issued and to take effect before the decision of the Court on the substance of the case in order to avoid serious and irreversible damage to the party seeking them. Finally, they must be provisional in the sense that they do not prejudge the decision on the substance of the case.

35 According to Article 92 (1) of the Treaty, any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. According to Article 93 (3) the Commission must be informed, in sufficient time to enable it to submit its comments, of any projects to grant or alter aid. Article 93 (3) also provides that if the Commission considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in Article 93 (2). The last sentence of Article 93 (3) provides that the Member State concerned is not to put its proposed measures into effect until this procedure has resulted in a final decision.

36 The Commission contends that the provisional measure requested is clearly incompatible with the last sentence of Article 93 (3). It states that the Netherlands Government unlawfully applied the measure in question before the adoption of the Commission decision contested in these proceedings.

37 Although the Commission is correct in arguing that the review of the compatibility of State aids with the common market under Articles 92 and 93 depends on the rule that any national measure granting aid may not be put into effect until the Commission has given a decision, it is also true that even if a Member State has infringed the provisions of Article 93 it may not be deprived of the right to challenge before the Court, by means of Article 173 *et seq.* in particular, the legality of a Commission decision adversely affecting it and consequently it must be entitled to apply for the suspension of the operation of that decision in accordance with Article 186 of the Treaty. As the Court has recognized, in particular in its order of 21 May 1977 in Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* [1977] ECR 921, that conclusion does not affect the Commission's right to apply to the Court for a declaration that the Kingdom of the Netherlands has infringed the last sentence of Article 93 (3) of the Treaty.

38 As regards the existence of a *prima facie* case for granting the measure applied for, the following observations may be made. For many years, negotiations have taken place between the Commission and the Netherlands Government concerning the price of gas charged in horticulture. Following the Commission's decision of 15 December 1981 requiring the abolition of the preferential tariff for natural gas, cited above, the Kingdom of the Netherlands took the necessary measures to align the horticultural tariff on the industrial tariff. The terms of the new agreement were noted in a letter dated 29 July 1982 from the Commission to the Netherlands Minister for Foreign Affairs.

39 In view of the measures taken by the Netherlands Government, which appreciably reduced the difference between the price of gas supplied to glasshouse-growers and that supplied to industry, the Commission decided to repeal its decision of 15 December 1981 and terminated the procedure initiated against the Netherlands Government (Official Journal 1982, L 229, p. 38).

40 It is clear from the agreement between the Netherlands Government and the Commission that the tariff for glasshouse-growers had to be adjusted by reference to the calorific parity between gas and heavy fuel oil.

41 On 1 October 1984, however, Gasunie applied a new tariff for horticulture, which provided a ceiling on the price of gas of 42.5 cents per cubic metre for a period of 12 months. The ceiling was agreed even though the price of heavy fuel oil was constantly rising. Furthermore, as a result there was once again a substantial difference between the horticultural tariff and the industrial tariff.

42 Accordingly, it is clear that the Netherlands Government destroyed the balance which it had voluntarily agreed upon with the Commission. Furthermore, *prima facie* the Government did not comply with Article 93 (3), since it did not inform the Commission of the new contract in advance and it put the proposed measures into effect before the procedure initiated by the Commission had been terminated, so enabling Dutch growers over a period of many months to enjoy an advantage which the Commission and the Member States which have intervened in these proceedings regard as discriminatory.

43 In view of the position which the Commission had adopted in its decision of 15 December 1981, such a tariff should only have been put into effect if it was clear that it did not constitute aid. In that connection, however, it is sufficient to state, in addition to the considerations set out above, that the submissions put forward by the applicants on this point cannot be regarded as so clear that they can be accepted by the Court without serious risk of prejudging the arguments which must be presented on the substance of the case. That applies especially to the arguments relating to the role which the Netherlands Government plays in the fixing of Gasunie's prices and the possibility available to growers of converting to coal.

44 In the circumstances there is no urgency such as to justify the further retention of an advantage granted in breach of Article 93 (3) of the Treaty.

45 As regards the serious and irreversible damage which the applicants allege that they will suffer as a result of the application of the contested decision, it must be viewed in the light of the undesirable effects which, according to the Commission and the interveners the preferential tariff for gas has already had and will continue to have on horticulture in other Member States.

46 The applications must therefore be rejected, as regards both the main claim and the alternative claim that the operation of the contested decision should be suspended for two months.

47 The applicants also submitted that if the President should refuse to grant the interim measures applied for, the Commission should at least be required to maintain the contested decision in effect, even if it is implemented by the Netherlands Government. The applicants claim that they have an interest in ensuring that the procedure under Article 173 of the Treaty is allowed to reach its conclusion. That claim must be rejected. The applicants have not shown the necessity for such a measure, by reference to the special conditions applicable to applications for interim measures. It should also be pointed out that the Court's rules of procedure enable applicants in any appropriate case to put forward their observations and their interest in having a case retained in the list before a decision is taken as to whether to remove their applications from the Register.

On those grounds,

THE PRESIDENT,

by way of an interlocutory order,

hereby orders as follows:

**(1) Cases 67/85 R, 68/85 R and 70/85 R are joined for purposes of the order.**

**(2) The applications are dismissed.**

**(3) Costs are reserved.**

Luxembourg, 3 May 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President