using another energy source, the Member State was entitled to consider that by raising the tariff to a level just below that range it properly implemented the Commission's decision.

That does not affect the Commission's right, if necessary, to initiate new proceedings under Article 93 with regard to the new tariff.

2. Where, in a decision requiring a Member State to discontinue or alter an aid measure, the Commission does not fix the period within which the aid must be discontinued but sets a date by which it must be informed of the action taken in that regard, that date constitutes the time-limit within which the decision must be implemented.

REPORT FOR THE HEARING
delivered in Case 213/85 *

I — Facts

In Article 1 of Decision 85/215 of 13 February 1985 (Official Journal 1985, L 97, p. 49), 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, the Commission ordered that 'the Netherlands shall inform the Commission before 15 March 1985 of the action it has taken to comply with Article 1'.

Actions for the annulment of that decision were submitted pursuant to Article 173 of the EEC Treaty by Kwekerij Gebroeders van der Kooy BV and Johannes Wilhelmus van Vliet (Case 67/85), the Landbouwschap (Case 68/85) and the Kingdom of the Netherlands (Case 70/85). Those cases were joined pursuant to Article 43 of the Rules of Procedure by an order of the Court of 24 April 1985.

For a summary of the facts which led to the adoption of Decision 85/215 and the reasons for its adoption reference may be made to the Report for the Hearing in Joined Cases 67, 68 and 70/85, [1988] ECR 219.

By an order of 3 May 1985 the President of the Court dismissed the applications for an order suspending the operation of Commission Decision 85/215 submitted in those cases.

* Language of the case: Dutch.

Subsequently, by a telex message of 8 May 1985, the Commission asked the Netherlands Government to inform it as soon as possible, and within 14 days at the latest, of the measures it had taken to implement the Commission decision on the appointed date.

By a telex message of 31 May 1985 from the Permanent Representation of the Netherlands, the Netherlands Minister for Agriculture informed the Commission that the Landbouwschap, Gasunie and Vegin had entered into an agreement on gas tariffs applicable to horticultural producers replacing the agreement on the same subject which the Commission, in Decision 85/215, held to constitute aid incompatible with the common market. The new agreement was based on the following principles:

(i) the price of gas for growers was the price applied in the industrial sector (Tariff D) + 0.5%;

(ii) for the 1985-86 heating season, there was a ceiling of 45 cents/m³ for growers using only gas;

(iii) for the 1986-87 season, the same calculation was to apply, it being understood that the ceiling price could be adopted in the light of the prevailing circumstances;

(iv) for the period from the first week of June until 1 October 1985 the price of gas used in horticulture was to be 45 cents/m³.

In the same telex message the Netherlands Government justified the setting of the ceiling price at 45 cents/m³ by asserting first of all that, according to Gasunie's forecasts, for the 1985/86 season 'the price of heating oil will not support a gas price in horticulture higher than 45 cents/m³', since heating-oil prices have an affect on gas prices. Secondly, the Netherlands Government stated that at a gas price in excess of 45 cents/m³ Gasunie might lose significant numbers of customers.

The Netherlands Government declared that it had approved the agreement, in a desire to avoid any further delay in the implementation of the Commission's decision.

By a telex message of 6 June 1985 the Commission asked the Dutch Government for further information. The Netherlands Government replied by a telex message of 11 June 1985 in which it stated that in the meantime the agreement in principle referred to in the telex of 31 May had become a final contract and had come into force in the first week of June 1985.

The Commission considered that by doing so the Netherlands Government had failed to comply with Decision 85/215; it therefore brought the matter before the Court pursuant to the second subparagraph of Article 93 f the Treaty.

The Commission's application was lodged at the Court Registry on 16 July 1985.

II — Written procedure and conclusions of the parties

By applications received at the Court Registry on 18 and 22 November 1985

respectively, the United Kingdom and the Danish Government applied to intervene in the proceedings in support of the Commission.

By orders of 20 November and 4 December 1985 the Court granted them leave to intervene.

The written procedure took its usual course.

In its application the Commission submits that the Court should:

'Declare, pursuant to the second subparagraph of Article 93 (2) of the EEC Treaty, that the Kingdom of the Netherlands, by not complying with Articles 1 and 2 of the Commission's Decision of 13 February 1985 on the preferential tariff for natural gas for horticultural producers in the Netherlands, has failed to fulfil one of its obligations under the EEC Treaty;

Order the Kingdom of the Netherlands to pay the costs.'

In its defence the Netherlands Government contends that the application should be dismissed. In its rejoinder it also contends that the Commission should be ordered to pay the costs.

The Danish Government submits that the Court should uphold the application.

The United Kingdom submits that the Commission's application should be upheld.

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 enquiry.

III — Submissions and arguments of the parties

The Commission argues that the Netherlands Government has failed to comply with Decision 85/215 in two respects:

(1) It applied or ordered or permitted the application without modification of the tariff prohibited by that decision during the period from 22 February 1985 until the first week of June 1985;

(2) It applied or ordered or permitted the application from the first week of June 1985 until the end of the 1986-87 heating season, that is to say until October 1987, of a new gas tariff for horticultural producers which must be regarded as an aid measure in favour of Dutch horticulture for the purposes of Articles 92 and 93 of the EEC Treaty.

The application without modification of the prohibited tariff until the first week of June 1985

The Commission submits that under Decision 85/215 the Netherlands Government was required to discontinue the aid in question on 22 February 1985, the date on which the decision was notified to it and thus became binding on it, or, in the alternative, on 15 March 1985, the date on which, pursuant to Article 2 of the decision, the Netherlands Government was obliged to inform the Commission of the action it had taken in that regard. The Commission points out that this was a new aid measure introduced by the Netherlands Government

contrary to Article 93 (3) which ought, accordingly, to have been discontinued or suspended even before the adoption by the Commission of Decision 85/215. The Commission was not obliged to set a period within which the Netherlands Government was required to discontinue the aid as provided for in Article 93 (2), since that provision refers not to new aid but to already existing aid.

With regard to the legal or technical difficulties which might be raised in order to explain the delay in discontinuing the aid, the Commission points out that as early as 11 October 1984 it had informed the Netherlands Government that under the Treaty it should not apply the aid measure in question before the Commission had ruled on its compatibility with the common market.

In those circumstances, says the Commission, the Netherlands Government or the parties to the agreement setting the gas tariffs applicable to horticultural producers should have taken protective measures; they could, for example, have inserted in individual supply contracts clauses providing for the subsequent repayment of excess charges.

As for the fact that no steps were taken to amend the tariff in question before the date on which the President of the Court made the interlocutory order in Joined Cases 67, 68 and 70/85, the Commission states that the commencement of proceedings does not have the effect of suspending the operation of the contested decision and that there was nothing to prevent the Netherlands Government from making the application of the tariff in question provisional during the interlocutory proceedings, so that in the event of the dismissal of the application for suspension of the operation of the decision the aid measure could be discontinued immediately, with retroactive effect.

The Netherlands Government admits that the tariff prohibited by Decision 85/215 was not altered immediately upon the notification of that decision, but considers that it would not have been logical to adjust the tariff while an application for suspension of the operation of the decision was still pending, since such an alteration would have caused precisely the harm to horticultural producers and to Gasunie which it sought to avoid by making that application.

As soon as the order of the President of the Court was made the parties concerned took steps to implement Decision 85/215; that took the whole period of 14 days given by the Commission in its telex message of 6 May 1985, referred to above. A new tariff agreement was concluded on 4 June 1985, that is to say as rapidly as possible. It was necessary on the one hand to read the gas meters in each undertaking in order to be able to alter the tariff correctly between normal reading dates and, on the other hand, inform gas distributors and each horticultural producer in writing of the new tariff (since the contracts between individual horticultural producers and distributors clearly indicated a tariff applicable until 1 October 1985).

The Netherlands Government considers that since Decision 85/215 did not require it to discontinue the tariff in question before a specific date and since the time-limit laid down in Article 2 of the decision was extended by the Commission in its telex message of 6 May 1985, it has complied in that respect with Decision 85/215.

The compatibility of the new tariff with Articles 92 and 93 of the Treaty

The Commission states that the new gas tariff for horticultural producers differs from the tariff which was the object of Decision 85/215 in the following respects:

(i) the ceiling price is raised from 42.5 to 45 cents/m³;

(ii) the compensation clause included in the earlier tariff is dropped;

(iii) the new tariff is established for a period of two years, with a revision of the ceiling price after one year, while the earlier tariff was only set for one year;

(iv) a fixed price of 45 cents/m³ is laid down for the period from the beginning of June until 1 October 1985.

In spite of those differences the Commission considers that the new tariff, like the earlier one, is incompatible with Articles 92 and 93 of the Treaty. The ceiling price, it is said, was set in accordance with the likelihood of growers converting to other fuels, but the Netherlands Government does not state whether the same risk of conversion arises in other sectors in which gas is used and what measures, if any, are taken to discourage conversion in those sectors. In that regard, the Netherlands Government confined itself, in its telex message of 11 June 1985, to stating that the risk of conversion by industrial users was not as great as in the horticultural sector and that in any event Gasunie had recently decided to moderate the increase in prices for industrial buyers.

The Commission therefore concludes that the new tariff is discriminatory, since it is not based on objectively verifiable economic criteria applied equally in other economic sectors.

As for the fact that the ceiling price for gas supplied to horticultural producers was set at 45 cents/m³, there is nothing to show, according to the Commission, that that price was set so as to take into account competition from other fuels, since in its telex of 11 June 1985 the Netherlands Government confined itself to stating that the price was set 'on the basis of [Gasunie's] evaluation of the risk of conversion to other fuels.'

The Commission also asks why the ceiling prices are to be adapted after one year and not more frequently. In relation to the gas prices which would have been charged had the tariff applied between April 1983 and September 1984 remained in force, the new tariff amounts to a reduction of 5.8 cents/m³ for the month of June 1985 and 4.3 cents/m³ for the period from July to September 1985. For the period immediately prior to the adoption of the new tariff the reduction amounted to 5.5 cents/m³ until 1 April 1985 and 8.3 cents/m³ from that date until the beginning of June.

With regard to the risk of conversion to coal, the Commission points out that according to the expert's report which it submitted to the Court in Joined Cases 67, 68 and 70/85 (the GFE Report), the natural gas price likely to lead significant numbers of growers to convert is 46.5 cents/m³ for a medium-sized holding and 47.5 cents/m³ for a large holding. The ceiling price of 45 cents/m³ thus remains lower than those prices.

The Commission also points out that coal prices have recently shown a tendency to

increase, which makes the risk of conversion less likely.

The Netherlands Government argues that in relation to the tariff which was the object of Decision 85/215, the new tariff presents the following differences:

(i) the ceiling price is set at a significantly higher level;

(ii) the ceiling price is not applied to all growers but only to those who use only gas;

(iii) its period of validity is increased to two years, which meets the argument raised by the Commission in Joined Cases 67, 68 and 70/85 with regard to the excessively short period of validity of the old tariff.

According to the Netherlands Government, it is necessary to ascertain what modifications are required by Decision 85/215 to the tariff for gas used in horticulture. It points out that, as it argued in Joined Cases 67, 68 and 70/85, that decision refers to two separate criteria. On the one hand, the Commission has accepted that there may be some differentiation in gas tariffs according to the specific market, particularly in the light of the competitivity of natural gas in relation to other fuels. On the other hand, the Commission argues that the tariff calculation should in principle be the same for all economic sectors. Between these two criteria, the application of which would lead to different results, the parties which concluded the tariff agreement chose the first, and set a ceiling price taking into account the competitivity of natural gas on the market in question, that is to say Dutch horticulture.

According to the Netherlands Government it is no longer necessary to compare that tariff with the tariffs applied in other sectors.

As for the Commission's calculations according to which the ceiling price of 45 cents/m³ is still too low, the Netherlands Government states that that price was fixed at such a level as to prevent significant conversion to coal. In order to do so it was necessary to set the price at a level lower than the ceiling of 46.5 cents/m³ adopted by the Commission, since at that level, as the GFE report shows, a significant number of growers would convert to coal. The Netherlands Government also remarks that the ceiling price of 45 cents/m³ is higher than the equilibrium price calculated by the Commission itself, 43 to 44.3 cents/m³.

The Danish Government argues *inter alia* that the fact that the new tariff applies only to horticultural producers who use only gas is not of decisive importance in assessing that tariff in the light of Articles 92 and 93 of the Treaty, since 95% of the energy consumption of Dutch farming businesses is accounted for by gas.

Like the United Kingdom, the Danish Government also emphasizes the effect of the new tariff and the advantage which it gives Dutch horticultural producers in competition with horticultural producers in other Member States.

G. Bosco
Judge-Rapporteur