JUDGMENT OF THE COURT
2 February 1988 *

In Case 213/85

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

applicant,

supported by

Kingdom of Denmark, represented by L. Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the office of I. Bodenhagen, interim chargé d'affaires, Danish Embassy, 11 B boulevard Joseph II,

and by

United Kingdom of Great Britain and Northern Ireland, represented by R. N. Ricks, of the Treasury Solicitor's Department, acting as Agent,

interveners,

v

Kingdom of the Netherlands, represented by A. Bos, Deputy Legal Adviser at the Ministry for Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Dutch Embassy, 5 rue C. M. Spoo,

defendant,

* Language of the case: Dutch.

APPLICATION for a declaration that by failing to comply with Commission Decision 85/215 of 13 February 1985 on the preferential tariff charged to glasshouse growers for natural gas in the Netherlands (Official Journal 1985, No L 97, p. 49) the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and J. C. Moitinho de Almeida (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet and F. Schockweiler, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

having regard to the Report for the Hearing and further to the hearing on 18 December 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 April 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 16 July 1985 the Commission of the European Communities brought an action pursuant to the second subparagraph of Article 93 (2) of the EEC Treaty for a declaration that by failing to comply with Commission Decision 85/215 of 13 February 1985 on the preferential tariff charged to glasshouse growers for natural gas in the Netherlands (Official Journal 1985, L 97, p. 49) the Kingdom of the Netherlands had failed to fulfil its obligations under the Treaty.

2 In Article 1 of that decision the Commission stated 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 the Commission stated that 'the Netherlands shall inform the Commission before 15 March 1985 of the action it has taken to comply with Article 1'.

3 Three actions were brought pursuant to Article 173 of the Treaty for the annulment of that decision (Joined Cases 67, 68 and 70/85, *Van der Kooy and Others* v *Commission* [1988] ECR 219). In the course of those cases applications were made pursuant to Article 185 of the Treaty for the suspension of the operation of the decision; those applications were dismissed by an Order of the President of the Court of 3 May 1985. By a judgment delivered today the Court has dismissed those actions for annulment.

4 By applications lodged at the Court Registry on 18 and 22 November 1985 respectively, the United Kingdom and Denmark applied to intervene in this case in support of the Commission. By orders of 20 November and 4 December 1985 the Court granted them leave to intervene.

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 Before considering the claims which the Commission has formulated against the Kingdom of the Netherlands in this action the Court must emphasize that the action was brought pursuant to the second subparagraph of Article 93 (2) of the Treaty. That subparagraph provides that if the State concerned does not comply within the prescribed time with a Commission decision finding that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, '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'.

7 As is apparent from the wording of that provision, in particular the phrase 'in derogation from the provisions of Articles 169 and 170', an action of the kind

referred to can relate only to the failure by the Member State concerned to comply with a Commission decision requiring it to discontinue or alter an aid measure (see the judgment of 12 October 1978 in Case 156/77 *Commission* v *Belgium* [1978] ECR 1881).

8 The conduct of a Member State against which an action of this kind is brought must therefore be assessed solely in the light of the obligations imposed on it by the Commission decision.

The first claim, concerning the delay in the implementation of Decision 85/215

9 In its first claim the Commission complains that the Netherlands Government allowed the preferential gas tariff for horticultural producers declared incompatible with Article 92 of the Treaty by Decision 85/215 to remain in force until the first week of June 1985.

10 According to the Commission, the Netherlands Government was obliged pursuant to that decision to discontinue the aid in question with effect from 22 February 1985, the date on which the decision was notified to it and became binding in accordance with the second paragraph of Article 191 of the Treaty.

11 In the alternative, the Commission submits that Decision 85/215 required the Netherlands Government to discontinue the aid in question before 15 March 1985, the date by which, pursuant to Article 2 of the decision, it was to inform the Commission of the action it had taken in that respect.

12 The Commission's argument to the effect that Decision 85/215 should have been implemented with effect from the date on which it was notified to the Government to which it was addressed cannot be upheld.

13 It is not necessary to consider the question whether, in this case, the Commission had the power pursuant to Article 93 (2) and (3) to require the Netherlands Government to discontinue the tariff in question immediately and without delay; it need merely be pointed out that Decision 85/215 contains no such obligation.

14 In Article 1, no mention is made of any period within which the tariff in question must be discontinued; however, Article 2 requires the Netherlands Government to inform the Commission 'before 15 March 1985' of the action taken, and the Netherlands Government therefore had until that date to adopt the necessary measures.

15 It is therefore necessary only to examine the Commission's alternative submission.

16 In order to rebut that argument the Netherlands Government submits that Decision 85/215 did not oblige it to discontinue the aid within a specific period and that the date of 15 March 1985 was merely the date by which certain information was to be provided. Furthermore, that time-limit was extended by the Commission in its telex message of 8 May 1985, following the Order of the President of the Court of 3 May 1985 dismissing the application for suspension of the decision's operation, in which the Commission asked the Netherlands Government to inform it 'as soon as possible and at the latest within two weeks' of the measures actually taken to implement Decision 85/215.

17 The Netherlands Government considers, moreover, that it would have been illogical to discontinue the tariff in question before a determination had been made on the application submitted in Joined Cases 67, 68 and 70/85 for suspension of the decision's operation. It points out that following the Order of the President of the Court of 3 May 1985, referred to above, a new tariff was established by a contract concluded on 4 June 1985. In its view, technical and legal difficulties associated with the introduction of a new tariff prevented it from taking action sooner.

18 The arguments of the Netherlands Government cannot be upheld.

19 The fact that Article 2 of Decision 85/215 fixes the date of 15 March 1985 as the date by which the Netherlands Government must inform the Commission of the

action taken to comply with the decision clearly implies that that was also the date by which that Government was to discontinue the aid concerned by the decision.

20 Contrary to the arguments of the Netherlands Government, the Commission's telex message of 8 May 1985 did not set a new time-limit for implementation of Decision 85/215. In that telex message the Commission simply requested the Netherlands Government to inform it 'as soon as possible and within two weeks at the latest of the measures actually taken in order to implement the decision in question by the date laid down'. The reference to the 'date laid down' shows that the Commission did not intend to extend the time-limit for implementation set in Article 2 of the decision.

21 As for the Netherlands Government's argument that it was appropriate to wait until the Court had dealt with the the application for suspension of the decision's operation submitted in Joined Cases 67, 68 and 70/85, it need merely be pointed out that according to Article 185 of the Treaty 'actions brought before the Court of Justice shall not have suspensory effect'. The application of a measure may be suspended only by a decision of the Court.

22 With regard to the Netherlands Government's argument concerning the legal and technical difficulties associated with the implementation of the Commission's decision, it should be recalled that in its judgment of 15 January 1986 (Case 52/84 *Commission* v *Belgium* [1986] ECR 89), the Court held that in an action of this kind a Member State may 'plead that it was absolutely impossible for it to implement the decision [of the Commission] properly'. It must therefore be determined whether, on the basis of the argument put forward by the Netherlands Government, it may be concluded that it was absolutely impossible to implement Decision 85/215 within the time-limit set by the Commission.

23 The Netherlands Government submits that from the technical point of view it was necessary for the gas distribution company to read the meters in each undertaking in order to be able to introduce the new tariff correctly. It was also, it says, necessary for the company to inform each horticultural producer in writing in order to avoid the risk of being held liable for a unilateral alteration of the conditions of the supply contract, since these conditions included an indication of the tariff applicable.

24 It need merely be pointed out that the Netherlands Government has in no way shown that those steps could not have been taken within the time-limit laid down in the decision in question. Moreover, it is apparent from the documents before the Court that after the dismissal by the President of the Court of the application for suspension of the decision's operation, the Netherlands Government was able to alter the disputed tariff within a period comparable to that given by the Commission decision.

25 It must therefore be concluded that by allowing Gasunie to apply the preferential gas tariff for horticultural producers which was the subject-matter of Commission Decision 85/215 of 13 February 1985 (Official Journal 1985, L 97, p. 49) until the first week of June 1985 the Kingdom of the Netherlands failed to fulfil its obligations under that decision and under Article 93 (2) of the Treaty.

The second claim, concerning the incompatibility of the new tariff with Article 92 of the Treaty

26 In its second claim the Commission, supported by the interveners, submits that the tariff introduced by the agreement of 4 June 1985, referred to above, replacing the tariff held unacceptable in Decision 85/215, also contains an element of aid which makes it incompatible with Article 92. It follows, says the Commission, that the Kingdom of the Netherlands failed to comply with Article 1 of the decision, which required it to discontinue the aid to horticultural producers in the form of the old tariff.

27 A significant aspect of the new tariff is that the ceiling price for gas supplied to horticultural producers is 45 cents/m^3, whereas in the old tariff the ceiling price was 42.5 cents/m^3.

28 It must therefore be determined whether, by adopting that tariff or causing it to be adopted, the Netherlands Government complied with its obligations under Article 1 of Decision 85/215.

29 In that decision the Commission did not indicate precisely at what level the tariff for horticultural producers should be fixed in order to be free of any element of aid for the purposes of Article 92; it simply indicated a range of prices from 46.5 to 47.5 cents/m^3, depending on the size of holdings, but recognized that at prices within that range 30% of the gas consumed by the horticultural sector would be replaced by coal in less than three years.

30 In the absence of any more precise and detailed indications on the part of the Commission, the Netherlands Government was entitled to consider that by raising the ceiling price for horticultural producers to 45 cents/m^3 it properly implemented Decision 85/215.

31 In those circumstances, and without prejudice to the Commission's right, if necessary, to initiate new proceedings under Article 93 with regard to the new tariff, it must be concluded that the Kingdom of the Netherlands has not failed to fulfil its obligations under Article 1 of Decision 85/215.

Costs

32 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, pursuant to the first subparagraph of Article 69 (3), where each party succeeds on some and fails on other heads the Court may order that the parties bear their own costs in whole or in part. With regard to the interveners, it should be observed that they made no submissions on the issue of costs.

33 The Commission was successful only in its first claim. The parties must therefore be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by allowing Gasunie to apply the preferential gas tariff for horticultural producers which was the subject-matter of Commission Decision 85/215 of 13 February 1985 (Official Journal 1985, L 97, p. 49) until the first week of June 1985 the Kingdom of the Netherlands failed to fulfil its obligations under that decision and under Article 93 (2) of the EEC Treaty;

(2) For the rest, dismisses the application;

(3) Orders the parties to bear their own costs.

Mackenzie Stuart Bosco Due Moitinho de Almeida Koopmans

Everling Bahlmann Galmot Kakouris Joliet Schockweiler

Delivered in open court in Luxembourg on 2 February 1988.

P. Heim
Registrar

A. J. Mackenzie Stuart
President