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

My Lords,

In Joined Cases 67, 68 and 70/85 *Van der Kooy and Others* v *Commission* the Court is concerned with a challenge to the validity of Decision 85/215/EEC of 13 February 1985 (Official Journal 1985, L 97, p. 49). For the reasons given in my Opinion in that case ([1988] ECR 219, at p. 240) I am of the view that that decision does not fall to be annulled.

Subsequent to the making of that decision an application was made to the Court for its operation to be suspended. By Order of 3 May 1985, the President refused that application. On 6 May 1985, the Commission sent a telex to the Netherlands Government asking to be informed as soon as possible and within a fortnight at the latest of the measures actually taken to implement the decision 'on the date set'. The Netherlands Government replied more than three weeks later, by telex of 31 May 1985, that the Landbouwschap, Gasunie and Vegin had reached agreement in principle on a new horticultural tariff. The Netherlands Government stated that it had given its approval to this agreement in principle so as not to delay any further the execution of the Commission's decision in the light of the President's order. By telex of 6 June 1985, the Commission asked for more details of the proposed new tariff, specifying in particular that it should be calculated in an objectively verifiable manner and be capable of adaption to changing circumstances and noted that the telex of 31 May 1985 made no reference to the period elapsed since 22 February 1985. The Netherlands Government's reply of 11 June 1985 spelt out the new tariff in more detail and informed the Commission that the agreement in principle had become a contractual commitment.

The details of the new tariff were as follows. It was to apply from 1 June 1985. As before, the horticultural tariff was in principle Tariff D plus 0.5 cents. For the period 1 June to 1 October 1985, a ceiling of 45 cents/m³ was to apply. That ceiling was also to apply throughout the 1985/86 heating season (that is, 1 October 1985 to 30 September 1986). However, for that season the ceiling was only to apply to growers using gas for all their heating requirements. I note in passing that, in the earlier of the Netherlands Government's two telexes, that condition was said to apply 'provisionally'; however, no point has been taken on that and it must be assumed that the condition was in fact applied. For the 1986/87 season, the same system was to apply but the ceiling was to be recalculated in the light of prevailing circumstances. The Court has not been informed of any adjustment to the ceiling of 45 cents/m³. The Netherlands Government made no direct reference to the period from 22 February 1985, confining itself to the

comment that negotiations between the parties to the agreement had been completed very rapidly following the President's order and that the new tariff had been introduced at the earliest possible moment from a legal and technical point of view and had been implemented on 1 June whereas normally it was only amended quarterly (in October, January, April and July).

The Commission considers that the measures which I have just described do not amount to full compliance with its decision. It therefore applies to the Court under the second paragraph of Article 93 (2) of the EEC Treaty, the first two paragraphs of which provide as follows:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned should abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct.'

The Commission's decision contested in *Van der Kooy* was notified to the Netherlands Government on 22 February 1985 and therefore took effect on that date by virtue of Article 191 of the Treaty, which provides that 'directives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. Article 1 of the decision provides:

'The aid represented by the preferential tariff for natural gas applied in the Netherlands in respect of glasshouse growers from 1 October 1984 is incompatible with the common market within the meaning of Article 92 of the Treaty and must be discontinued.'

Article 2 provides:

'The Netherlands shall inform the Commission before 15 March 1985 of the action it has taken to comply with Article 1.'

The new tariff, replacing that in force since 1 October 1984, applied from 1 June 1985 with a refinement applying from 1 October 1985 that the ceiling of 45 cents/m^3 only applied to growers using gas to the exclusion of other energy sources.

The Commission makes the preliminary point that the aid, the subject matter of Decision 85/215, was unlawful even prior to that decision. It should never have been implemented and may be recoverable as the Netherlands Government was warned in December 1984 and by the caveat in the final paragraph of the reasons for the decision, namely that the decision was 'without prejudice to any consequences which the Commission might draw as regards recovery of the abovementioned aid from the recipients or the financing of the common agricultural policy by the EAGGF'. That may be so but the decision lays no obligation on the Netherlands Government to recover the aid and the failure to do so cannot be a failure to comply with the

decision itself. The Commission, rightly, does not seek a declaration that the Government was in breach of the terms of the decision by failing to recover aid paid prior to the date of the decision. The fact that the Commission could have taken different steps or may now be able to take steps for the recovery of the aid does not affect the present application.

The Commission contends that there was a failure to comply with the decision firstly, in that the very aid ordered to be discontinued was continued in force until the first week of June 1985 and, secondly, that the new tariff put into effect from that date was itself a State aid.

The decision, taken following the procedure under Article 93 (2) of the Treaty, does not in Article 1 specify a period within which the aid is to be withdrawn. The Court has recognized that the date does not necessarily have to be specified — see Case 173/73 *Italy* v *Commission* [1974] ECR 709 where at p. 717 it is said:

'Moreover, the spirit and general scheme of Article 93 imply that the Commission, when it establishes that an aid has been granted or altered in disregard of paragraph 3, must be able, in particular when it considers that this aid is not compatible with the common market having regard to Article 92, to decide that the State concerned must abolish or alter it, without being bound to fix a period of time for this purpose and with the possibility of referring the matter to the Court if the State in question does not comply with the required speed.'

If no proceedings are taken under Article 169 of the Treaty (as was done in Case 171/83R *Commission* v *France* [1983] ECR 2621) and no date is set or order made for the recovery of aid paid prior to a date specified, then it seems to me that the aid must be discontinued as soon as possible. If monies are being paid out directly by the State, no more monies should be paid. If the aid takes the form of a tariff laid down then that tariff must be abolished and a new one substituted; such a process cannot necessarily be effected on the date of notification of the Commission's decision. It must, however, be effected 'with the required speed' and the necessary steps put in motion.

An order in the form adopted in the present decision does not mean either that any benefits resulting from the tariff during the period necessary to discontinue the aid with reasonable speed must be recovered by the State under that order. It was for the Commission to order recovery or to take subsequent steps for recovery, as the last paragraph of the reasons for the decision contemplated that it might.

Accordingly I do not consider that the Netherlands Government was in breach on 22 February because the tariff was not immediately abolished or any repayments from that date sought.

The Commission then contends that there was a breach of the obligation to discontinue the aid as of 15 March 1985, by which time the Netherlands was required to notify the Commission of the action it had taken to comply with Article 1 of the decision. That date is not to be read necessarily as the date by which the tariff was to be finally discontinued. As I see it the

Commission accepted the reality of the situation that a reasonable time would be required to abolish the tariff and it wished to know what had been done. The Netherlands was in breach by not informing the Commission what steps it had taken and as far as can be seen, by not having taken any steps towards discontinuance, but not necessarily in not having finally discontinued the tariff by that date.

The Netherlands Government contends that it was entitled to wait until after the determination of its application for the annulment of the decision or at least until the determination of its application for interim measures, which were refused by the President's Order of 3 May 1985. The Government considers that it would have been illogical to amend the tariffs whilst at the same time seeking interim measures designed to avoid the damage which would be caused to the horticulture sector and to Gasunie by the increase of the tariff.

Article 185 of the Treaty, however, provides that 'actions brought before the Court of Justice shall not have suspensory effect'. The Court may, of course, suspend the operation of contested acts and award other interim measures by virtue of Articles 185 and 186: until it does so, those acts must be complied with by virtue of Article 185 read in conjunction with Article 191. The fact that it will take time to obtain such an order does not give the addressee of a decision an automatic extension. Steps must be taken to implement the decision meanwhile. This argument of the Netherlands Government must therefore be rejected.

The Netherlands Government seeks to argue, next, that the two-week period specified in the Commission's telex of 6 May 1985, to which I have already referred, operated to extend the deadline for information specified in the decision. This is clearly not the case. The Commission's telex of 6 May 1985 can only be seen as a further reminder to the Netherlands Government of its obligation to comply with the decision.

In the telexes to which I have already referred and again in its pleadings, the Netherlands Government appears to consider that it, as well as Gasunie, the Landbouwschap and Vegin acted with speed when they moved following the President's order. It seems to have taken the parties a month (from 3 May to 4 June 1985) to reach a new agreement and obtain government approval. According to the Netherlands Government there were technical and legal reasons why such a length of time was necessary. The technical reasons were in particular that all the meters had to be read on site in order to apply the new tariff. The legal reasons were that the distribution companies and the growers had to be informed in writing of the new tariff before any increase could be agreed contractually. Furthermore, it was impossible to apply the new tariff retroactively: that would have exposed the suppliers and distributors to legal risks (presumably of being sued by the growers).

These arguments are not entirely convincing, in particular since, if the price under the tariff introduced in October 1984 was supposed to be fixed until October 1985, the legal risks run in imposing a retroactive increase would apply equally to the

period from 1 June to the end of September 1985. Furthermore, the tariff was said to be agreed on 4 June and to be effective from 1 June 1985, in other words with a short retroactive element. Be that as it may, a new tariff was able to be implemented within one month: there is nothing to suggest that it could not have been implemented within one month of notification of the decision. In my opinion, the Netherlands Government did not comply with the decision with the required speed in that it implemented measures effective only from 1 June 1985; nor has it shown that it began to take the necessary steps immediately on notification of the decision. To that extent it failed to comply with the decision.

The final and most important question is whether, by abolishing the tariff in operation from 1 October 1984 and substituting the new tariff, the Netherlands Government can be said to have failed to comply with Decision 85/215. That is not necessarily the same question as whether the new tariff itself independently constitutes an aid.

The answer seems to me to depend firstly on the nature of the obligation laid down. Was it to abolish all aid to glasshouse growers or was it to abolish a specific aid? In my view it was the latter — it was 'the aid represented by the preferential tariff for natural gas applied . . . from 1 October 1984' which was to be discontinued. Such tariff constituted an aid in the finding of the Commission and, in my opinion, that finding stands. It was that tariff which had to be discontinued. No other steps were prescribed, as they had been in the 1981 Decision which required 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'.

In fact four changes were made: (i) the price was fixed at 45 cents/m^3 from 1 June to 1 October 1985 and for the 1985-86 season the ceiling was raised from 42.5 cents/m^3 to 45 cents/m^3, the ceiling to be reconsidered in the light of prevailing circumstances for the 1986-87 season; (ii) the ceiling was to apply for two years rather than one; (iii) it was to apply only to growers who used only gas; (iv) the set-off or compensation clause in the earlier agreement was removed.

The second change was specifically made to counter the Commission's charge that one year was too short a period to have the necessary effect on growers' plans but this change seems to me to be of peripheral importance. I doubt whether the third change amounted to very much since the large majority of horticulturalists fall into that category and the fourth change may not have had much practical effect.

The question really turns on the first change. As to this there is, it seems to me, force in the contention that to have taken and retained tariff D applicable to industrial users was itself preferential for horticulturalists, since on the figures given they

consume far less than the quantity required to be consumed by industrial users if they were to enjoy tariff D. The Commission has not, however, complained of this as such and it was accepted as the basis of the settlement for the period ending on 1 October 1984. The real complaint of the Commission as to the tariff condemned in the decision was that the ceiling of 42.5 cents/m³ was below the equilibrium price at which competition between gas and coal was in balance without either being advantaged or disadvantaged, namely 43 and 44.3 cents/m³, and well below the lowest price which would cause a significant switch to coal (namely 46.5 cents/m³ for an average-sized holding and 47.5 cents/m³ for a larger holding). The new ceiling, however, was between 2 and 0.7 cents above the range taken as the equilibrium price; on the other hand it was 1.5 and 2.5 cents/m³ below the price at which medium and larger holdings would switch significantly to coal.

The Commission contends that 45 cents/m³ is still too low in relation to the figures of 46.5 and 47.5 cents/m³ and in view of the fact that coal prices have allegedly increased. In the result, the ceiling of 45 cents/m³, it is argued, represents an advantage of 5.8 cents/m³ for the second quarter of 1985 and 4.3 cents/m³ for the third quarter of 1985 over the figure resulting from the application of tariff D plus 0.5 cents. The Netherlands Government could not show that comparable steps were taken in respect of the price for industrial users who might be liable to convert to coal, nor could it show what the risk of such users converting to coal really was. The Netherlands Government has not shown either why the tariff applicable to industrial users could not equally be applicable to horticulturalists. Accordingly no objective criteria have been shown to justify the new tariff which is still an aid. Moreover, the ceiling was not to be reconsidered with sufficient frequency in order to take account of changing circumstances. Further, as the United Kingdom also points out, the existence of a ceiling shields Dutch growers from the effects of sharp rises in oil prices and enables them to plan ahead with more confidence than their competitors in other Member States.

On the other hand, it is to be noted that the decision estimated that the prices in the range of 46.5 cents/m³ for the average sized holdings and 47.5 cents/m³ for the larger holdings would result in 30% of the natural gas consumed in the horticultural sector being replaced by coal in less than three years. The range of prices is thus not the range at which growers would begin to convert to coal, but the range within which in a three-year period Gasunie would or would be likely to lose one-third of its sales to the horticultural market.

The decision does not expressly require the ceiling to be fixed at or above that level; nor does it seem to me that it should be interpreted as implicitly requiring prices to be fixed at or above that level, by which Gasunie was estimated to lose such a substantial amount of trade.

I accept that the Commission does not necessarily have to fix the level of prices at which there ceases to be an aid element but if it requires specific aid to be abolished without doing so then it must be open to a Member State to show that by discontinuing the specific aid and adopting a new price level it has complied with the decision to discontinue the specific aid complained of. This does not mean that a token change of a fraction of a cent without any apparent justification would amount to a bona fide discontinuance of the existing tariff. It must be a genuine discontinuance and fixing of a new tariff. On the facts of the present case, the new tariff was fixed above the equilibrium price accepted by the Commission and below the figure taken as likely to lead to a substantial reduction in gas sales because of the attractiveness of coal to the horticultural industry. On that basis since the Commission accepts that in principle a tariff differential may be adopted if objectively justified, it cannot, in my view, fairly be said that the Netherlands Government failed to discontinue the specific tariff in force from 1 October 1984. This is the only matter in issue in these proceedings and the Commission is accordingly not entitled to the declaration it seeks in respect of the period subsequent to 1 June 1985.

Such a result does not mean that the new tariff was not an aid. On the contrary, there is material relied on by the Commission and the two intervening Member States which may point to the new tariff constituting a State aid. If the Commission considered that a new aid had been notified it could have instituted the procedure available under Article 93 (2); if it had not been notified then it could have taken steps (by, for example, applying to the Court) to prevent the proposed measures being put into effect contrary to the last sentence of Article 93 (3). On such an application different considerations would have arisen from those which arise in the present limited application and it would be necessary to have regard to any change of circumstances by the time the new tariff was implemented.

It is obviously still open to the Commission to consider whether the sums which it regards as having been given by way of aid with serious effects on competitors in other Member States can be recovered and whether, as part of its duty to keep all aids under constant review pursuant to Article 93 (1), it should use the procedures and powers available to it under Article 93 (2) and (3).

In my opinion, therefore, the Commission is entitled to a declaration that the Netherlands Government has failed to comply with the decision with the required speed by implementing a new tariff only with effect from 1 June 1985. The rest of the application I would dismiss. The parties and the interveners should bear their own costs.