

JUDGMENT OF THE COURT (Fifth Chamber)
29 February 1996 ^{*}

In Case C-56/93,

Kingdom of Belgium, represented by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, acting as Agent, assisted by Claude A. Gonthier, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

applicant,

v

Commission of the European Communities, represented by Michel Nolin and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the offices of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Kingdom of the Netherlands, represented by Jaap de Zwaan and Ton Heukels, Assistant Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with

^{*} Language of the case: French.

an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

intervener,

APPLICATION for annulment of the Commission's decision pursuant to Article 93(2) of the EEC Treaty, addressed on 29 December 1992 to other Member States and other parties concerned, regarding a preferential tariff system applied in the Netherlands for supplies of natural gas to Dutch nitrate fertilizer producers (OJ 1992 C 344, p. 4),

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann (Rapporteur), P. Jann and L. Sevón, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 28 September 1995,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 2 March 1993, the Kingdom of Belgium brought an action under Article 173 of the EEC Treaty for annulment of the Commission's decision pursuant to Article 93(2) of the EEC Treaty, addressed on 29 December 1992 to other Member States and other parties concerned, regarding a preferential tariff system applied in the Netherlands for supplies of natural gas to Dutch nitrate fertilizer producers (OJ 1992 C 344, p. 4, hereinafter 'the Decision').
- 2 On 25 October 1983 the Commission initiated the procedure provided for in Article 93(2) of the Treaty in respect of a preferential tariff system for supplies of natural gas, applied in favour of Dutch nitrate fertilizer producers by NV Nederlandse Gasunie (hereinafter 'Gasunie'), an undertaking governed by private law, 50% of whose share capital is owned directly or indirectly by the Netherlands State.
- 3 In the course of that procedure, Gasunie made changes to its tariff structure, one of which was the introduction, with retroactive effect from 1 November 1983, of a new tariff, 'tariff F', to be made available to very large industrial users established in the Netherlands (with the exception of those in the energy sector), provided that they fulfilled certain conditions regarding the quantity of gas consumed and the load factor, consented to interruptions of supplies and accepted supplies of gas

of varying calorific values. In practice, tariff F was intended essentially for Dutch producers of ammonia to be used for the manufacture of nitrate fertilizers. It corresponded to the tariff available to large industrial customers, less a variable rebate up to a maximum of HFL 0.05/m³.

- 4 On 17 April 1984 the Commission had decided to terminate the procedure under Article 93(2) of the Treaty on the ground that tariff F did not contain any element of State aid. In particular, the Commission had formed the view that Gasunie achieved considerable savings on the cost of supply by reason of the high load factor and the supply conditions applicable to very large industrial users and, especially, nitrate fertilizer producers.
- 5 Following proceedings brought by French ammonia producers, the Court annulled that decision by judgment of 12 July 1990 in Case C-169/84 *CdF Chimie AZF v Commission* [1990] ECR I-3083. That judgment was based on an experts' report, provided at the Court's request, according to which Gasunie's savings on supplies of natural gas under tariff F amounted at the most to HFL 0.005/m³ in respect of elements valued by the Commission at over HFL 0.05/m³ and the rebates for customers under tariff F had therefore to be attributable to other considerations. The Court accordingly decided that the Commission had committed a manifest error in its assessment of the facts.
- 6 The Commission subsequently re-examined the compatibility of tariff F with Articles 92 and 93 of the Treaty, finally concluding that tariff F was justified on commercial grounds, that it did not favour Dutch ammonia producers in relation to those in the other Member States and that the Netherlands State had not influenced the fixing of the tariffs to a greater extent than any normal shareholder,

in so far as there had been no loss of revenue. The Commission therefore found tariff F to be compatible with the common market and decided to terminate the procedure under Article 93(2) of the Treaty.

- 7 It is that decision against which the Kingdom of Belgium has brought the present proceedings. In support of its application, it puts forward three pleas in law, alleging a manifest error of assessment, errors of law in the interpretation of Article 92 of the Treaty and an inadequate statement of reasons.
- 8 According to the documents before the Court, Gasunie has introduced a new tariff system and tariff F has therefore not been used since 31 December 1991.

The plea alleging a manifest error of assessment

- 9 The Kingdom of Belgium contests the Commission's conclusions that tariff F was justified on commercial grounds and that it did not favour Dutch ammonia producers in relation to those in other Member States.

The Commission's conclusion that tariff F was justified on commercial grounds

- 10 According to settled case-law, the charging by a Member State, or an entity on which it exerts influence, of a tariff fixed at a level lower than that which would normally be chosen may be regarded as aid for the purposes of Article 92(1) of the Treaty. In such circumstances, the State, or the entity on which it exerts influence, does not apply the preferential tariff as an ordinary economic agent but uses it to

confer a financial advantage on certain undertakings by forgoing the profit which it would normally realize. On the other hand, a preferential tariff does not constitute aid if, in the context of the market in question, it is objectively justified by economic reasons such as the need to withstand competition on the same market (see, to that effect, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, paragraphs 28 to 30).

- 11 Since a complex economic appraisal is involved here, it should also be noted that, according to the case-law, in reviewing an act of the Commission which has necessitated such an appraisal, the Court must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (see *inter alia* Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, paragraph 25; Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62; Case C-174/87 *Ricoh v Council* [1992] ECR I-1335, paragraph 68, and Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 25).
- 12 The Commission, supported by the Kingdom of the Netherlands, contends that tariff F is justified by Gasunie's need to withstand competition on the ammonia market from ammonia imports from non-member countries.
- 13 The Commission explains that natural gas is the primary feedstock used to produce ammonia, accounting for approximately 75% of the production costs. Ammonia is the basic product involved in the manufacture of nitrate fertilizers, representing about 60% of the production costs. As a general rule, the Dutch nitrate fertilizer producers produce themselves the ammonia they require and consume each year about 30% of the natural gas supplied by Gasunie to Netherlands industry. However, if the price of the natural gas needed to produce ammonia is too high, the fertilizer producers will choose to purchase it elsewhere rather than manufacture it themselves.

- 14 According to the Commission and the Kingdom of the Netherlands, the situation of the Community ammonia industry in the 1980s was such that, if Gasunie had not granted special tariffs to the Dutch nitrate fertilizer producers, it could well have lost that important outlet. There is nothing therefore to support a conclusion that, in supplying natural gas to the Dutch nitrate fertilizer producers in accordance with tariff F, Gasunie behaved differently from any other private undertaking in normal market conditions.
- 15 The Kingdom of Belgium maintains that tariff F was not justified on commercial grounds but politically motivated, its purpose being to place Dutch ammonia producers at an advantage. In that respect, it challenges on several points the reasoning on which the contested decision is based.
- 16 While conceding that tariff F was not secret and that it was the guide price for natural gas supplied to ammonia producers in north-west continental Europe, the Kingdom of Belgium first argues that, since tariff F — unlike Gasunie's other tariffs — was never published, it was not a public tariff.
- 17 That argument must be rejected. It need only be pointed out here, as was done by the Commission, that in paragraph 15 of the judgment in *CdF Chimie AZF v Commission*, cited above, the Court found that tariff F was a public tariff whose conditions of availability were public and perfectly open.
- 18 The Kingdom of Belgium submits, secondly, that the Commission's assertion that Gasunie earned a profit throughout the period in which tariff F was in force (see paragraph 16 of the Decision) does not prove that tariff F was a commercial policy practised because it was economically sound. The Kingdom of Belgium refers in this context to the fact that Gasunie's annual profit has been pre-set at HFL 80 million by agreement between Gasunie's shareholders and the Dutch

natural gas producers. Gasunie receives its gas from the Nederlandse Aardolie Maatschappij (NAM), a consortium mainly owned by Shell and Esso. NAM exploits the Netherlands natural gas fields on behalf of the Groningen Association, in which NAM and the Netherlands State hold shares of 60% and 40% respectively. The Netherlands State receives approximately 80% of the profits from sales of natural gas. In accordance with the price-fixing mechanism termed 'netback', Gasunie purchases natural gas from NAM at a price equal to its final selling price on the various markets, less its transport and other costs and its agreed annual profit. Gasunie is, therefore, only a cost centre and bears no risk, since its costs and its profit are assured irrespective of the price charged to its customers.

- 19 The Commission, supported by the Kingdom of the Netherlands, argues that the annual profit of HFL 80 million represents the maximum that Gasunie may retain, any surplus being paid to NAM. Gasunie's actual profits during the period in which tariff F was in force were considerably higher and it was to those that the Commission referred in its Decision.
- 20 As the Kingdom of Belgium observed at the hearing, the actual profits to which the Commission refers are really the profits earned by Gasunie's suppliers, so that the Commission's Decision is neither clear nor accurate on this point. However, that does not mean to say that the Commission's assessment of the facts was manifestly erroneous. As the Kingdom of the Netherlands pointed out, the Commission's intention was to show that the application of tariff F was a normal and economically sound commercial policy. In that regard, the question whether the profits were ultimately realized by the Groningen Association rather than by Gasunie is not pivotal. Belgium's argument must therefore be rejected.
- 21 Thirdly, the Kingdom of Belgium contests the Commission's argument that both Gasunie's variable and fixed costs were well below tariff F, so that the company was able to increase its net revenue through sales at tariff F rates and yet make sure

that it retained important customers which it was in danger of losing if those rates had not been offered (see paragraph 17 of the Decision). According to Belgium, that argument is invalidated by Gasunie's annual reports for 1990 and 1991, which indicate that the average purchase price paid by Gasunie for natural gas was higher than tariff F.

- 22 In that connection it should be pointed out that the fact — confirmed moreover by the Commission and the Kingdom of the Netherlands — that the average purchase price was higher than tariff F does not undermine the Commission's argument. Suffice it to note that the average purchase price paid by Gasunie is calculated from the various final selling prices on the different markets, less its costs and profit. Consequently, the Commission's statement concerning Gasunie's variable and fixed costs cannot be shown to be false merely on the basis of information regarding the average purchase price. That argument must therefore be rejected also.
- 23 Fourthly, the Kingdom of Belgium argues that the Commission cannot prove Gasunie's need to retain the loyal custom of the Dutch nitrate fertilizer producers from the fact that, in 1982, it had just lost a substantial share of the French market (see paragraph 24 of the Decision). That loss was attributable to Gasunie's own policies, since the Netherlands had decided during the 1970s, in order to meet the first 1973-74 fuel crisis, to reduce the quantity of natural gas available for export.
- 24 As the Commission and the Kingdom of the Netherlands correctly maintain, the Kingdom of Belgium has not established any relevant connection between the decision taken in 1974 and the fact that in 1982 Gasunie had just lost a share of the French market. That argument must therefore be rejected.
- 25 Fifthly, the Kingdom of Belgium challenges the following statement made by the Commission: '... If the price of the gas which [a nitrate fertilizer producer] uses in order to manufacture the ammonia he requires is too high, he will decide to

purchase the ammonia, if possible, elsewhere at a lower cost than he would have to pay if he produced it himself (situation in Belgium, for example, in 1983) ...' (paragraph 21 of the Decision). The Kingdom of Belgium points out that Belgian nitrate fertilizer producers annually import ammonia so as to bridge the gap between production and consumption and there is nothing to indicate that 1983 imports were prompted by other considerations or that production levels had been abnormally low.

- 26 The Commission has produced figures for Belgian ammonia imports between 1980 and 1991, which show a significant decline in Belgian ammonia production. Thus, the proportion of Belgium's ammonia requirements covered by imports rose from 38% in 1982 to 51% in 1983, and then to over 70% in the early 1990s. Those figures — which the Kingdom of Belgium has not contested — show that the Commission could reasonably have quoted Belgium's example to support its speculations as to how nitrate fertilizer producers would react to the prospect of a comparatively high price for natural gas. That argument must therefore be rejected also.
- 27 Sixthly, the Kingdom of Belgium argues that the Commission refers to markets which are not comparable when asserting that the prices, recorded or estimated, which producers in the United States, Venezuela, Trinidad and Tobago, and the Middle East were able to charge from 1981 to 1991 for natural gas supplies have always been well below the Netherlands tariffs (see paragraph 22 of the Decision). According to the Kingdom of Belgium, the low prices charged in those countries represent the real value of natural gas on their respective markets, whereas tariff F was lower than the value of natural gas on the European market. To that effect, the Kingdom of Belgium has produced figures showing that tariff F was lower than the price charged on the market in various European countries for non-continuous supplies to large industrial consumers with dual fuel-burning capacity.
- 28 The Kingdom of Belgium also argues that on the ammonia market, by contrast, any interruptions in supply give rise to technical and commercial problems which are difficult to overcome, since ammonia producers have no feedstocks available as

an alternative. Since supplies must be regular and continuous, natural gas has a higher intrinsic value for ammonia producers than for producers in other industrial sectors.

- 29 Those arguments must be rejected. First, the Commission rightly observes that it did not seek to compare markets in the non-member countries mentioned with the Community market but simply to show that ammonia producers in those countries represent real and serious competition for ammonia producers established in the Community.
- 30 Secondly, the Kingdom of Belgium's assertion that tariff F was lower than the value of natural gas on the Community market is not material in view of the price formation system used for natural gas. Since the value of natural gas is determined by the intended market — in this case, the subsector of ammonia producers — the relationship between tariff F and the price of natural gas to be delivered to large industrial customers with dual fuel-burning capacity is not relevant in determining whether the Commission could cite such factors in giving the reasons for its decision. The decisive question is whether the conditions of competition on the market were such as to justify Gasunie in granting Dutch ammonia producers a lower price than that charged to other industrial sectors. However, that question will be considered below.
- 31 The Kingdom of Belgium's argument concerning the non-feasibility of interrupting gas supplies to ammonia producers and the repercussions which this has on the value of gas intended for them is also irrelevant. Even supposing that argument were well founded, it does nothing to undermine the Commission's conclusion that, if the price of gas is too high by comparison with the price of imported ammonia, nitrate fertilizer producers will stop producing ammonia themselves.

- 32 Seventhly, the Kingdom of Belgium challenges the Commission's argument that export supplies, and in particular exports to Belgium, Germany and France, were less attractive in terms of price and in terms of the need to carry out new investment (see paragraph 24 of the Decision). The Kingdom of Belgium maintains that export prices were higher than tariff F, that the existing infrastructure could have borne further exports without new investment, and that there was sufficient demand on the export markets to compensate for any decline in sales to Dutch nitrate fertilizer producers. Also, that decline would probably have been gradual, in view of the significant investments made by nitrate fertilizer producers in the Netherlands.
- 33 The Kingdom of Belgium adds that it was also open to the Netherlands to limit its natural gas production so as to prolong the life of its natural gas fields.
- 34 The Commission and the Kingdom of the Netherlands maintain that, but for tariff F, Gasunie would immediately have lost an important outlet which could not have been replaced by export outlets. Export contracts for natural gas are concluded on a long-term basis to ensure security of supply and, for that reason, it would have been impossible for Gasunie to substitute exports for its sales to Dutch ammonia producers in a short space of time. Gasunie's sales to Dutch ammonia producers account for one-third of its sales to Netherlands industry and are virtually equal in volume to all the gas sold by Gasunie in Belgium. An increase in exports would also have entailed technical problems relating to gas quality, pressure and so on. Besides, the export price was higher than tariff F because it represented the average price on the various sectoral markets in the importing countries. Since the export market was saturated, the considerable volume of excess natural gas could only have been exported at very much lower prices. According to the Commission, proof of the danger facing Gasunie was provided by the closure, during 1992 and 1993, of a large number of Community ammonia production plants owing to the large-scale importation of ammonia from the East.

- 35 In the light of the arguments put forward by the Commission and the Kingdom of the Netherlands, it is evident that the Kingdom of Belgium has failed to establish that the Commission committed a manifest error of assessment in considering that Gasunie was not in a position to compensate for a decline in sales to Dutch nitrate fertilizer producers by increasing its export sales.
- 36 As regards the possibility of restraining production, that would have resulted — as the Advocate General points out in paragraph 71 of his Opinion — in a decrease in revenue and, therefore, in a less rapid pay-back on the money invested. In those circumstances, it must be concluded that the Kingdom of Belgium has presented no evidence that its suggested solution would have been commercially sound.
- 37 Lastly, the Kingdom of Belgium contested the principal basis for the Commission's Decision, namely that tariff F was justified by the need to withstand competition on the ammonia market presented by imports from non-member countries. According to Belgium, that conclusion is invalidated by the fact that tariff F was made available to Dutch nitrate fertilizer producers even at times when, in view of the high price commanded by ammonia, there was no need whatsoever to withstand competition from imports. On that point, Belgium founds its argument on tables provided by the Commission, according to which the maximum tariff F rebate of HFL 0.05/m³ had been granted at times when the price of imported ammonia was high and a lower rebate had been offered at other times, when ammonia prices were low.
- 38 As the Commission and the Kingdom of the Netherlands rightly pointed out, tariff F variations must be appraised by reference to the relative prices of industrial gas and imported ammonia, whatever their absolute levels. Whenever the price of

natural gas is relatively high by comparison with that of imported ammonia, it may be commercially attractive for a nitrate fertilizer producer to purchase ammonia rather than produce it itself.

39 However, as the Advocate General found in paragraphs 86 to 91 of his Opinion, the tables provided by the Commission indicate that tariff F tended to mirror fluctuations in the markets for natural gas and ammonia, certain time-lags being explainable in terms of occasional problems of acclimatization. Failing further information and evidence from the Kingdom of Belgium, it must be concluded that it has not been shown that, in finding that tariff F was necessary in order to withstand competition on the ammonia market from imports from non-member countries and to retain important existing customers, the Commission exceeded its powers of appraisal in this context.

40 It follows from the foregoing that the first part of this plea is unfounded.

The Commission's conclusion that tariff F did not favour Dutch ammonia producers in relation to their counterparts in other Member States

41 It is common ground that the method used to calculate the frontier price agreed between Gasunie and Distrigaz, the Belgian distribution company, was the 'net-back' system, in accordance with which the purchase price was determined on the basis of the market value of natural gas according to the various uses to which it is put in the importing country, less Distrigaz's transport and distribution costs and its profit margin. The frontier price represented the average market value of natural gas, weighted by reference to the volumes predicted for each sector. The market value of natural gas in each sector was in turn largely dictated by the price of

competing petroleum products — gas oil for the domestic/commercial sector and heavy fuel oil for the industrial sector — plus a premium allowing for the greater advantages of natural gas.

- 42 The parties also agree that the mechanism described above merely served as a basis for commercial negotiations between the parties, during which each sought to obtain from the other the most favourable price. Those negotiations culminated in the establishment of a global price for all sales of natural gas made by Gasunie to Distrigaz. That frontier price was renegotiated every three years.
- 43 The Kingdom of Belgium takes issue with the Commission's statement that the French, Belgian and German distribution companies were charged by Gasunie, for the quantities intended for the nitrate fertilizer industry, a frontier price that was more or less identical to tariff F (see the fourth subparagraph of paragraph 8 of the Decision).
- 44 On that point, the Kingdom of Belgium maintains, first, that the frontier price for exports of Netherlands natural gas to Belgium was, for considerable periods, higher than tariff F.
- 45 That argument cannot be accepted. As the Commission and the Kingdom of the Netherlands pointed out, there are sectoral markets, such as the domestic-user market, on which it is possible to achieve higher selling prices than in the industrial sectors, including the nitrate fertilizer producers. It is not surprising, therefore, that the frontier price, being a global price reflecting an average between the various prices on the different sectoral markets, could be higher than tariff F.

- 46 The Kingdom of Belgium submits, secondly, that the frontier price was a single price negotiated for the market as a whole, which cannot be broken down objectively into its constituent elements, each representing a different sectoral market. In support of that argument, Belgium alleges that the premium paid for natural gas by comparison with substitute fuels was a global premium agreed for the market as a whole. Furthermore, the forfeit to be paid in cases of under-utilization (the 'take or pay' principle), or the selling price where purchases were made in excess of the annually agreed quantities, were invoiced on the basis of the single frontier price, whichever subsector of the market was using reduced or increased quantities.
- 47 That argument must also be rejected. Even supposing that the frontier price were a single price which cannot be broken down retrospectively into the elements initially employed in its calculation, that would not be a determining factor, in so far as it is common ground that the frontier price is partially calculated on the basis of a price-fixing mechanism which takes into account the market value of natural gas in the different market sectors.
- 48 Thirdly and lastly, the Kingdom of Belgium objects that, during the negotiations between Gasunie and Distrigaz on the frontier price, the Belgian nitrate fertilizer producer market was not expressly taken into account. The market value taken into consideration for the quantities intended for that market was no different from that taken into consideration for other industrial uses and hence not approximately equal to tariff F.
- 49 It should be recalled here that, according to the Commission and the Kingdom of the Netherlands, the market value of natural gas which is not used as a combustible or fuel but as a feedstock is affected not only by the price of competing petroleum products but also by the price of other feedstocks, including in this case imported ammonia.

- 50 The Kingdom of Belgium does not appear to contest the fact that the market value of natural gas intended for nitrate fertilizer producers is also affected by the price of imported ammonia. Indeed, Belgium itself points out that, for much of the period in question, Distrigaz granted a tariff similar to tariff F to Belgian nitrate fertilizer producers.
- 51 Furthermore, this is confirmed by the expert opinion drawn up at the Court's request in *CdF Chimie AZF v Commission*, cited above, the relevant section of which is quoted in paragraph 18 of the contested Decision. The experts stated that, when natural gas is used as a feedstock in industrial processes, and when the price of the feedstock plays an essential role in determining the cost of the end product — as in the case of ammonia production — not only prices of substituting feedstocks play a role in determining the market price of the feedstock, but also the market price of the end product, whose role is essential. The assessment of the maximum price which an ammonia plant can pay for the feedstock (natural gas, for example) while remaining competitive in the market place for the end product (ammonia, for example) is, they say, a complicated process.
- 52 The Kingdom of Belgium, on the other hand, maintains that, during the negotiations between Gasunie and Distrigaz, sales of natural gas to Belgian nitrate fertilizer producers were not regarded as forming a separate market subsector for the purposes of fixing the frontier price. According to Belgium, those sales were simply classed together with sales of natural gas on the industrial market in general and their price was therefore affected only by the price of heavy fuel oil and not by the price of ammonia. Gasunie had consistently refused to make allowances for the selling price of natural gas to the lower-yield industrial sectors, such as the ammonia sector, since it believed that reductions for quantities sold to those sectors should be obtained from Distrigaz's Norwegian and Algerian suppliers.
- 53 Furthermore, the Belgian Government contends that the contractual frontier price was indexed only to movements in petroleum product prices. No provision was made for indexation to movements in ammonia prices.

- 54 As evidence, the Belgian Government has produced a table entitled 'Simplified Presentation of Netback Analysis', which refers to only two sectors: the domestic/commercial sector, whose market value is calculated by reference to the price of gas oil, and the industrial sector, whose market value is calculated by reference to heavy fuel oil.
- 55 The Kingdom of Belgium asserts that the table supplied by the Commission setting out the price-formation mechanism cannot be used as a basis for settling this dispute. It does not even bear out the Commission's arguments. Even supposing that the frontier price was determined in the light of a separate market value for each industrial subsector, the table reveals that, as regards the nitrate fertilizer subsector, the market value itself was determined by reference to the price of heavy fuel oil and not to the price of ammonia.
- 56 Lastly, the Kingdom of Belgium points out that, by aligning its selling price for natural gas intended for the Belgian nitrate fertilizer producers with the Netherlands guide price, Distrigaz suffered serious losses in that subsector. The only time when Distrigaz was able, without incurring losses, to supply natural gas to the Belgian ammonia producers for a price corresponding to tariff F was from October 1984 until October 1986, the period in which Gasunie granted it a rebate on a 20% portion — called the 'defensive' portion — of the total volume of natural gas purchased. As for Distrigaz's overall rate of profit during the relevant period, it was greatly inferior to that of Gasunie.
- 57 The Commission and the Kingdom of the Netherlands submit that the portion of the frontier price which reflects the sectoral market of industrial customers took account of all subsectors of industry, including nitrate fertilizer producers. Accordingly, the frontier price granted to Distrigaz enabled it to grant Belgian nitrate fertilizer producers a tariff comparable to tariff F. It can therefore be

stated that, with regard to the quantities intended for the nitrate fertilizer industry, Gasunie charged a frontier price approximately equal to tariff F. On that point, the Commission relies on a table drawn up by the Netherlands Ministry for Economic Affairs, which divides the industrial sector into various separate subsectors such as fertilizers, paper, engineering, chemical and so on.

- 58 As regards the defensive portion granted to Distrigaz, the Commission points out that it accounted for approximately 7.5% of Belgian natural gas consumption, which corresponds to the quantities of natural gas used by the Belgian nitrate fertilizer producers during the reference period. The Commission insists that there is a parallel between the granting of the defensive portion for sales to Distrigaz and the rebate granted to Dutch nitrate fertilizer producers. It was only during the period when the defensive portion was granted that the tariff F rebate — which was periodically reviewed and recalculated according to the price of ammonia — was available at its maximum level of HFL 0.05/m³. At other times, the rebate level was lower.
- 59 Lastly, as regards the losses incurred by Distrigaz on sales to nitrate fertilizer producers, the Commission considers that these were notional and attributable to Distrigaz's accounting policy of calculating profits, in all cases, by reference to the global frontier price. In fact, its losses were compensated for by sales to other users at a price above the global frontier price. The truth of the matter is that Distrigaz made substantial and rising overall profits during the relevant period.
- 60 It should be noted at the outset, as the Advocate General observed in paragraph 46 of his Opinion, that the table provided by the Kingdom of Belgium, which by its own admission is in simplified form, does not directly contradict the Commission's version, which seeks to give a more detailed account of sectoral price formation. Furthermore, Belgium has failed to show that the Commission's

table does not accurately depict the formal basis on which the negotiations between Gasunie and Distrigaz took place.

- 61 On the other hand, it is true that, as the Kingdom of Belgium pointed out, the second column of the table provided by the Commission, concerning the 'fixing of an alternative fuel', brackets all subsectors of industry, including fertilizers, as 'largest part fuel oil'.
- 62 It should nevertheless be observed that the table also contains a third column, concerning the 'market value per subsector', which indicates that the market value of natural gas is calculated separately in relation to the fertilizer subsector. As has already been noted in paragraphs 49 to 51, the market value of natural gas intended for the nitrate fertilizer subsector is affected not only by the price of competing petroleum products but also by that of ammonia. In those circumstances, as the Advocate General pointed out in paragraph 47 of his Opinion, the mere fact that there is no express mention in the table of the effect of the price of ammonia on that of natural gas intended for the nitrate fertilizer sector is not sufficient to show that it was not taken into account when determining the frontier price.
- 63 Furthermore, as the Commission argues, the fact that Distrigaz incurred losses on sales to the nitrate fertilizer sector in no way demonstrates that the frontier price did not take that market into account, since those losses were calculated by reference to the global frontier price and therefore compensated for by profits from other sectoral markets on which prices higher than the frontier price could be obtained. As regards the fact that Distrigaz's overall profit levels were lower than Gasunie's, that may be explained, as the Advocate General pointed out in paragraph 37 of his Opinion, by other factors and, again, does not sufficiently substantiate the Kingdom of Belgium's arguments.

- 64 Lastly, even if the Kingdom of Belgium appears to be correct in asserting that the portion of the frontier price reflecting the nitrate fertilizer subsector was indexed to movements in the price of petroleum products and not to movements in the price of ammonia, that cannot be conclusive.
- 65 As the Advocate General points out in paragraphs 41, 42, 48 and 49 of his Opinion, on the basis of the information made available to the Court in this case the defensive portion must be viewed as an exceptional measure designed to supplement the rebate granted to Distrigaz through the frontier price for natural gas intended for nitrate fertilizer producers at a time when the rebate granted to the Netherlands under tariff F reached its maximum level of HFL 0.05/m³. That exceptional measure therefore replaced a formal indexation mechanism.
- 66 It follows from the foregoing that the Kingdom of Belgium has failed to show that, in finding that the frontier price granted to Distrigaz made it possible for Belgian nitrate fertilizer producers to be granted a tariff comparable to tariff F, the Commission made a manifestly erroneous assessment of the economic data.
- 67 In its reply, the Kingdom of Belgium submits that the Belgian ammonia sector was adversely affected by price distortion caused by the fact that the Netherlands environmental tax ('Milieuheffing') was included in the frontier tax, but repaid to the Dutch ammonia producers. Belgium also pointed out that Belgian ammonia producers were required to pay a supplement of BFR 5 per gigajoule.
- 68 It should be remembered in that regard that, pursuant to Article 42(2) of the Court's Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure. Since that is not the position here, this plea must be rejected.

- 59 In those circumstances, the second part of the first plea in law is also unfounded and this plea must therefore be rejected in its entirety.

The plea of errors of law in the interpretation of Article 92 of the Treaty

- 70 The Kingdom of Belgium argues, first, that to justify tariff F on the ground that prices for natural gas are lower in other countries is contrary to the Court's finding in Case 78/76 (*Steinike und Weinlig v Germany* [1977] ECR 595, paragraph 24), to the effect that a Member State cannot justify an infringement of Article 92 of the Treaty by claiming that other Member States are also failing to comply with that provision. Furthermore, the Commission did not examine the specific conditions on the markets for natural gas and ammonia in Member States where prices are lower than in the Netherlands.
- 71 On that point, the Kingdom of Belgium refers to the Commission's statement that ammonia producers in Italy, the United Kingdom and Ireland were able to purchase their gas requirements at supply prices well below the tariffs applying in the Netherlands, Belgium and France (see the third subparagraph of paragraph 8 of the Decision).
- 72 It should be made clear that the Commission is not claiming in that subparagraph that the prices charged in the Member States mentioned constitute State aid. On the contrary, it expressly points out that the prices in question were justified commercially. The first part of the second plea must therefore be rejected.
- 73 The Kingdom of Belgium also refers to the Commission's argument set out in the expert opinion referred to in paragraph 51 to the effect that, when natural gas is used as a feedstock and when its price as such plays an essential role in determining the cost of the end product, its price does not only depend on prices of the

substituting feedstocks but also on the price of the end product itself (see paragraph 18 of the Decision). According to the Kingdom of Belgium, that argument runs counter to the position adopted by the Court in its judgment in Case 27/76 (*United Brands v Commission* [1978] ECR 207, paragraph 229), in which it stated that the interplay of supply and demand should only be applied to each stage where it is really manifest.

- 74 This second part of the plea must also be rejected. The Court, in its reasoning in *United Brands*, set out to demonstrate that the mechanisms of the market are affected if, in the calculation of the price, account is taken of the law of supply and demand, not as between the vendor and the purchaser (in that case, distributors) but — by jumping one market stage — as between the vendor and the ultimate consumer (see paragraph 230). Thus the Court's reasoning in that decision is in no way at variance with the Commission's argument that demand for natural gas by the nitrate fertilizer producers is actually affected by competition from imported ammonia.
- 75 The Kingdom of Belgium argues, thirdly, that, contrary to the Court's direction in paragraph 30 of its judgment in *Van der Kooy and Others v Commission*, cited above, the Commission took no account in its Decision of the costs entailed for nitrate fertilizer producers if they were to convert from producing ammonia from natural gas to purchasing ammonia directly.
- 76 As the Commission observed, the alternative for nitrate fertilizer producers in the present case was not to convert their plant, but only to give up one stage in the production process, namely ammonia production. According to the Commission,

the costs entailed could only be marginal. Since the Kingdom of Belgium has not sought to rebut that contention, the third part of the plea must be rejected.

- 77 Fourthly, the Kingdom of Belgium, relying on paragraph 28 of the judgment in *Van der Kooy and Others v Commission*, argues that the Commission should have examined whether Gasunie had forgone a possible profit. Belgium also points out that, as was stated in the expert opinion provided in *CdF Chimie AZF v Commission*, cited above, tariff F is still a State measure seeking to confer a financial benefit on certain undertakings, even if a political decision to support Dutch nitrate fertilizer producers is perhaps also in Gasunie's commercial interests.
- 78 The fourth part of the plea must also be rejected. In the first place, fault cannot be found with the Commission for omitting to make express mention in its Decision of the fact that Gasunie had not forgone a profit which it could ordinarily have achieved, in so far as the Commission set out the precise reasons for which it saw nothing to support a finding that, by delivering gas at tariff F prices to Dutch nitrate fertilizer producers, Gasunie acted differently from any other private undertaking in those market conditions.
- 79 According to settled case-law, Article 92 of the Treaty does not make a distinction according to the causes or aims of the measures of State intervention concerned but defines them according to their effects (Case 173/73 *Italy v Commission* [1974] ECR 709 and Case 310/85 *Deufil v Commission* [1987] ECR 901, paragraph 8). Where a practice is objectively justified on commercial grounds, the fact that it also furthers a political aim does not mean to say that it constitutes State aid for the purposes of Article 92 of the Treaty.

- 80 Fifthly, the Kingdom of Belgium objects that the Commission did not explain the contradiction between the official conditions for the application of tariff F and Gasunie's practice of withholding those tariff terms from large consumers who fulfilled the requisite conditions but did not belong to the nitrate fertilizer sector whilst extending them to nitrate fertilizer producers who did not meet the specified volume requirements.
- 81 On that point, it should be noted that Article 92 of the Treaty only applies to aid, granted by States or through State resources, which favours certain undertakings or the production of certain goods. In paragraph 23 of its judgment in *CdF Chimie AZF v Commission*, cited above, the Court found that tariff F is sectoral in nature since it applies to certain undertakings, namely Dutch ammonia producers.
- 82 In its Decision, the Commission recognized the sectoral nature of tariff F, in that it mentioned that Gasunie also had some other customers whose gas consumption was comparable in terms of quantities to that of some of the fertilizer manufacturers, whose existence was not, however, threatened. The Commission goes on to explain that, if it is commercially necessary, it is common commercial practice for an undertaking to grant a discount if it is economically maintainable. That necessity did not exist in the case of such customers, to whom the threat of substitution did not apply (see paragraph 15 of the Decision).
- 83 In those circumstances, the Commission cannot be criticized for not seeking to explain why it might have been in Gasunie's interest to lay down formal and apparently impartial conditions, instead of expressly holding that the tariff concerned is sectoral in character.
- 84 Since the last part of the second plea in law must also be rejected, this plea must be rejected in its entirety.

The plea of inadequate reasoning

- 85 The Kingdom of Belgium argues that the reasons given for the Decision do not meet the requirements laid down by Article 190 of the EEC Treaty since they are incomprehensible and inadequate and do not support the Commission's findings.
- 86 The Court has consistently held that the statement of reasons required by Article 190 of the Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to carry out its review. It is also clear from the relevant case-law that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799, paragraph 16).
- 87 In the present case, it must be borne in mind that the Commission's Decision was preceded by a decision of the Commission, a judgment of the Court annulling that decision and a communication from the Commission reopening the procedure under Article 93(2) of the Treaty and calling on interested parties to submit their observations (OJ 1992 C 10, p. 3), to which, moreover, reference was made.
- 88 The Kingdom of Belgium points out that the Decision does not describe tariff F and the conditions for its application and does not explain that the tariff F rebate rate was variable.

89 It should be noted here that those points were covered both in the Court's judgment annulling the previous decision and in the related Opinion delivered by Advocate General Mischo, and in the Commission's communication reopening the procedure under Article 93(2) of the Treaty. Consequently, it may properly be concluded that the interested parties could ascertain those matters and put their point of view in that regard to the Court.

90 As regards the other points made by the Belgian Government in support of this plea, as the Advocate General observes in paragraphs 110 and 111 of his Opinion, they amount to a repetition of its earlier arguments in support of the plea alleging a misinterpretation of Article 92 of the Treaty. They must therefore be rejected in this connection, too.

91 It follows from the foregoing that the third plea must be rejected.

92 Since none of the pleas in law put forward by the Kingdom of Belgium has been upheld, the application must be dismissed as unfounded.

Costs

93 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful in its pleadings, the latter must be ordered to pay the costs. Pursuant to the first sentence of Article 69(4), the Kingdom of the Netherlands, which intervened in the proceedings, must bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the applicant to pay the costs;**
- 3. Orders the intervener to bear its own costs.**

Edward

Moitinho de Almeida

Gulmann

Jann

Sevón

Delivered in open court in Luxembourg on 29 February 1996.

R. Grass

D. A. O. Edward

Registrar

President of the Fifth Chamber