4. The fact that a Commission decision which prohibits State aid in the form of a preferential energy tariff benefiting a given category of undertakings and clearly states that it is the unduly low level of the tariff which is found unacceptable does not stipulate by how much the tariff would need to be increased in order to eliminate any element of aid does not constitute an infringement of essential procedural requirements.

REPORT FOR THE HEARING
delivered in Joined Cases 67, 68 and 70/85 *

I — Facts

In the northern countries of the Community, significant quantities of vegetables and flowers are grown in heated glasshouses. This form of cultivation is particularly widespread in the Netherlands, which according to data available in 1985 accounted for 75% of Community production of hothouse gherkins and cucumbers, 40% of lettuce and 65% of tomatoes and exported a very substantial proportion of its hothouse production.

In the 1970s Dutch horticultural producers heated their glasshouses with heavy fuel oil. Because of the air pollution caused by the use of that fuel the Netherlands Government encouraged conversion to natural gas. Natural gas now accounts for 95% of the energy consumption of Dutch horticultural producers.

The transport, importation and exportation of natural gas in the Netherlands are carried out by NV Nederlandse Gasunie, Groningen, a company governed by private law, 40% of whose capital is held by Staatsmijnen (which in turn is wholly owned by the Netherlands State), 10% by the Netherlands State and the remainder by two private oil companies. Gasunie is administered by a Board consisting of eight members, one of whom is appointed by the Minister for Economic Affairs, three by the Staatsmijnen and two by each of the private oil companies. Gas prices are set by the Board of Directors, acting by a ¾ majority. Since 1963, however, by agreement with Gasunie, prices and delivery conditions for the supply of gas to public distributors and the level of price for gas supplied to other parties have been subject to the approval of the Minister for Economic Affairs.

The largest customers, who account for 45% of gas consumption, are upplied directly by Gasunie. Smaller consumers, on

* Language of the Case: Dutch.

the other hand, are supplied by several local distribution companies, who are members of the Vereniging van Exploitanten van Gasbedrijven in Nederland (Association of Dutch Gas Companies, hereinafter referred to as 'Vegin').

Gasunie enters into individual standard contracts with gas purchasers whose consumption exceeds 170 000 m³ per year, whether they are direct users or distributors. Contracts of that type are regularly entered into between Gasunie, Vegin and the Landbouwschap with regard to the sale of gas to horticultural producers (represented by the Landbouwschap).

According to the Commission, the tariff laid down in the contract applicable in 1981 amounted to a preferential tariff and provided for conditions which were particularly advantageous for horticultural producers. The Commission took the view that that advantage should be regarded as an aid incompatible with Article 92 of the EEC Treaty, and on 15 December 1981 it therefore adopted Decision 82/73 (Official Journal 1982, L 37, p. 29), in which it required the Netherlands Government to take the measures necessary to discontinue the aid in question.

Actions for the annulment of that decision were brought before the Court by the Netherlands Government, the Landbouwschap and by certain horticultural producers. In the mean time, negotiations took place between the Commission and the Netherlands Government. A new agreement was ultimately entered into between Gasunie, Vegin and the Landbouwschap on the following conditions:

the alignment of the market gardening tariff on the industrial tariff taking into account the calorific parity between gas and heavy fuel oil, as determined by the Centraal Bureau van de Statistiek (Central Statistical Office — CBS);

the price determined by the average of CBS prices was to be increased, for horticultural producers, by a premium of 0.5 cents/m³;

the revision of the horticultural tariff at quarterly intervals, as in industry.

The new contract was applicable from 1 April 1983 to 30 September 1984.

On the conclusion of that agreement, the Commission, by Decision 82/518 of 22 July 1982 (Official Journal 1982, L 1229, p. 38), repealed its earlier decision. In its letter of 29 July 1982 informing the Netherlands Government of the repeal of that decision, the Commission asked the Netherlands Government to keep it informed of 'any alterations in the calculation method which might be made in the light of progress in heating technology and developments in the economic situation'. The proceedings brought before the Court against the decision were also withdrawn.

On 28 September 1984 a further contract was entered into between Gasunie, Vegin and the Landbouwschap for the period from 1 October 1984 to 1 October 1985. That contract provides for the application in the horticultural sector of a price for gas corresponding to the average level in 1983 plus a fixed percentage of 10%. A ceiling of 42.5 cents/m³ was thus placed on the price of gas. It was however provided that if the price resulting from the calculation formula used in the previous contract was lower than the price level applicable on the basis of the new contract from 1 October 1984, the resulting difference would offset the benefit obtained during the preceding

period, where the price relationship was reversed.

It must be pointed out that for the first quarter of 1985 Gasunie also froze industrial tariffs, with a price reduction of about 3% from what would have been the normal level.

By a letter of 4 October 1984 the Netherlands Government informed the Commission of the new contract between Gasunie, Vegin and the Landbouwschap. The Commission considered that the contract entailed aid incompatible with Article 92 (1) of the EEC Treaty, and on 27 November 1984 it therefore opened the procedure provided for in Article 93 (2) of the Treaty with regard to the Netherlands. In so doing it pointed out that the aid in question had been introduced contrary to Article 93 (3) of the Treaty and could therefore be recovered and taken into consideration, where necessary, in the clearance of accounts under the EAGGF, Guarantee Section.

By a letter of 21 December 1984, the Netherlands Government denied that the new gas tariff for horticultural producers constituted a State aid. In its statement of its position and in its replies of 3 January and 1 February 1985 to the questions put by the Commission, the Netherlands Government put forward the following arguments:

changes in the economic situation since 1982 mean that the price of gas, while remaining linked to that of petroleum products, must be determined in the light of competition from coal;

although the price of heavy fuel oil has considerably increased, largely because of the increase in the value of the American dollar, it may be expected to decline shortly, which explains why it is desirable for the contracting parties to stabilize the price of gas in relation to that of heavy fuel oil;

there is an increasing danger that a large number of horticultural producers will convert to coal, because of the increase in the price of gas and the simultaneous fall in the price of coal; for some horticultural producers conversion would be attractive if the price of coal rose beyond about 37 to 38 cents/m^3 and it would become a real option for a significant number of users at gas prices above 42 to 43 cents/m^3; in order to avoid losing customers Gasunie is obliged to lower the price of gas;

the fact that gas prices for industry did not fall to such a significant extent (3% for industry as opposed to 12% for market gardening) reflects the fact that coal is more likely to be used in horticulture than in industry, for the following reasons:

(i) 60% of horticultural production businesses will be obliged to replace their boilers in the near future;

(ii) fuel costs form a lower proportion of total costs in industry than in horticulture;

(iii) since horticultural production businesses are already very efficient in their use of energy, only conversion to coal can make further savings possible;

(iv) the extra work required by the use of coal is less of an obstacle for horticultural production businesses, which are often family-operated, than for industry;

(v) equipment is depreciated over two to three years in industry and over five years in horticulture.

Several Member States and a number of other persons concerned by the matter submitted observations to the Commission in which they stated that the preferential tariff for gas at issue in the procedure constituted a State aid incompatible with the common market. Only the Landbouwschap took the contrary view.

On 13 February 1985 the Commission adopted Decision 85/215 (Official Journal 1985, L 97, p. 49).

In that decision, the Commission describes the price at which natural gas is supplied to Dutch horticultural producers on the basis of the agreement of 28 September 1984 as a preferential tariff. According to the Commission, a tariff falls within the prohibition laid down in Article 92 (1) of the EEC Treaty when it exhibits the following three characteristics:

the tariff favours certain undertakings or the production of certain goods competing with the undertakings or production of other Member States, and the products in question are traded within the Community;

the tariff has been imposed by a public authority;

the tariff results in compensation from the State being paid to the distribution company or in the State receiving less revenue.

With regard to the condition that the prefential tariff should, in this case, have been imposed by the Netherlands State, the Commission refers to the structure of Gasunie. It concludes that even if the Netherlands State holds only 50% of the capital of Gasunie, it may nevertheless influence its pricing decisions by means of the ministerial approval to which Gasunie's tariffs are subject.

The fact that the tariffs applied to horticultural producers by Gasunie under the agreement of 28 September 1984 were imposed by the Netherlands State is confirmed, says the Commission, by the consideration that 'under a normal economic approach, there is no reason why such a favourable tariff should be given to growers'.

The Commission accepts that a company such as Gasunie may decide to vary its tariffs depending on the use of the goods which it sells, but considers that such variations 'must have sound and comprehensible economic reasons, e.g. to ensure the competitiveness of gas on the various user markets, and must not discriminate between horticulture and other consumers in a comparable situation'.

The Commission considers that that is not so in this case. It accepts that the price of gas may be fixed on the basis of the price of a fuel other than heavy fuel oil, in particular coal. However, it doubts whether a tariff whose application is limited to one year will have a significant impact on the decisions of growers whether or not to convert to coal.

The Commission observes that the argument based on the need to avoid competition from coal and that based on the need to provide against the existing instability of the price of fuel oil are valid not only with regard to horticultural producers but also with regard to other sectors in which gas is used, such as industry. In that sector too there is a risk of conversion to coal and it

too needs stable energy prices. According to the Commission, the Netherlands Government has not shown why horticultural producers need a more advantageous gas tariff than that applied in the industrial sector.

With regard to the ceiling placed on gas prices for horticultural producers by the contract of 28 September 1984, the Commission points out that, on the basis of the information in its possession, the equilibrium price, that is to say the price at which horticultural producers have no incentive to convert to coal and will therefore continue to use gas, is between 43 and 44.3 cents/m³. At a price between 46.5 and 47.5 cents/m³, on the other hand, the Commission considers that 30% of the natural gas used in horticulture would be replaced by coal in less than three years. The Commission concludes from those calculations that the gas tariff applied to horticultural producers is too low and is discriminatory.

By imposing such a tariff, says the Commission, the Netherlands State gives up revenue which it could draw from its interest in Gasunie, and the resulting advantage for horticultural producers thus comes from State resources.

The impact of the aid in question on competition and on intra-Community trade derives, according to the Commission, 'both from the comparison between Dutch horticultural production in heated greenhouses and Community horticulture in heated greenhouses as a whole and from the effect of even a slight advantage in heating costs'. That is to say, 'Dutch production is sufficiently large for even a slight cost advantage to have an effect on producer prices'. The Commission therefore concludes that 'Dutch horticultural production . . . enjoys an advantage which necessarily affects intra-Community trade, especially as the major part of Dutch produce is exported to other Member States'.

Consequently, the Commission considers that the aid in question fulfils the conditions set out in Article 92 (1) of the EEC Treaty.

With regard to the possibility of derogation pursuant to Article 92 (3), the Commission points out that the aid in question is not intended to promote the execution of a project of common European interest, as referred to in subparagraph (b), but is an aid granted in the interests of a particular sector of the Dutch economy. Furthermore, it is contrary to the objectives of the common energy policy, which is intended to encourage energy saving and the rational use of energy. Nor is the aid in question intended to promote the economic development of a particular area, for the purposes of subparagraphs (a) and (c), since no reference is made to the adjustment or improvement of the structure of undertakings or development in the regional context.

The Commission therefore finds, in Article 1 of its decision, that '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'. In Article 2 of the decision it is provided that 'the Netherlands shall inform the Commission before 15 March 1985 of the action it has taken to comply with Article 1'.

Three actions for the annulment of that decision pursuant to Article 173 of the Treaty have been brought, by (1) Kwekerij Gebroeders Van der Kooy BV, whose head office is in Zevenhuizen (Netherlands), and J. W. Van vliet, a market gardener residing in Uithoorn (Netherlands) (hereinafter collectively referred to as Van der Kooy), (2) the Landbouwschap and (3) the Kingdom of the Netherlands.

The applications submitted by Van der Kooy and the Landbouwschap were lodged at the Court Registry on 15 March 1985; the application submitted by the Kingdom of the Netherlands was lodged on 18 March 1985.

II — Written procedure and conclusions of the parties

By an order made on 8 May 1985 pursuant to Article 43 of the Rules of Procedure, the Court joined the cases for the purposes of the procedure and of the judgment.

By applications lodged at the Court Registry on 14 and 15 March 1985 respectively, the Netherlands Government, Van der Kooy and the Landbouwschap asked that the operation of the contested decision be suspended pursuant to Article 185 of the EEC Treaty.

By an order dated 3 May 1985, the President of the Court dismissed the application for interim measures and reserved the costs.

In an application received at the Court Registry on 24 April 1985 the Danish Government applied to intervene in these cases in support of the Commission's conclusions.

By applications received at the Court Registry on 25 April and 21 June 1985 the Government of the Federal Republic of Germany applied to intervene in these cases in support of the Commission's conclusions.

By an application received at the Court Registry on 7 August 1985, the United Kingdom applied to intervene in these cases in support of the Commission's conclusions.

By orders made on 8 May, 26 June and 18 September 1985 the Court allowed those applications to intervene.

In Cases 67/85 and 68/85, Van der Kooy and the Landbouwschap claim that the Court should:

'annul or declare void, in whole or in part, the decision . . . of the Commission of the European Communities of 13 February 1985 on the preferential tariff charged to glasshouse growers for natural gas in the Netherlands, published in the *Official Journal of the European Communities*, L . . . of . . . ;

make such other orders as it may deem appropriate;

order the Commission to pay the costs.'

In Case 70/85, the Netherlands Government claims that the Court should:

'annul the decision of the Commission of the European Communities of 13 February 1985 (COM(85) 284 final) on the preferential tariff charged to glasshouse growers for natural gas in the Netherlands;

make such further orders as it may deem appropriate;

order the Commission to pay the costs.'

The Commission claims that the Court should:

declare the applications in Cases 67/85 and 68/85 inadmissible, or, in the alternative, dismiss them as unfounded;

'dismiss the application in Case 70/85 as unfounded;

order the applicants in the three joined cases to pay the costs.'

In its observations the Government of the Federal Republic of Germany claims that the Court should:

(1) 'dismiss the applications in Cases 67/85, 68/85 and 70/85 as unfounded;

(2) order the applicants to pay the costs.'

The United Kingdom, in its observations, submits that the Court should:

'dismiss the applications in Cases 67, 68 and 70/85.'

The Danish Government submits that the Court should dismiss the applications.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it asked the Netherlands Government and the Commission to reply in writing, before the hearing, to a number of questions and to provide certain information.

III — Submissions and arguments of the parties

The admissibility of the applications in Cases 67 and 68/85

In its defence, the Commission disputes the admissibility of the applications in Cases 67 and 68/85.

With regard to the application submitted by Van der Kooy, the Commission points out that the aid in question benefits all Dutch horticultural producers who use natural gas. Van der Kooy cannot, therefore, rely on the judgments of the Court (the judgments of 14 November 1984 in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, and of 17 September 1980 in Case 30/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671) to the effect that the recipient of an individual State aid may bring proceedings pursuant to the second paragraph of Article 173 of the EEC Treaty against a Commission decision prohibiting such aid.

The Commission goes on to point out that in its view the aid at issue is a new aid to which Article 93 (3) of the Treaty applies. It should not therefore have been implemented without the Commission's agreement. The fact that the preferential tariff for natural gas was applied illegally from 1 October 1984 onward does not have the effect of giving recipients of the aid, that is to say persons to whom the tariff was applied, rights which they would not have had if the Netherlands Government had complied with Article 93 (3).

With regard to the position of the Landbouwschap, the Commission considers that it should not be regarded as directly and individually concerned by the contested decision for the sole reason that it was a

contracting party to the agreement establishing the preferential tariff.

The Commission denies, first of all, that the Landbouwschap may in this case be deemed to act as the representative of Dutch horticultural producers. It is an organization established by statute to represent all agricultural undertakings. Its function is thus not only to protect the general interests of horticultural producers but also to promote the activities of the undertakings in question in the general interests of the Netherlands. The Commission refers in that regard to Article 71 of the Wet op de Bedrijfsorganisatie (Law on Industrial Organization) of 27 January 1985 and to a decision of the Hoge Raad (Supreme Court) of 15 May 1970.

The Commission also points out that the Court has held (in its judgments of 18 March 1975 in Case 72/74 *Union syndicale* v *Council* [1975] ECR 401, and of 28 October 1982 in Case 135/81 *Groupement des agences de voyages* v *Commission* [1982] ECR 3799) that an organization formed for the protection of the collective interests of a category of persons cannot be regarded as being directly and individually concerned by a measure affecting the general interests of that category.

As for the fact that the contested decision obliges the Landbouwschap to enter into a new contract regarding natural gas tariffs with Gasunie and Vegin, the Commission considers that that is the result of the Netherlands Government's conduct in implementing the preferential tariff contrary to Article 93 (3).

Van der Kooy, on the other hand, considers that as a horticultural producer to which the tariff agreement in question was applied, it is concerned by the contested decision, in view of its factual situation which differentiates it from all other persons and thus distinguishes it individually in the same manner as the Netherlands, the person to which the decision is addressed. It argues in that regard that it was entitled to expect that the tariff agreed upon by the Landbouwschap and Gasunie on 28 September 1984 would be in force from 1 October 1984 until 1 October 1985, and that it organized the management of its business for that period on the basis of the application of the agreement. Since the aim of the contested decision is to nullify that agreement and increase the natural gas tariff applicable to horticultural producers, it directly affects Van der Kooy.

As for the judgment of 17 September 1980 in *Philip Morris*, Van der Kooy argues that nowhere in that judgment does the Court make the admissibility of an application dependent upon the fact that it concerns an individual aid.

It concludes that it would be in the interest of the proper administration of justice to allow it to bring proceedings in the defence of its legitimate interests.

The Landbouwschap also considers that its application is admissible. It states that it should be regarded as the representative of horticultural producers, a function conferred on it by a declaration made on 13 October 1967 by the organizations representing employers and employees in the agricultural and horticultural sectors. Its powers include in particular the conclusion of agreements with regard to the price of natural gas. The fact that the tariff agreement of 28 September 1984 does not expressly designate the Landbouwschap as the representative of horticultural producers is not decisive, as is shown by the fact that the contracts entered into by horticultural producers complied with the terms of that

agreement. That is to say, the agreement is binding both on the Landbouwschap and on individual horticultural producers.

Indeed, the Commission has always accepted that the Landbouwschap is the representative of horticultural producers, as is shown by the extensive correspondence between the Commission and the Landbouwschap, the discussions which took place between them with regard to the question now at issue and the actual text of the contested decision.

The Landbouwschap also considers that it is affected by the decision in its independent capacity since, if the Commission's decision is upheld, horticultural producers might lose confidence in the Landbouwschap as a negotiator. The economic difficulties with which many horticultural producers would be faced in the event of an increase in the price of natural gas would mean a loss of subscriptions for the Landbouwschap of about HFL 1 to 2 million.

The submissions of the applicants

In Cases 67 and 68/85, Van der Kooy and the Landbouwschap make the following submissions with regard to the contested decision:

infringement of the EEC Treaty, in particular Article 92 (1) and (3);

lack of competence or misuse of powers or both;

breach of one or more principles of Community law;

infringement of Article 190 of the EEC Treaty in so far as no adequate reasons were stated for the decision.

In Case 70/85, the Netherlands Government raises the following submissions:

Infringement of essential procedural requirements, on the ground that:

(i) the substance of the decision was imprecise,

(ii) the statement of the reasons on which the decision was based was inadequate;

Infringement of the EEC Treaty, in particular Article 92.

Those submissions may be discussed under the following headings:

A — Infringement of Article 92 of the EEC Treaty;

B — Infringement of essential procedural requirements (the imprecise nature of the contested decision);

C — Inadequate statement of reasons.

A — *Infringement of Article 92 of the EEC Treaty*

Van der Kooy and the Landbouwschap state that, as is clear from the contested decision, the tariff in question falls within the scope of Article 92 of the Treaty only if the following conditions are fulfilled:

(1) The tariff benefits producers who are in competition with undertakings or producers in other Member States and there is intra-Community trade in the products in question;

(2) The tariff was imposed by a public authority;

(3) The tariff results in compensation being paid by the State to the distribution company or in the State's receiving less revenue.

Van der Kooy and the Landbouwschap are of the view that none of those three conditions is met by the tariff in question.

1.(a) With regard to the first condition, Van der Kooy and the Landbouwschap ask whether a natural gas tariff which is more beneficial to horticultural producers than to other categories of customers must for that reason alone always be regarded as a preferential tariff and therefore as an aid for the purposes of Article 92.

They point out in that regard that in the contested decision the Commission stated that different categories of consumers could be charged different tariffs only on the basis of objective and verifiable criteria.

Van der Kooy and the Landbouwschap consider that the specific circumstances of horticultural producers may constitute such a reason, sufficient at least to justify a certain reduction in the tariff applicable to that sector in comparison with the tariff applicable in industry.

They consider that the adoption of the tariff in question is explained by the need to ensure the competitivity of gas in hothouse horticultural production in the face of competition from coal. That need is particularly important in the sector in question for the following reasons:

since energy costs amount to 25 to 30% of total costs in horticulture, horticultural producers are much more ready than industrial undertakings to make investments to reduce costs;

horticultural producers have already invested a great deal in energy saving, and the only way of making further savings would be to convert to coal, whereas industry can make such savings while still using gas;

the extra work which would be caused by conversion to coal is less of an obstacle for horticultural undertakings, which are normally family businesses, than for industrial undertakings;

a large number of boilers used in horticulture are already fully depreciated, so that their replacement presents no problem;

the prices of horticultural products depend on daily variations in supply and demand, so that a horticultural producer cannot pass on increases in gas tariffs;

because of the heavier requirements, industrial boilers need more manpower than boilers used in horticulture;

because their use is less constant, industrial boilers are less efficient.

Van der Kooy and the Landbouwschap also complain that in its decision the Commission implies that in the Netherlands there are only two tariffs, that applicable to horticultural producers and that applicable in industry, whereas in fact there are special tariffs for several other sectors which are particularly heavy energy-consumers,

reflecting the specific competitive position of gas on the various markets concerned. The Commission cannot therefore compare the tariff charged in horticulture with only the general tariff applied to large consumers, but must also take into account the other special tariffs and examine whether the distinctions made between different markets other than horticulture are also based on proper and comprehensible economic reasons. Van der Kooy and the Landbouwschap argue that the Commission failed to make such a general inquiry.

The Netherlands Government takes the view that every undertaking may vary its tariffs in accordance with economic considerations. The reasons justifying the adoption by Gasunie of the tariff in question are the following:

the great uncertainty with regard to petroleum prices;

the possibility for horticultural producers of converting to another fuel, that is to say coal.

Gasunie sought simply to preserve an outlet for its product, not to forgo an advantage. Its tariff policy is therefore entirely responsible and complies with the Community energy policy as set out in Council Recommendation 83/230 of 21 April 1983.

The Netherlands Government contests the importance attached by the Commission to the comparison between the tariff applicable in horticulture and the tariff applicable to other categories of consumers. It would be absurd, it says, if a tariff applicable in a particular sector, fixed in an entirely correct manner from the commercial point of view, could nevertheless be regarded as a preferential tariff if it appeared that the tariff applicable in other sectors was higher. By imposing such an obligation to maintain equality between the tariffs applied in different sectors the Commission adds to Article 92 an element which is not to be found in that provision.

According to the Commission, on the other hand, the application to certain consumers of a tariff more advantageous than the tariffs applied for the same product to other consumers automatically raises the presumption that it is a preferential tariff, so long as it has not been shown that it is economically justified by objective criteria. The introduction of such a tariff must therefore be notified to the Commission pursuant to Article 93 (3) and be examined in accordance with the relevant procedure.

Although it is true that in the Netherlands there is a system of differential tariffs for industrial consumers of gas, the tariff applicable in horticulture, which until October 1984 was aligned on the industrial tariff applied to consumers using 10 to 50 million m^3 (tariff D), is no longer aligned on that tariff but has been reduced to the average 1983 level, increased by 10%. That resulted in a reduction of 3.9 cents/m^3 in relation to the third quarter of 1984. In the Commission's view the objective of the new tariff was therefore not only to freeze prices at the levels prevailing before its introduction of the new tariff but to reduce prices to the level prevailing at the end of 1983 and the beginning of 1984.

Furthermore, the industrial tariff was frozen only for the first quarter of 1985, which resulted in a reduction of about 3% in industrial prices.

The Commission therefore argues that the tariff in question gave horticultural producers distinctly more favourable treatment than comparable industrial sectors and thus constitutes a preferential tariff in their favour.

Since this was a newly established aid, the Netherlands Government was under an obligation to inform the Commission, in accordance with Article 93 (3), and to suspend its application. The question whether the tariff in question is justified on commercial grounds, should, according to the Commission, have been raised in the course of an examination of the matter under the procedure laid down in Article 93 (2) and (3). It is in any event for the Netherlands Government to rebut the presumption that the preferential tariff constitutes aid.

(b) Secondly, Van der Kooy and the Landbouwschap dispute the assertion in the contested decision that the price resulting from the tariff in question, 42.5 cents/m³, does not reflect the competitive position of coal and gas in the horticultural sector. They complain first of all that the Commission has not made public the calculations on the basis of which it arrived at that conclusion.

That criticism is repeated by the Netherlands Government. It states that the Commission has in no way shown that the calculations on which it based its action were incorrect. Furthermore, says the Netherlands Government, the Commission was wrong to base its calculations on the present price of heavy fuel oil and not on the price which prevailed at the time when the tariff in question was adopted. That led to an incorrect assessment of the price of 42.5 cents/m³ provided for in the tariff.

The Commission states that the argument based on the risk of conversion to coal was raised by the Netherlands Government only at a relatively late stage of the examination procedure. Furthermore, the figure of 42 to 43 cents/m³ indicated by the Netherlands Government as the price above which conversion would become a valid option for a significant number of horticultural producers was not supported by arguments and economic calculations; the Netherlands Government confined itself to observing that that price derived from a recent report by the LEI (Institute for Agricultural Economics) and Krachtwerktuigen, but it did not make that report available to the Commission before proceedings were brought in Case 70/85.

The Commission states that for its part it had a study of the matter carried out by an independent research company, the Société belge de gestion d'énergie SA (hereinafter referred to as GFE). The results of that study, which were incorporated in the contested decision, show that the 'equilibrium price', that is to say the price at which there would not be a significant number of conversions to coal, is between 43 and 44 cents/m³, while on the most favourable assumptions there would be a significant number of conversions only at a price of 46.5 cents/m³ in medium-sized undertakings and 47.5 cents/m³ in smaller undertakings.

After examining the LEI report, on which the Netherlands Government bases its arguments and which is annexed to the application in Case 70/85, and the calculations set out by Van der Kooy and by the Landbouwschap in their applications in Cases 67/85 and 68/85, the Commission points out that the GFE report fixes the equilibrium price at 44.3 cents/m³, the LEI report at 46.9 cents/m³, while the calcu-

lations of Van der Kooy and of the Landbouwschap, the source of which is not stated, set it at 37 to 38.3 cents/m³.

In their reply, Van der Kooy and the Landbouwschap refute the Commission's assertion that the LEI report was not submitted to it in the course of the examination of the tariff in question. The Commission never asked to be shown such a report, even though in its letter of 24 December 1984, the Landbouwschap had stated that in its negotiations with Gasunie over the preparation of the tariff in question the report was taken into consideration.

As for the comparison between the equilibrium prices arrived at in the various reports, Van der Kooy and the Landbouwschap point out that the price set out in the LEI report chosen by the Commission, that is to say 46.9 cents/m³, represents the equilibrium price calculated by the LEI for businesses possessing a combined condenser. Because of the advantages associated with the use of that technology, those businesses, which number only 892 out of a total of 8 174 Dutch horticultural production businesses, would be the last to convert to coal. It follows that the equilibrium price for them must be the highest.

Van der Kooy and the Landbouwschap also criticize the comparison carried out by the Commission, since it places on the same footing undertakings which are quite different.

In its reply the Netherlands Government states that neither the calculations set out in the LEI report nor those made in the GFE report submitted by the Commission can provide an indication or a forecast of general application accurate to the nearest cent. Such calculations indicate a tendency, and show the existence of an increasing risk of conversion to coal by horticultural producers.

The Netherlands Government also denies that the LEI report was not submitted to the Commission before the institution of proceedings before the Court.

With regard to the equilibrium price, the Netherlands Government argues that there are several such prices. At the lowest equilibrium price, hardly any horticultural producers will convert to coal, while at the highest equilibrium price there is a high probability that virtually all horticultural producers will take that step. In that regard the Netherlands Government emphasizes that the LEI report calculates a series of equilibrium prices. For businesses which have a combined condenser, a system which permits a significant increase in the output of the boiler, the equilibrium price was calculated at 46.9 cents/m³. For those equipped with a simple condenser connected to a separate circuit, the price is 45.3 cents/m³. For businesses which have only a simple condenser connected to the return circuit the equilibrium price is 42.9 cents/m³, while for standard businesses without condensers, that is to say 39% of all Dutch horticultural production businesses, the equilibrium price is 41 cents/m³. The possibility of using such equipment depends on the type of undertaking and in particular on the type of plants cultivated.

The Netherlands Government points out that the sole example examined by the GFE report submitted by the Commission is that of a business equipped with a simple condenser on the return circuit. It also argues that the GFE report contains errors with regard to boiler efficiency, which, in the example cited by that report, is given as

100%, whereas according to the LEI report it is only 95%. Furthermore, the calculation in the GFE report of the heading 'extra work' required by a coal-fired boiler seems to the Netherlands Government to be too high.

In conclusion, the Netherlands Government criticizes the GFE report submitted by the Commission on the ground that:

it describes the situation of only one type of undertaking, whereas there are a number of types of undertaking and for each of them the equilibrium price is different;

it describes a situation which is not representative, since only 11% of Dutch horticultural production businesses correspond to that description;

there are errors in its calculation of the equilibrium price in the situation described, and the resulting equilibrium price is too high.

(c) In their observations, the Governments which have intervened in support of the Commission's conclusions seek primarily to show that the tariff in question has the effect of distorting competition and affecting trade between Member States.

According to the Danish Government, it is clear that the economic advantage obtained during the 1984-85 heating season by Dutch horticultural producers placed them in a position of strength in relation to their competitors in other Member States. It states that if Danish hothouse growers had obtained a corresponding reduction in their energy costs, they would have saved DKR 30 million, that is to say an average of DKR 6.83/m³ of heated surface.

The Danish Government emphasizes that the prices of Dutch horticultural products are lower than those of Danish products.

The Government of the Federal Republic of Germany makes a similar submission. It points out that by comparison with the previous tariff, the tariff in question results in an advantage of 5.5 cents/m³ for the first quarter of 1985, that is to say 10% of the price set under the old tariff. Since energy costs represent 25 to 30% of production costs in the hothouse horticulture sector the reduction of gas prices resulted in a 3 to 4% reduction in costs.

The Government of the Federal Republic of Germany states that most Dutch hothouse products are exported and compete in particular with the corresponding German products, since consumption habits in the Federal Republic of Germany and in the Netherlands are identical and the geographic position of those two countries lowers transport costs.

It points out that only 15% of German horticultural production businesses have converted to coal, mainly because of the great expense of doing so. Businesses using natural gas, on the other hand, do not enjoy a preferential tariff and pay a tariff of between 48 and 50 pfennig/m³.

The United Kingdom also considers that the advantage granted to Dutch horticultural producers on gas prices has improved their competitive position in relation to producers in other Member States. It argues that if British horticultural producers had enjoyed an advantage of that type, that is to say of 8 cents/m³, they would have saved some

UKL 11 000 to UKL 12 000 per hectare, that is to say between 50 and 100% of the profits of reasonably efficient growers. Such a saving would significantly affect growers' ability to hold down prices so as to meet competition or to retain funds for investment.

In recent years, according to the United Kingdom, Dutch horticultural producers have considerably increased their share of the British market. That increased market penetration is related to the fact that British growers, 80% of whom use heavy fuel for heating, have seen fuel prices increase by 43% between 1 April 1983 and 1 January 1985, whereas the increase in gas prices for Dutch horticultural producers during the same period was only 8%.

Those assertions are contested by Van der Kooy and the Landbouwschap in their reply. They contend that the present position in Western Europe of Dutch hothouse growers is not due to energy prices but to the following factors:

specialization of production;

very strict quality standards;

uniform packaging;

a very high level of knowledge;

a high degree of cooperation;

year-round availability of Dutch products.

The Netherlands Government also disputes the assertions of the Governments which have intervened. It states that the strength of Dutch horticulture is based primarily on the high degree of technological development, the concentration of such activities in the Westland area and the integration and efficiency of production, marketing, sale and distribution.

2. With regard to the second condition put forward by the Commission in order to determine whether a tariff such as that at issue is to be regarded as an aid, that is to say the fact that it is imposed by a public authority, Van der Kooy and the Landbouwschap dispute the Commission's view that the tariff in question was imposed by the Dutch State.

They observe in that regard that Gasunie is a company governed by private law of which the Netherlands State holds, directly or through Staatsmijnen, only 50% of the share capital, the remainder being held by private oil companies. They emphasize that the tariff in question was the subject matter of an agreement governed by private law between Gasunie, Vegin and the Landbouwschap, and argue that Articles 92 to 94 of the Treaty do not give the Commission the power to force the Netherlands to interfere with a contract between third parties governed by private law in order to alter that contract in the manner provided for in the contested decision. By doing so, say Van der Kooy and the Landbouwschap, the Commission went beyond its powers under Article 92 and even committed a misuse of its powers.

As for the right of the Netherlands Minister for Economic Affairs to approve gas prices and tariffs adopted by Gasunie, Van der

Kooy and the Landbouwschap argue on the one hand that that right was intended to prevent prices and tariffs from becoming too high and on the other that it is based on a contract governed by private law between Gasunie and that Minister.

The Netherlands Government shares that point of view. It emphasizes that it was not a party to the contract adopting the tariff in question and that the right of the Minister for Economic Affairs to approve prices and tariffs is no more than a simple *a posteriori* check, intended only to ensure that the tariffs adopted by Gasunie are in accordance with the objectives of Netherlands energy policy.

It argues that it is in any event for the Commission to prove that the tariff in question was imposed by the Netherlands State.

The Commission, on the other hand, considers that the Netherlands authorities can exercise a decisive influence on the determination of the tariffs applied by Gasunie and are therefore in a position to force it to apply subsidized tariffs to certain undertakings or sectors. The object of the contested decision was only to prevent the Netherlands Government from exercising its influence to that effect and perhaps to prevent the application of such tariffs, by ensuring that the required ministerial approval was refused. The Commission cannot therefore be accused of exceeding its powers under Article 92.

The Commission admits that the lack of transparency in the decision-making process within Gasunie and in the role played by the Netherlands Government means that it is only by examining the nature of the tariff in question that it can be determined whether it constitutes an aid for the purposes of Article 92: if that tariff clearly distorts competition and is not justified by commercial considerations, it must be presumed that it is an aid measure imposed by a public authority (see the judgment of 22 March 1977 in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595). The fact that Gasunie is independent of the authorities is not decisive in that regard (see judgment of 30 January 1985 in Case 290/83 *Commission* v *France* [1985] ECR 439).

The Netherlands Government's power to influence Gasunie tariffs is shown, according to the Commission, by the fact that that Government was able, in accordance with Commission Decision 82/73 of 15 December 1981, subsequently repealed, to carry out a revision of the gas tariffs applied in horticulture, the legality of which was disputed by the Commission in that decision.

The Commission's opinion on this point is shared by the Danish Government and the Government of the Federal Republic of Germany.

3. With regard to the third condition put forward by the Commission in order to determine whether the tariff in question is to be regarded as aid for the purposes of Article 92, that is to say that the advantage constituted by a reduced tariff gives rise to the payment of compensation by the State to the distribution company or to the State's receiving less revenue, Van der Kooy and the Landbouwschap argue that no such compensation has been paid to Gasunie, although if the tariff in question was in fact the result of pressure exerted by the Netherlands State such compensation would be necessary at least for the private shareholders. As to the reduction in tax revenue which may result from the lower price of gas demanded by Gasunie from horticultural producers, Van der Kooy and the Landbouwschap argue that that cannot be

regarded as an advantage provided from State resources, since it is based on a private contract.

The Netherlands Government shares that point of view and observes that if Gasunie had not applied a tariff maintaining an equilibrium price in relation to coal, sales of gas would have declined and the Netherlands State would indirectly have suffered a much greater loss of revenue.

B — *Failure to comply with essential procedural requirements (the imprecise nature of the decision in question)*

The Netherlands Government argues that in the contested decision the Commission did not specify which part of the tariff in question constitutes aid and thus made it impossible for the Government to comply with that decision. In particular the Commission does not state what price would in its view be justified for gas supplied to horticultural producers. The Netherlands Government points out in that regard that in its decision the Commission accepts on the one hand that tariffs may be varied to some degree owing in particular to Gasunie's interest in ensuring the competitiveness of gas on the various user markets but on the other hand insists that the price of gas for use in horticulture should correspond to the price paid by comparable Dutch industries. The substance of the obligation imposed by the contested decision on the Netherlands Government is thus not sufficiently specific, and it is therefore contrary to the essential procedural requirements applicable to a decision as referred to in Article 189 of the Treaty (see the judgment of 12 July 1973 in Case 70/72 *Commission* v *Germany* [1973] ECR 813).

The Commission replies that since this case concerns a new aid for the purposes of Article 93 (3), that is to say an aid which cannot be implemented, the Commission is not obliged to indicate in its decision, the object of which is only to prevent such implementation, how the aid in question may be altered in order to make it compatible with the Treaty.

C — *Failure to give an adequate statement of reasons*

The Netherlands Government argues that the statement of the reasons on which the decision is based is inadequate in a number of respects. The Commission failed to show in what way the figures and calculations submitted by the Netherlands Government with regard to the price level at which a significant number of growers would convert to coal are incorrect. Nor did it take into account the particular characteristics of horticulture and simply took the view that any reduction in gas prices in order to retain customers must of necessity be applied in all comparable sectors in which gas is used. The Commission gave no grounds for its conclusion that the tariff in question distorts competition. In particular, the Commission failed to specify the products with which the products of Dutch horticultural producers are said to be in competition. Furthermore, it does not state why it considers that any advantage in gas tariffs, in particular a temporary one, should be reflected immediately in the price of products, since these are fresh products whose prices are determined largely by the balance of supply and demand at any particular time.

Van der Kooy and the Landbouwschap also consider that the Commission has failed to give reasons for its conclusion with regard to the effect of the tariff on competition and intra-Community trade.

The Commission replies that it is for the Netherlands Government to bring evidence in support of its conduct, especially since there are no immediately convincing arguments showing that the application of the tariff in question only to horticultural producers was justified. As for the 'equilibrium price', the Commission points out that it stated precisely the factors which it took into consideration in calculating that price.

With regard to the effects of the tariff in question on competition and on intra-Community trade, those effects, according to the Commission, seem so obvious that no effort was made to describe them in a precise and exhaustive manner, since the relative importance of hothouse horticultural production in the Netherlands is sufficient to show the repercussions which such a tariff must have. The Commission observes that although Dutch hothouse products compete mainly with hothouse products from other Member States, their competitive situation with regard to products of the same kind not cultivated in hothouses must also be taken into account.

IV — Replies of the parties to questions put by the Court

In a letter dated 8 July 1986 the Court asked the Netherlands Government to reply in writing before 1 October 1986 to the following questions:

'(a) Why, in its reply dated 20 October 1985, it continued to maintain that the price of natural gas to horticultural producers of 42.5 cents/m³ set in the agreement between Gasunie, Vegin and the Landbouwschap of 28 September 1984, was entirely justified when on that date, 20 October 1985, it has already given its approval to a new agreement dated 4 June 1985 between the same parties raising the price of gas to 45 cents/m³ (see statement of defence in Case 213/85 *Commission* v *Netherlands*, p. 3);

(b) whether and to what extent the increase in the price of natural gas for horticultural producers from 42.5 cents/m³ to 45 cents/m³ provided for in the new contract has entailed or will forseeably entail, during the period of application of the price of 45 cents/m³, conversion to coal on the part of horticultural producers who previously heated their greenhouses with natural gas'.

In a letter dated 30 September 1986 which was lodged at the Court Registry on 2 October 1986, the Netherlands Government replied to those questions in the following manner:

'In reply to the first question, the Netherlands Government states that, although it continues to be of the view that the gas tariff laid down in the agreement of 28 September 1984 was compatible with Community law, under the order made by the President of the Court in Case 70/85 dismissing an application for the suspension of the operation of the contested decision, it is obliged to give effect to that decision, in particular by increasing the ceiling provided for in the previous agreement (42.5 cents/m³) to 45 cents/m³. That was done by means of a new agreement between Gasunie, Vegin and the Landbouwschap to which the Netherlands Government has given its approval. The setting of a new, higher tariff does not prevent that government from continuing to defend the previous tariff;

With regard to the second question, the Netherlands Government states that the increase in the gas tariff to 45 cents/m³ has not resulted in any significant movement on the part of horticultural producers to other means of heating their glasshouses. The absence of such movement, in spite of the fact that the new tariff is higher than the coal equivalent, may be explained, first of all, by the fact that the very existence of a price ceiling for gas and the hope that that ceiling will be maintained until 1 October 1987 are matters to which horticultural producers attach great importance. Secondly, the increase in the ceiling to 45 cents/m³ took place during a period where oil prices fell to a considerable degree, giving rise to hopes that gas prices might also fall. The Netherlands Government states that at the beginning of 1983 only three horticultural producers heated with coal, whereas there were 30 by the end of 1984 and there are now 41.'

In a letter of 8 July 1986 the Court asked the Commission to provide it before 1 October 1986 with 'a comparative table of average prices per m³ of natural gas paid during the period between 1 October 1984 and 31 May 1985 by horticultural producers heating their glasshouses with natural gas in Member States where there is a significant level of horticultural production in heated glasshouses'.

In a letter of 29 September 1986 which was lodged at the Court Registry on 1 October 1986 the Commission submitted the following table:

'Member State	Price per m³ converted into Dutch cents for Groningen quality (8 400 cal/m³)
1. Netherlands	42.5
2. FR of Germany	Permanent supply 50.5 — 58 Intermittent supply 49 — 53
3. Belgium	65 — 70
4. Denmark	71.5
5. France	65
6. United Kingdom	48 — 49'.

In its letter the Commission stated that the prices indicated had been provided by the Member States at its request and converted into Dutch currency.

G. Bosco
Judge-Rapporteur