JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
22 October 1997 *

In Joined Cases T-213/95 and T-18/96,

Stichting Certificatie Kraanverhuurbedrijf (SCK), a foundation established under Netherlands law, whose registered office is in Culemborg, Netherlands,

Federatie van Nederlandse Kraanverhuurbedrijven (FNK), an association established under Netherlands law, whose registered office is in Culemborg, Netherlands,

represented by Martijn van Empel, of the Amsterdam Bar, and Thomas Janssens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicants,

v

Commission of the European Communities, represented by Wouter Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

supported in Case T-18/96 by

Van Marwijk Kraanverhuur BV, a company incorporated under Netherlands law, whose registered office is in Zoetermeer, Netherlands,

Kraanbedrijf Nijdam BV, a company incorporated under Netherlands law, whose registered office is in Groningen, Netherlands,

Kranen, Transport & Montage 's Gilde NV, a company incorporated under Netherlands law, whose registered office is in Geldermalsen, Netherlands,

Wassink Transport Arnhem BV, a company incorporated under Netherlands law, whose registered office is in Arnhem, Netherlands,

Koedam Kraanverhuur BV, a company incorporated under Netherlands law, whose registered office is in Vianen, Netherlands,

Firma Huurdeman Kraanwagenverhuurbedrijf, a company incorporated under Netherlands law, whose registered office is in Hoevelaken, Netherlands,

Datek NV, a company incorporated under Belgian law, whose registered office is in Genk, Belgium,

Thom Hendrickx, resident in Turnhout, Belgium,

represented by August Braakman, of the Rotterdam Bar, and Willem Sluiter, of the Hague Bar, with an address for service in Luxembourg at the Chambers of Michel Molitor, 14A Rue des Bains,

interveners,

APPLICATION, in Case T-213/95, for an order under Articles 178 and 215 of the EC Treaty requiring the Commission to pay compensation for the harm caused to the applicants by its unlawful conduct and, in Case T-18/96, for the annulment of Commission Decision 95/551/EC of 29 November 1995 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.179, 34.202, 216 — Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven) (OJ 1995 L 312, p. 79),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber, Extended Composition),

composed of: K. Lenaerts, President, P. Lindh, J. Azizi, J. D. Cooke and M. Jaeger, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 4 June 1997,

gives the following

Judgment

Background and procedure

1 These cases are concerned with the mobile crane-hire sector in the Netherlands. Mobile cranes are cranes which can be moved freely about a worksite. They can thus be distinguished from tower cranes which are mounted on fixed rails and can move forwards and backwards only. Mobile cranes are used mainly in construction, in the petrochemical industry and in the transport sector.

2 For technical reasons, the area of operation of a mobile crane is confined to a radius of 50 kilometres. A further feature of the mobile crane-hire sector is that contracts are entered into very shortly before a job is carried out ('overnight contracting'). When a crane-hire firm is asked to do a job at very short notice, it decides, in the light of the site's location and the availability of its own cranes, either to use one of the latter or to hire a crane from another firm located near the site.

3 The foundation Keuring Bouw Machines ('Keboma'), which was set up in 1982 by the Netherlands Ministry for Social Affairs, inspects cranes before they are brought into service for the first time, to ensure that they comply with the legal safety requirements set out in the Arbeidsomstandighedenwet (Law on Conditions at the Workplace), in the Veiligheidsbesluit voor Fabrieken of Werkplaatsen (Decree on Safety in Factories and at Worksites), in the Veiligheidsbesluit Restgroepen (Decree on Safety at other types of Workplace) and in various ministerial

regulations and publications of the Labour Inspectorate. Keboma is the only official body designated to inspect and test mobile cranes. Under Council Directive 89/392/EEC of 14 June 1989 on the approximation of the laws of the Member States relating to machinery (OJ 1989 L 183, p. 9), the requirement that cranes be inspected before they are first brought into service does not apply, from 1 January 1993, to cranes which bear an EC mark and are accompanied by an EC declaration of conformity within the meaning of the directive. Cranes must be inspected by Keboma three years after they are first brought into service and, after that second check, every two years.

4 The Federatie van Nederlandse Kraanverhuurbedrijven ('FNK') is the sector-based organization, established on 13 March 1971, which brings together crane-hire firms in the Netherlands. Under its statutes, its object is to defend the interests of crane-hire firms, in particular of its members, and to encourage contacts and cooperation in the broadest sense between members. FNK members account for 1 552 of the 3 000 or so cranes available for hire in the Netherlands. From 15 December 1979 to 28 April 1992 Article 3 of FNK's internal rules contained a clause requiring its members to give priority to other members when hiring or hiring out cranes ('the priority clause') and to charge 'reasonable' rates. The FNK set and published recommended rates and cost estimates for the hiring of cranes by clients. In addition, internal rates applicable to hirings between FNK members were set at regular meetings of crane-hire firms.

5 The Stichting Certificatie Kraanverhuurbedrijf ('SCK') is a foundation set up in 1985 by representatives of crane-hire firms and their clients. Under its statutes, its object is to promote and maintain the quality standards of crane-hire firms. It accordingly set up a certification system under which it issues certificates to firms which meet a range of requirements relating to the management of a crane-hire firm and to the use and maintenance of cranes. That certification system enables clients to proceed on the basis that the firm concerned complies with the requirements in question without having to check this themselves. The second indent of Article 7 of SCK's rules on the certification of crane-hire firms prohibits firms certified by it from hiring cranes from firms not certified by it ('the prohibition on

hiring'). With effect from 20 January 1989, SCK was accredited by the Raad voor de Certificatie (Certification Council), the Netherlands authority responsible for accrediting certification bodies; it recorded that SCK fulfilled the conditions established on the basis of the European standards EN 45 011 defining the criteria which certification bodies must satisfy. Under Paragraph 2.5 of the accreditation criteria of the Raad voor de Certificatie, the certificate-awarding body is required to ensure that the certification conditions are also complied with if subcontractors are used. It can meet that requirement either by checking subcontractors itself (Paragraph 2.5. A1) or by monitoring the checks on subcontractors carried out by the accredited firm (Paragraph 2.5. A2 and A3).

6 On 13 January 1992, M. W. C. M. Van Marwijk ('Van Marwijk') and ten other undertakings submitted a complaint to the Commission together with an application for interim measures. They considered that the applicants were infringing the competition rules of the EC Treaty by excluding firms not certified by SCK from hiring out mobile cranes and by imposing fixed prices for crane hire.

7 On 15 January 1992 SCK's statutes and its rules on the certification of crane-hire firms were notified to the Commission. FNK's statutes and internal rules were notified on 6 February 1992. In both cases, an application was made for negative clearance or, in the alternative, exemption pursuant to Article 85(3) of the Treaty.

8 In an action brought by the complainants in the Netherlands courts, the President of the Arrondissementsrechtbank (District Court), Utrecht, made an interim order on 11 February 1992 requiring FNK to withdraw the priority clause and the system of recommended rates (applicable to hirings with clients) and of internal rates (applicable to hirings between crane-hire firms). He made an order restraining SCK from applying the prohibition on hiring. By a further interim order, made on

9 July 1992, the Gerechtshof (Regional Court of Appeal), Amsterdam, set aside the first order, holding that it was not obvious and beyond all doubt that there was no prospect of the arrangements in question being exempted by the Commission. On the same day, SCK reinstated the prohibition on hiring. FNK, on the other hand, gave up future involvement in the formulation of recommended rates and internal rates.

9 On 16 December 1992, the Commission issued a statement of objections addressed to the applicants. In that document it informed them that it intended, pursuant to Article 15(6) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87; 'Regulation No 17'), to lift the immunity from fines laid down in Article 15(5).

10 On 3 February 1993 the applicants sent the Commission their reply to the statement of objections. In that reply they asked in particular for a hearing to be arranged.

11 By letter of 4 June 1993 the Commission informed them that the procedure under Article 15(6) of Regulation No 17 could be terminated only if the prohibition on hiring was withdrawn.

12 The complainants made a fresh application to the President of the Arrondissementsrechtbank, Utrecht, who, by interim order of 6 July 1993, ruled that the prohibition on hiring could no longer be applied since the Commission had in the meantime made known its view on the arrangements at issue and there appeared to be no prospect of its exempting that prohibition.

13 By letter dated 29 September 1993 the Commission informed the applicants that it would hold the hearing requested by them before it adopted a final decision under Article 85 of the Treaty, but that there was no requirement for such a hearing to be held where a decision was based on Article 15(6) of Regulation No 17.

14 The order of the Arrondissementsrechtbank, Utrecht, of 6 July 1993 was confirmed by the Gerechtshof, Amsterdam, in a judgment delivered on 28 October 1993. The judgment was based, in particular, on an undated letter which Mr Giuffrida, of the Commission's Directorate-General for Competition (DG IV), had sent to the complainants with a copy to the applicants' adviser. The applicants state that they received the copy on 22 September 1993. The author of the letter expressed himself as follows: 'I can confirm that a draft decision under Article 15(6) of Regulation No 17 is to be submitted, as part of a written procedure, to the Commission for adoption at the end of this week, once all the necessary language versions are available. The approval of the departments concerned has already been obtained ... My department envisages that it should be possible to notify [the applicants] formally of the decision in the first half of October 1993'.

15 On 4 November 1993 SCK issued a statement that the prohibition on hiring would be suspended until the Commission had adopted a final decision.

16 On 13 April 1994 the Commission adopted a decision under Article 15(6) of Regulation No 17.

17 By letter dated 3 June 1994 the applicants formally called on the Commission to adopt its final decision no later than 3 August 1994.

18 By letter of 27 June 1994 Mr Ehlermann, who was then Director-General of DG IV, informed the applicants that 'the date of 3 August 1994 specified for adoption of the final decision was completely unrealistic', but that 'adoption of the final decision was a priority'.

19 By letter of 9 August 1994 the Commission, replying to a letter from the applicants of 3 August 1994, informed them that the statement of objections of December 1992 related solely to the initiation of a proceeding prior to adoption of a decision under Article 15(6) of Regulation No 17. It stated that the final decision would be preceded by the adoption of a fresh statement of objections, following which the applicants would have the opportunity to be heard.

20 On 21 October 1994 a fresh statement of objections was issued to the applicants, relating to a proceeding pursuant to Article 85 of the Treaty.

21 On 21 December 1994 the applicants sent the Commission their reply to the statement of objections. In that reply they again formally called on the Commission to act without delay and waived their right to a hearing.

22 On 27 November 1995 they brought an action for damages before the Court of First Instance (Case T-213/95). They also applied, by separate document, for interim measures (Case T-213/95 R). They subsequently discontinued that application and, by order of 24 January 1996, the President removed Case T-213/95 R from the register. Costs were reserved.

23 On 29 November 1995 the Commission adopted Decision 95/551/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.179, 34.202, 216 — Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse

Kraanverhuurbedrijven) (OJ 1995 L 312, p. 79; 'the contested decision'). It found that FNK had infringed Article 85(1) of the Treaty from 15 December 1979 to 28 April 1992 by applying a system of recommended and internal rates, which had enabled its members to predict each other's pricing policy (Article 1). It also found that SCK had infringed Article 85(1) of the Treaty from 1 January 1991 to 4 November 1993 (with the exception of the period between 17 February 1992 and 9 July 1992) by prohibiting its affiliated firms from hiring cranes from firms not affiliated to SCK (Article 3). In addition, it ordered the applicants to terminate those infringements forthwith (Articles 2 and 4) and imposed a fine of ECU 11 500 000 on FNK and one of ECU 300 000 on SCK (Article 5).

24 By letter of 11 January 1996 the applicants requested access to the file for the purpose of bringing an action against the contested decision. The Commission refused that request by letter of 15 January 1996.

25 By application lodged at the Registry of the Court of First Instance on 6 February 1996, they brought an action for annulment of the contested decision (Case T-18/96). They also applied, by separate document, for interim measures (Case T-18/96 R).

26 On 25 March 1996 the applicants reached an agreement with the Commission regarding amendment of the prohibition on hiring for the period up to delivery of the Court's judgment in Case T-18/96. According to the amended version of the second indent of Article 7 of the rules on the certification of crane-hire firms, the firms certified by SCK may use only 'cranes bearing a valid certification plate, on the basis of prior certification either by the foundation or by another certification body — in the Netherlands or abroad — which is qualified to certify crane-hire firms and which manifestly applies equivalent criteria, unless it can be established from written documentation (including faxes) that when the client placed the order he attached no importance to whether or not the (third-party) crane-hire

firm whose services he called upon in that instance was certified' (letter from the Commission to the applicants of 25 March 1996).

27 The President of the Court of First Instance dismissed the application for interim measures in Case T-18/96 R by order of 4 June 1996 ([1996] ECR II-407). The costs of the application for interim measures were reserved. An appeal against that order was dismissed by order of the President of the Court of Justice of 14 October 1996 ([1996] ECR I-4971).

28 By letter of 9 July 1996 sent to the President of the Court of First Instance in connection with Case T-18/96, the applicants applied to the Court for an order, pursuant to Article 65(b) of the Rules of Procedure or, in the alternative, pursuant to Article 64(3)(d) thereof, for the production of the Commission's file in the SCK and FNK cases, numbered IV/34.179, 34.202 and 34.216, including the Commission's internal documents relating to the exchanges of views which had taken place between the Directorate-General for Industry (DG III) and DG IV on those cases, together with any other files which formed the basis for the contested decision.

29 By order of 4 October 1996 the President of the Fourth Chamber, Extended Composition, granted Van Marwijk and seven other mobile crane-hire firms leave to intervene in support of the form of order sought by the Commission in Case T-18/96.

30 By order of 12 March 1997 he decided, pursuant to Article 50 of the Rules of Procedure, to join the two cases for the purposes of the oral procedure.

31 Upon hearing the Report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, it requested the original parties to produce certain documents before the hearing.

32 The parties presented oral argument and answered questions put to them by the Court at the hearing on 4 June 1997.

33 After hearing the parties in this regard at the hearing, the Court (Fourth Chamber, Extended Composition) considers that the two cases should also be joined for the purposes of the judgment.

Forms of order sought

34 In Case T-213/95 the applicants claim that the Court should:

— declare the Community liable for the damage which they are suffering and will continue to suffer as a result of the Commission's unlawful conduct;

— order the Community to pay compensation for that damage, to determine the extent thereof in consultation with the applicants and, if an amicable settlement is not reached in that regard, to determine the amount of the damage itself, if need be after appointing an expert to quantify it precisely;

— order the Commission to pay the costs.

35 The Commission contends that the Court should:

— dismiss the action;

— order the applicants jointly and severally to pay the costs, including the costs of the application for interim measures.

36 In Case T-18/96 the applicants claim that the Court should:

— declare that the contested decision is non-existent, since, in its operative part, the Commission decides that Article 85(1) applies and fines the applicants in that connection but does not rule on the applicants' request for an exemption under Article 85(3) of the Treaty;

— in the alternative, declare the contested decision to be unconditionally void;

— in the further alternative, annul it because it infringes Article 85 of the Treaty, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the European Convention on Human Rights'), general principles of law and the obligation to give reasons (Article 190 of the Treaty);

— in the further alternative, annul it in part so that no fine is imposed on the applicants;

— order the Commission to pay the costs;

— order the interveners to pay the costs relating to the intervention.

37 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

38 The interveners contend that the Court should:

— give judgment for the Commission in the terms sought by it;

— order the applicants to pay the costs, including those of the interveners.

The action for damages (Case T-213/95)

39 It is settled case-law that the Community's liability under the second paragraph of Article 215 of the EC Treaty is dependent on the concurrent presence of a number of conditions as to the unlawfulness of the acts alleged against the Community institution concerned, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of (see, for example, Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80).

1. *The allegedly unlawful conduct of the Commission*

40 The applicants put forward four pleas in law to establish the existence of unlawful conduct on the part of the Commission in the proceeding which it initiated in response to the complaint submitted on 13 January 1992 and the notifications given by the applicants on 15 January and 6 February 1992. Those pleas allege respectively infringement of Article 6 of the European Convention on Human Rights, breach of the principle of legal certainty, breach of the principle of the protection of legitimate expectations and breach of the *audi alteram partem* rule.

The first plea: infringement of Article 6 of the European Convention on Human Rights

Summary of the arguments of the parties

41 The applicants submit that the Commission is required to comply with the European Convention on Human Rights. They refer, in that regard, to the case-law (Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125, Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859 and Case 374/87 *Orkem* v *Commission* [1989] ECR 3283), to Article F(2) of the Treaty on European Union and to the Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977 (OJ 1977 C 103, p. 1).

42 They submit that administrative procedures before the Commission for the application of Article 85 of the Treaty are proceedings to which Article 6 of the European Convention on Human Rights applies. Under the case-law of the European Court and the European Commission of Human Rights, that provision applies to contentious administrative proceedings (*Stenuit* v *France* [1992] 14 EHRR 509 and *Niemitz* v *Germany* [1993] 16 EHRR 97).

43 According to the applicants, the Commission failed to comply with the requirement of a 'reasonable time' laid down in Article 6(1) of the European Convention on Human Rights. The European Court of Human Rights has held that a period of 17 months exceeds a reasonable time (judgment of 9 December 1994, *Schouten and Meldrum* v *Netherlands*, Series A, No 304). The entire administrative procedure before the Commission took more than 45 months. It is clear, therefore, that the Commission's conduct infringed Article 6(1) of the Convention.

44 The Commission abused the procedure under Regulation No 17 by drawing up the first statement of objections solely in order to adopt a decision based on Article 15(6) of that regulation. Furthermore, it is impossible to understand why

the Commission needed 22 months from the adoption of the first statement of objections to issue the second one, which contained precisely the same basic arguments as the first. The drawing-up of the second statement of objections served no purpose and was intended by the Commission to prolong the procedure.

45 The applicants point out that the judgment of the Gerechtshof, Amsterdam, of 28 October 1993 took the form of a temporary measure designed to have effect until the Commission adopted its decision. Accordingly, the Commission should have come to a final decision quickly. Furthermore, the spirit in which the Commission conducted the procedure was imbued with the conviction that it was sufficient for it to influence the national court and to adopt a decision under Article 15(6) of Regulation No 17. The Commission never gave the case the slightest priority.

46 The applicants did not in any way contribute to the Commission's delays. They made constructive proposals in order that a decision might be reached quickly, but the Commission rejected those proposals. They waived their right to a hearing after receiving the second statement of objections, in order to expedite the adoption of the final decision. The Commission cannot criticize them for pleading their case before DG III, which has responsibility within the Commission for certification policy. The intervention of DG III would have been necessary even if the applicants had not sought it. Nor can they be criticized for the interventions before the Commission by the Permanent Representation of the Netherlands to the European Union and the Raad voor de Certificatie, which took place within a period of no more than two weeks (from 13 to 27 October 1993).

47 The applicants add that the complexity of the case cannot in any event justify the exceeding of a reasonable time (*Schouten and Meldrum* v *Netherlands*, cited above). As regards the delays caused by the absence of the Finnish and Swedish

translations of the draft decision, they contend that organizational delay cannot be relied on as a justification for the exceeding of a reasonable time (judgment of the European Court of Human Rights of 6 May 1981, *Buchholz*, Series A, No 42).

48 In response to the applicants' submissions, the Commission states that account must be taken of all the circumstances of the case when determining whether proceedings are of unreasonable duration. Not only the Commission's conduct is relevant, but also that of the applicants, as well as the complexity of the case and all the other particular circumstances. The Commission admits that it did not regard the case as a priority from January to July 1992, in view of the fact that it was also pending before the Netherlands court and that the infringements had ceased once the Arrondissementsrechtbank, Utrecht, had made its order of 11 February 1992 (see, in that regard, Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 77 and 85). It expedited its consideration of the case after the Gerechtshof, Amsterdam, had delivered its judgment of 9 July 1992 allowing SCK to reinstate the prohibition on hiring (see paragraph 8 above).

49 It was apparent from the provisional examination of the case that the conditions for application of Article 15(6) of Regulation No 17 were met. Five months after the Gerechtshof, Amsterdam, had given its judgment, the applicants received from the Commission a statement of objections with respect to the application of that provision (statement of objections of 16 December 1992, see paragraph 9 above).

50 The Commission also points out that when the draft decision under Article 15(6) was ready, DG III asked DG IV for a meeting on the draft decision before it was presented to the college of Commissioners. The intervention by DG III in the procedure, which was the principal cause of delay in dealing with the case in the following months, was, however, the direct result of steps taken by the applicants. The decision under Article 15(6) was finally adopted on 13 April 1994.

51 Subsequently, on 21 October 1994, the Commission notified the applicants of the statement of objections with a view to the adoption of a final decision. That decision, adopted on the basis of Articles 3 and 15(2) of Regulation No 17, had a different purpose and different legal consequences from a decision adopted on the basis of Article 15(6). One month after receiving the applicants' reply to the second statement of objections, DG IV had already formulated a draft decision. However, following the accession of Finland and Sweden to the European Union on 1 January 1995, there were serious problems of delay with translations into Finnish and Swedish. The Commission finally adopted the contested decision on 29 November 1995.

52 Therefore, the Commission argues, it cannot be accused in this case of having offended against the principle requiring action to be taken within a reasonable time in the course of the administrative procedure.

Findings of the Court

53 It is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* v *Austria* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect (Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and *Kremzow*, cited above, paragraph 14). Furthermore, as provided in Article F(2) of the Treaty on European Union, 'the Union shall respect fundamental rights, as guaranteed by the [European Convention on Human Rights] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

54 The applicants claim that, following the complaint submitted by Van Marwijk and others on 13 January 1992 and the notifications given by SCK on 15 January 1992 and FNK on 6 February 1992 (see paragraphs 6 and 7 above), the contested decision, dated 29 November 1995, was not adopted within a 'reasonable time' for the purposes of Article 6(1) of the European Convention on Human Rights, under which '... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...'.

55 When a party applies to the Commission for negative clearance under Article 2 of Regulation No 17 or gives it notification under Article 4(1) thereof for the purpose of obtaining an exemption, the Commission may not defer defining its position indefinitely. In the interests of legal certainty and of ensuring adequate judicial protection, it is required to adopt a decision or, if such a letter has been requested, to send a formal letter within a reasonable time. Similarly, when it receives an application under Article 3(1) of Regulation No 17 alleging infringement of Article 85 and/or Article 86 of the Treaty, it is required to adopt a definitive position on the complaint within a reasonable time (Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 38).

56 It is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy (see, with regard to the rejection of a complaint, *Guérin Automobiles*, cited above, paragraph 38, and, with regard to State aids, Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4, and Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraphs 12 to 17). Accordingly, without there being any need to rule on the question whether Article 6(1) of the European Convention on Human Rights is, as such, applicable to administrative proceedings before the Commission relating to competition policy, it is necessary to consider whether, in this case, in the proceedings preceding the adoption of the contested decision, the Commission offended against the general principle of Community law requiring it to act within a reasonable time.

57 The administrative proceedings in this case lasted, in all, approximately 46 months. However, as the Commission has rightly stated, the question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved (see, by analogy, the judgments of the European Court of Human Rights of 23 April 1987 in *Erkner*, Series A, No 117, p. 62, paragraph 66, of 25 June 1987 in *Milasi*, Series A, No 119, p. 46, paragraph 15, and in *Schouten and Meldrum* v *Netherlands*, cited above, p. 25, paragraph 63).

58 As regards, first, the context of the case, FNK's internal rules contained, as from 15 December 1979, a clause requiring its members to give priority to other members in the hiring out of cranes and to charge reasonable rates (Article 3(a) and (b) of the internal rules). The clause in SCK's rules on the certification of firms to which the contested decision relates, namely the prohibition on hiring (the second indent of Article 7 of the rules on certification), entered into force on 1 January 1991. The applicants apparently saw no need to seek the Commission's opinion on their statutes and rules before Van Marwijk and ten other undertakings submitted a complaint to the Commission on 13 January 1992. SCK's statutes and its rules on the certification of crane-hire firms were not notified to the Commission until 15 January 1992 and FNK's statutes and internal rules were not notified until 6 February 1992.

59 It should next be borne in mind that the period of 46 months from the lodging of the complaint and the notifications to the adoption of the contested decision is made up of various procedural stages. After the Commission had reviewed the complaint and the notifications, it issued, on 16 December 1992, a statement of objections with a view to the adoption of a decision under Article 15(6) of Regulation No 17 and it actually adopted such a decision on 13 April 1994. It then sent a new statement of objections on 21 October 1994 with a view to the adoption of the contested decision, which took place on 29 November 1995.

60 Each procedural stage must be examined to see whether its duration was reasonable.

61 The statement of objections of 16 December 1992 constitutes the first, provisional, position adopted by the Commission on the notifications given by the applicants. The duration of that first part of the procedure, approximately 11 months, was reasonable and may even be regarded as relatively short in the light of all the documents in the case. It should be noted that, during that period, the Commission considered in parallel the notifications given by the applicants and the complaint submitted by Van Marwijk and others objecting to the very practices notified by the applicants. Moreover, it was reasonable for the Commission to take the view that the case submitted by the applicants did not need to be given priority. The applicants themselves did not make clear, in their notifications, the need for their case to be dealt with urgently, even though paragraph 7.4 of the Annex to Form A/B (annexed to Regulation No 27 of the Commission of 3 May 1962, First Regulation implementing Council Regulation No 17 (OJ, English Special Edition 1959-62, p. 132), subsequently replaced by Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 (OJ 1994 L 377, p. 28)) asks the notifying parties to specify the degree of urgency. Furthermore, the practices notified, which the Commission considered could not be exempted under Article 85(3) of the Treaty, had ceased for a period of about five months, between 11 February 1992 and 9 July 1992 (see paragraph 8 above), following an action brought by the complainants before the Netherlands courts.

62 The period of approximately 16 months between the statement of objections of 16 December 1992 and the adoption, on 13 April 1994, of the decision under Article 15(6) of Regulation No 17 was also reasonable. Counsel for the applicants conceded at the hearing before the Court that, in its letter to the Commission of 21 October 1993 (to Mr Dubois in DG IV), SCK made clear for the first time the need for the case to be dealt with rapidly and as a matter of urgency. FNK did not take such a step before the decision was adopted on 13 April 1994. The letter of formal notice of 3 June 1994 from the applicants' adviser to the Commission is the first indication given by FNK of its interest in having the case dealt with rapidly. Furthermore, it is common ground that at the very time when SCK was first

making clear to DG IV the need for the procedure to progress rapidly, the applicants requested DG III to intervene with DG IV with a view to obtaining a successful outcome to their application for an exemption (see, in particular, the letter of 5 October 1993 from the applicants' adviser to Mr McMillan, the Head of Unit III. B.3). While such an approach is perfectly proper, the applicants should have realized that the intervention requested from DG III was going to slow down the procedure, in particular as DG III does not have to be consulted in a proceeding for exemption under Article 85(3) of the Treaty or in a proceeding for the finding of an infringement under Article 85(1).

63 The next stage in the procedure was the notification to the applicants of the statement of objections for the adoption of the contested decision. Such notification was given on 21 October 1994, six months after the decision under Article 15(6) of Regulation No 17 had been adopted.

64 That period of six months is not unreasonable.

65 The applicants claim, however, that the sending of the second statement of objections served no purpose and was intended by the Commission to prolong the procedure. That argument must be rejected. On the one hand, the two statements of objections had different purposes. The first related to withdrawal of immunity from fines, as provided for in Article 15(5) of Regulation No 17, by the adoption of a decision under Article 15(6), while the second was preparatory to a decision establishing infringements and imposing fines under Articles 3(1) and 15(2) of Regulation No 17. On the other hand, the second statement set out objections regarding all the infringements found in the contested decision, that is to say the prohibition on hiring and the recommended and internal rates, while the first was confined to analysing the prohibition on hiring in the light of Article 85 of the Treaty. Article 19(1) of Regulation No 17 and Articles 2 and 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in

Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition, 1963-1964, p. 47), which apply the *audi alteram partem* principle, require that undertakings concerned by a proceeding for the establishment of infringements are afforded the opportunity, in the course of the administrative procedure, of effectively making known their views on all the objections dealt with in the decision (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 39, and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 47). The Commission was thus required to send a second statement of objections to the applicants not only because the two statements of objections had different purposes but also because the contested decision deals with an objection not covered by the first statement of objections. In other words, if the Commission had not sent the second set of objections, the contested decision would have been adopted in manifest disregard of the applicants' rights of defence.

66 Next, the Commission adopted its final decision on 29 November 1995, approximately 11 months after it had received, on 21 December 1994, the applicants' reply to the second statement of objections. Irrespective of the translation problems debated by the parties in their pleadings, the fact that the Commission needed 11 months from receipt of the reply to the statement of objections in order to prepare a final decision in all the official Community languages does not amount to a breach of the principle that action must be taken within a reasonable time in an administrative procedure relating to competition policy.

67 As regards the applicants' argument that the Commission never gave the case the slightest priority and considered that it was sufficient for it to influence the national court and to adopt a decision under Article 15(6) of Regulation No 17, it should be noted that the Commission is entitled to apply different degrees of priority to the cases submitted to it (*Automec* v *Commission*, cited above, paragraph 77). Furthermore, if it takes the view that the practices notified to it cannot be exempted under Article 85(3), it may, when assessing the degree of priority to be given to the notification, take into account the fact that a national court has already caused the infringements in question to cease.

68 In addition, by way of reply to an argument developed by the applicants at the hearing, as to the permanent adverse effects of a decision under Article 15(6) of Regulation No 17, it should be pointed out that in Joined Cases 8/66, 9/66, 10/66 and 11/66 *Cimenteries CBR and Others* v *Commission* [1967] ECR 75, at pp. 92 and 93, the Court of Justice held that an action for annulment of such a decision was admissible on the basis, *inter alia*, that 'if the preliminary measure were excluded from all review by the Court ... [it] would ... have the effect of saving the Commission from having to give a final decision thanks to the efficacy of a mere threat of a fine'. In this case, it is not open to the applicants, who failed to bring an action for annulment of the decision of 13 April 1994 adopted under Article 15(6) of Regulation No 17, to complain of any permanent adverse effects of that decision.

69 In view of all of the above considerations, the Commission did act in accordance with the principle requiring it to act within a reasonable time in the administrative procedure preceding the adoption of the contested decision.

70 The first plea must therefore be rejected.

The second plea: breach of the principle of legal certainty

Summary of the arguments of the parties

71 The applicants state that for 45 months they were uncertain whether the exemption applied for would be granted. They add that the principle of legal certainty must be observed even more strictly in the case of rules liable to entail financial consequences (Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18). A decision under Article 15(6) of Regulation No 17 cannot in any way provide the same certainty as a final decision (judgment of the Court of Justice in *Cimenteries CBR and Others* v *Commission*, cited above). It is, moreover, strange

that the Commission states that they could be reassured as to their position following the decisions of the Netherlands courts, when those decisions were intended solely to lay down interim arrangements pending the final decision by the Commission. Besides, the judgment of the Gerechtshof, Amsterdam, of 28 October 1993 is based in particular on the letter from Mr Giuffrida of September 1993 (see paragraph 14 above) which incorrectly stated that 'the approval of the departments concerned [had] been obtained'. DG III had not yet adopted a position on the case when that statement was made.

72 The Commission denies that the applicants suffered from a lack of legal certainty for 45 months. It refers to the order of the Arrondissementsrechtbank, Utrecht, of 6 July 1993. In its rejoinder it adds that the statement of objections of 16 December 1992 and its letter of 4 June 1993 (see paragraphs 9 and 11 above) gave the applicants a clear signal as to whether an exemption might be granted. It also states that the term 'departments concerned' in Mr Giuffrida's letter of September 1993 encompassed solely the departments of DG IV and the Commission's Legal Service. DG III was involved in the procedure only after it had expressly made a request to that effect, following an approach by the applicants. DG III's involvement in the procedure meant that the decision under Article 15(6) of Regulation No 17 was adopted a few months later than Mr Giuffrida could reasonably have anticipated on 22 September 1993.

Findings of the Court

73 The plea falls into two parts.

74 The first raises the question whether the Commission is required, in accordance with the principle of legal certainty, to adopt a decision within a reasonable time when agreements have been notified to it under Article 2 and/or Article 4(1) of Regulation No 17. Formulated in this way, it merges with the first plea and must be rejected for the same reasons.

75 In the second part of the plea, the applicants complain that Mr Giuffrida's letter of September 1993 (see paragraph 14 above) incorrectly stated that 'the approval of the departments concerned [had] been obtained'. That complaint is also put forward under the third plea, alleging breach of the principle of the protection of legitimate expectations. It will be rejected for the reasons given in paragraph 82 below.

76 Accordingly, the plea that the principle of legal certainty was infringed cannot be upheld.

The third plea: breach of the principle of the protection of legitimate expectations

Summary of the arguments of the parties

77 The applicants contend that the Commission made promises which proved to be false. They refer, first, to the letter from Mr Giuffrida (see paragraph 14 above) which informed them in September 1993 that a decision under Article 15(6) of Regulation No 17 would be adopted shortly. They then refer to the letter from Mr Ehlermann of 27 June 1994 (see paragraph 18 above) according to which adoption of the final decision was a priority. Since the judgment of the Gerechtshof, Amsterdam, of 28 October 1993 was based on the Commission's promises to the effect that it was going to adopt its decision in the near future, the applicants consider that they were justified in believing that the Commission would keep its promises.

78 In their reply they also point out, in relation to the letter from Mr Giuffrida, that DG III is responsible for certification policy and that, according to the Commission, this case is the first time that Article 85 has been applied to a certification system. Accordingly, when the letter was drafted, at least one 'department concerned', namely DG III, had not given its approval. In view of the influence that

the letter in question had on the judgment of the Gerechtshof, it must be concluded that the Commission, by its incorrect statements, offended against the principle of the protection of legitimate expectations.

79 In response to those arguments, the Commission states that the letter of 22 September 1993 did not give a false idea of the situation at that time. It relies in that regard on the line of argument set out in paragraph 72 above. It also considers that its letter of 27 June 1994 does not contain any untrue statements.

Findings of the Court

80 The concept of legitimate expectations presupposes that the person concerned entertains hopes based on specific assurances given to him by the Community administration (judgment in Case T-465/93 *Murgia Messapica* v *Commission* [1994] ECR II-361, paragraph 67, and order of 11 March 1996 in Case T-195/95 *Guérin Automobiles* v *Commission* [1996] ECR II-171, paragraph 20).

81 In this case the applicants submit that two letters from the Commission contained promises which proved to be false.

82 The letter from Mr Giuffrida was drafted on 21 or 22 September 1993. It is a reply to a letter from the complainants of 21 September 1993 and the applicants state that they received a copy of it on 22 September 1993. The letter indicated that a draft decision under Article 15(6) of Regulation No 17 would be submitted to the College of Commissioners in the course of the following week and that the Commission envisaged that the applicants would be formally notified of the decision in the first two weeks of October 1993. While that correspondence might be considered to contain specific assurances regarding the impending adoption of a decision

by the Commission, the applicants do not deny that, as soon as they became aware of it, they approached DG III for it to intervene with DG IV (see, in particular, the letter of 5 October 1993 from the applicants' adviser to Mr McMillan, the Head of Unit III. B.3, which refers to a discussion between him and the adviser on 28 September 1993). In such circumstances, the applicants could not expect the Commission to honour any assurances expressed in its letter received by them on 22 September 1993.

83 The letter from Mr Ehlermann of 27 June 1994 confirmed that the adoption of a final decision in this case was a priority for the staff of DG IV. Having regard to the general nature of such a statement, there can be no question of specific assurances having been given by the Commission which could have given rise to reasonable expectations on the part of the applicants as to the date on which a final decision in the matter would be adopted. In any event, the truth of Mr Ehlermann's statement was in the event confirmed by the Commission, since it issued on 21 October 1994 a statement of objections for the adoption of a final decision.

84 It follows that the third plea must also be rejected.

The fourth plea: breach of the audi alteram partem *rule*

Summary of the arguments of the parties

85 The applicants point out that they requested a hearing on several occasions during the procedure which led to adoption of the decision under Article 15(6) of Regulation No 17. The fact that the Commission did not act on those requests consti-

tutes a contravention of the rights of the defence. They consider that, in order for those rights to be protected, they had to have the opportunity to react, in the course of oral proceedings, with all their procedural safeguards, first, to new matters which may have emerged during the administrative procedure and, secondly, to the Commission's rejection of any compromise. The interest which they had in such a hearing would have justified any procedural delay, at least during the period preceding the adoption of the decision under Article 15(6).

86 In response to this, the Commission states that it gave the applicants the opportunity to make known their views on the objections which it had expressed. There can therefore be no question of an infringement of the rights of the defence. Since there is no legislation which requires the undertakings or associations concerned to be heard orally before the Commission adopts a decision under Article 15(6) of Regulation No 17 and since there is no specific circumstance in this case to suggest that the rights of the defence could in fact be safeguarded only by holding a hearing, the Commission, having consulted the applicants in writing, was not in any way required to hear them orally.

Findings of the Court

87 According to the applicants, the damage suffered by them resulted from the fact that, when they brought their action, the Commission still had not adopted a final decision on their notifications and had thus allowed doubt to subsist for almost four years as to whether the statutes and rules notified by them were lawful. The result of the Commission's conduct was that the Raad voor de Certificatie was threatening SCK with withdrawal of its accreditation, hirers of cranes were paying less regard to FNK's general conditions and the applicants' good reputation was being affected.

88 It must be held that the Commission's conduct complained of in this plea, namely that it did not hold a hearing before it adopted a decision under Article 15(6) of

Regulation No 17, could not have caused or aggravated the damage as asserted in the application.

89 This plea therefore does not disclose any link with that damage.

90 Moreover, it is concerned solely with the lawfulness of the decision of 13 April 1994 adopted under Article 15(6) of Regulation No 17. The purpose of the present action is to obtain compensation for harm connected with a failure to adopt a final decision within a reasonable time and not with unlawfulness of the decision of 13 April 1984 which, in any event, the applicants did not challenge within the time-limit laid down for that purpose.

91 The fourth plea must accordingly be rejected.

92 It follows therefore that an analysis of the various pleas has not revealed any unlawful conduct on the part of the Commission sufficient for the Community to incur liability.

93 The Court nevertheless considers that it should still examine the question whether there is a causal link between the conduct claimed to be unlawful and the damage alleged by the applicants.

2. *Causal link*

Summary of the arguments of the parties

94 The applicants submit that the Commission must be held responsible for the damage suffered by them. They allege that SCK is threatened with loss of its accreditation, because the Raad voor de Certificatie considers the prohibition on hiring to be the only means of satisfying the accreditation criteria, while that very prohibition was suspended pending the contested decision. As for FNK, its reputation and its general conditions in particular have been affected by the Commission's conduct. The applicants point out in their reply that the Gerechtshof, Amsterdam, acting on the basis of an incorrect statement by the Commission, delivered an interim judgment suspending the prohibition on hiring until the Commission had adopted a final decision (see paragraph 14 above). The Commission's inactivity over an unacceptably long period gave the judgment of the Gerechtshof of 28 October 1993 a temporal effect far exceeding that intended by that court.

95 In response to this, the Commission states that there is no direct and necessary causal link between the steps taken by it and the continuing suspension of the prohibition on hiring. It was not the Commission, but the Netherlands court, which, as an interim measure, suspended the prohibition on hiring. If SCK considered after a certain time that the interim measures were no longer justified because the final decision by the Commission was taking longer than expected, it could have applied to the national court to have the interim measures varied or set aside.

Findings of the Court

96 Article 85(1) of the Treaty produces direct effects in relations between individuals and creates rights directly in respect of the individuals concerned which the

national courts must safeguard (see, for example, Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 45).

97 The Gerechtshof, Amsterdam, applied Article 85(1) of the Treaty in its judgment of 28 October 1993 and prohibited SCK from applying the prohibition on hiring (the second indent of Article 7 of SCK's rules on the certification of crane-hire firms). While it is true that the Gerechtshof was influenced by the Commission's position, that is to say by the letter of Mr Giuffrida of September 1993 (see paragraph 14 above) announcing the adoption of a decision under Article 15(6) of Regulation No 17, the fact remains that the position so taken did not bind the national court. Mr Giuffrida's assessment of the prohibition was merely a factor which the Gerechtshof could take into account in examining the question whether that practice was in accordance with Article 85 of the Treaty (Joined Cases 253/78, 1/79, 2/79 and 3/79 *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327, paragraph 13, and Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 43). Besides, as will become apparent from the analysis of the action for annulment brought against the contested decision, the view taken by the Commission during the administrative procedure and set out in the contested decision is based on a correct interpretation of Article 85(1) of the Treaty. Thus, if SCK was threatened with withdrawal of its accreditation, that threat was due to the fact that SCK had been required to put an end to an infringement of Article 85(1). The Commission cannot be held responsible for such 'harm'.

98 As regards FNK, the applicants fail to explain how its reputation and its general conditions were affected by the Commission's conduct, even though, according to settled case-law, the burden of proving a causal link between the fault committed by the institution and the injury pleaded falls on the applicants (see, for example, Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25, and Case T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 40). The only practices of FNK called into question during the administrative procedure were the system of recommended and internal rates and the priority clause which required FNK's members

to give priority to other members when hiring or hiring out cranes (Article 3(a) and (b) of FNK's internal rules). The applicants stated in the administrative procedure, in the written procedure before the Court and at the hearing that FNK voluntarily abandoned those practices after the Gerechtshof, Amsterdam, had set aside, on 9 July 1992, the order of the President of the Arrondissementsrechtbank, Utrecht, that is to say at a time (July 1992) when the Commission had not yet adopted a position, even provisionally, on FNK's notification or Van Marwijk's complaint. The harm pleaded by FNK cannot therefore have been caused in any way by the Commission's conduct during the administrative procedure.

99 Accordingly, the action for damages must be dismissed, without there being any need to consider in addition whether the other condition for Community liability, namely that damage has occurred, is satisfied.

The action for a declaration that the contested decision is non-existent or for its annulment (Case T-18/96)

1. *Claim for a declaration that the contested decision is non-existent*

Summary of the arguments of the parties

100 The applicants put forward a single plea in support of their claim. They submit that the contested decision is non-existent inasmuch as the Commission failed to rule in its operative part on the application for an exemption made under Article 85(3) of the Treaty. It was essential to rule on that application in the operative part, since compliance with the Community rules on competition must be

ascertained in relation to Article 85 as a whole (Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649) and only the operative part of an act is capable of producing legal effects (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 31, and Case T-50/92 *Fiorani* v *Parliament* [1993] ECR II-555, paragraph 39). The Commission's decision of 13 April 1994, adopted on the basis of Article 15(6) of Regulation No 17, has no relevance in that regard. Such decisions are adopted after only preliminary scrutiny and are therefore not equivalent to final decisions. Furthermore, even if they could be regarded as final decisions, the decision in this case was concerned only with SCK's prohibition on hiring and did not contain a ruling on the practices notified by FNK, so that there was still no decision on whether Article 85(3) might apply to those practices.

101 The Commission states in response that paragraphs 32 to 39 of the contested decision clearly show that it considered and rejected the applicants' arguments for an exemption under Article 85(3) of the Treaty. There was no logical reason for adding an article in the operative part expressly rejecting the application for an exemption under Article 85(3), because the finding, in Articles 1 and 3, of the infringements of Article 85(1) committed by SCK and FNK and the orders in Articles 2 and 4 necessarily meant that the application for an exemption under Article 85(1) was rejected.

Findings of the Court

102 In the operative part of the contested decision the Commission found that FNK's system of recommended and internal rates (Article 1) and SCK's prohibition on hiring (Article 3) infringed Article 85(1) of the Treaty and ordered FNK (Article 2) and SCK (Article 4) to terminate those infringements forthwith. The contested decision also imposed fines on the applicants (Article 5).

103 Although the operative part does not contain an express ruling on the applications for exemption made by the applicants under Article 85(3) of the Treaty, the Commission verified whether the practices referred to in Articles 1 and 3 of the contested decision complied with the rules on competition in relation to Article 85 as a whole. It is apparent from the carefully formulated grounds for the contested decision (paragraphs 32 to 39) that the Commission considered whether Article 85(1) of the Treaty could be declared inapplicable to those practices, pursuant to Article 85(3). At the end of its examination, it points out in paragraph 35, in relation to the recommended and internal rates laid down by FNK, that 'it is ... not possible ... to grant exemption under Article 85(3) of the Treaty'. Similarly, in paragraph 39 it expressly concludes that 'it is ... not possible ... to grant exemption under Article 85(3) of the Treaty' as regards SCK's prohibition on hiring.

104 The statement of the reasons for an act is indispensable for determining the exact meaning of what is stated in the operative part (Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27, Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21, and Case T-26/90 *Finsider* v *Commission* [1992] ECR II-1789, paragraph 53). Accordingly, even though the operative part of the contested decision does not contain an express ruling on the applications for exemption by SCK and FNK under Article 85(3) of the Treaty, the findings of infringement and the orders to terminate those infringements contained in the operative part necessarily mean, in the light of the grounds for the decision (paragraphs 32 to 39), that the Commission rejected the applications in question.

105 Finally, the applicants cannot use as an argument the judgments in *NBV and NVB* v *Commission* and *Fiorani* v *Parliament*. In each of those cases, which were not concerned at all with the question whether a decision of a Community institution was non-existent, the operative part of the decision challenged did not adversely affect the applicants. Only some of the grounds for the decisions in question were considered to be unfavourable to the applicants. The actions for annulment brought in those cases were held to be inadmissible because they in fact sought the annulment only of the grounds for the decision. In the present case the operative part of the contested decision adversely affects the applicants because it holds them liable for infringements of Article 85(1) of the Treaty, orders them to terminate

those infringements, imposes fines on them and, implicitly but definitely, rejects their applications for exemption.

106 It follows that the plea cannot be upheld.

107 As a result, the claim for a declaration that the contested decision is non-existent must be rejected.

2. *Claim for annulment of the contested decision*

108 The applicants put forward five pleas for the annulment of the contested decision, based on the infringement of, respectively, Articles 3, 4, 6 and 9 of Regulation No 17, Article 85(1) of the Treaty, Article 85(3) of the Treaty, the rights of the defence and Article 190 of the Treaty.

The first plea: infringement of Articles 3, 4, 6 and 9 of Regulation No 17

Summary of the arguments of the parties

109 The applicants, referring to their arguments on the non-existence of the decision, put forward a submission, albeit somewhat laconic, to the effect that the Commission's failure to rule on the applications for exemption under Article 85(3) of the Treaty infringes Articles 3, 4, 6 and 9 of Regulation No 17 and that the Commission also committed a serious procedural error, with the result that the decision does not fulfil the requisite procedural conditions and must therefore be annulled.

110 The Commission refers to the argument which it expounded in relation to the claim for a declaration that the contested decision is non-existent.

Findings of the Court

111 This plea is based on the same arguments as those relied on in connection with the plea put forward in support of the claim for a declaration that the contested decision is non-existent.

112 In the contested decision the Commission ruled unequivocally on the applications for exemption under Article 85(3) of the Treaty (see paragraphs 103 and 104 above).

113 The first plea must therefore be rejected.

The second plea: infringement of Article 85(1) of the Treaty

114 In the light of the Report for the Hearing and following the oral procedure, it is appropriate to divide this plea into four parts.

115 The first part of the plea alleges that SCK was mistakenly classified as an undertaking within the meaning of Article 85(1) of the Treaty. The second part is itself subdivided into two sections. In the first section it is alleged that the Commission erred in law with regard to the reference to the criteria of transparency, openness, independence and acceptance of equivalent guarantees offered by other systems in

assessing whether a certification system is compatible with Article 85(1) of the Treaty. In the second section the allegation is to the effect that the Commission erred in its assessment when it found that the prohibition on hiring had as its object or effect the restriction of competition within the meaning of Article 85(1) of the Treaty. In the third part of the plea it is alleged that the Commission committed an error of assessment in finding that the system of recommended and internal rates had as its object or effect the restriction of competition within the meaning of Article 85(1) of the Treaty. Finally, in the fourth part of the plea it is alleged that it erred in its assessment of the effect on trade between Member States.

The first part of the plea, to the effect that SCK was mistakenly classified as an undertaking within the meaning of Article 85(1) of the Treaty

— Summary of the arguments of the parties

116 The applicants submit that SCK is not an undertaking within the meaning of Article 85(1) of the Treaty because a certification body which devotes itself solely and exclusively to the neutral and objective supervision of undertakings in a particular sector is not engaged in an economic activity (see the judgments in Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979 and in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, and the Opinion of Advocate General Slynn in Case 123/83 *BNIC* v *Clair* [1985] ECR 391. Nor is SCK an association of undertakings within the meaning of the same provision.

117 In response to that submission the Commission states that, in order for a body to be able to be regarded as an undertaking within the meaning of Article 85(1) of the Treaty, it is sufficient that, whatever its legal status may be, it is engaged in an activity of an economic nature which may in principle be engaged in by a private undertaking and with a view to profit. In this case the issue of a certificate in return for payment amounts to such an activity. SCK must therefore be regarded as an undertaking within the meaning of Article 85(1).

— Findings of the Court

118 In the contested decision the Commission classified SCK as an undertaking within the meaning of Article 85(1) of the Treaty (second subparagraph of paragraph 17).

119 It is necessary to consider whether the Commission committed an error of assessment or was wrong in law in so classifying SCK.

120 In the context of competition law 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed' (*Höfner and Elser*, cited above, paragraph 21).

121 SCK is a body governed by private law which set up a certification system for crane-hire firms to which affiliation is optional. It establishes independently the criteria which the certified firms must satisfy. It issues a certificate only on payment of a subscription.

122 Those features demonstrate that SCK is engaged in an economic activity. It must therefore be regarded as an undertaking within the meaning of Article 85(1) of the Treaty.

123 Since the Commission correctly classified SCK as an undertaking, the applicants' argument that SCK is not an association of undertakings has no relevance.

124 It follows from the above that the first part of the second plea must be rejected.

The second part of the plea, alleging that the Commission, first, erred in law with regard to the reference to the criteria of transparency, openness, independence and acceptance of equivalent guarantees offered by other systems in assessing whether a certification system is compatible with Article 85(1) of the Treaty and, secondly, erred in its assessment when it found that the prohibition on hiring had as its object or effect the restriction of competition within the meaning of Article 85(1)

— Summary of the arguments of the parties

125 The applicants point out that the Commission considered in the contested decision that if a prohibition on hiring 'is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services' (first subparagraph of paragraph 23). The Commission infringed Article 85(1) of the Treaty by establishing, on its own initiative, general criteria for determining whether that provision applies to certification systems, when those criteria are not set out therein.

126 Furthermore, the prohibition on hiring under SCK's certification system does not have as its object or effect the restriction of competition. In order to determine whether such clauses come within the prohibition laid down in Article 85(1), it is necessary to examine what the state of competition would be if those clauses did not exist (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 18). SCK's certification system intensifies competition. It contributes to transparency of the market by enabling the quality and safety provided by the various persons offering the product to be assessed on the basis of an objective and impartial standard. The prohibition on hiring cranes from uncertified firms is essential because such a prohibition is the only way of ensuring that each contract placed with a certified firm is carried out by a firm which meets the same safety

and quality requirements. In that sense, the prohibition on hiring provides protection identical to that offered by a trademark, which the Court of Justice has held to be compatible with Community competition law (Case C-10/89 *CNL-SUCAL* v *HAG GF* [1990] ECR I-3711, paragraph 13). The prohibition on hiring is also essential because it constitutes the only means of complying with the requirement in Paragraph 2.5 of the accreditation criteria of the Raad voor de Certificatie (see paragraph 5 above), under which the certificate-awarding body is required to verify that, where a job is carried out by a subcontractor, the quality requirements are met. As for the Commission's suggestion that certified firms should be allowed to demonstrate, by pre-prepared lists, that uncertified firms upon whose services they call nevertheless meet the requisite quality requirements, the applicants consider that such an *ad hoc* system of checking would be the direct opposite of a certification system based on systematic checking. Finally, the prohibition on hiring must also be upheld where the client expressly authorizes cranes to be hired from an uncertified firm. The credibility of the certification system is founded on the fact that all the products and services offered by certified firms fulfil the requisite conditions.

127 The applicants submit that the system at issue complies in any event with all the criteria laid down by the Commission. First, it is completely open, accepting not only FNK members but also any other firm which wishes to be admitted to it. SCK has thus issued certificates to 12 firms which were not FNK members. The conditions for obtaining a certificate are objective and non-discriminatory. In that regard, the reduced subscriptions paid by FNK members until 1 January 1992 were merely to compensate for secretarial services rendered by FNK to SCK. The system was also open to firms from other Member States, as confirmed by a report by the Raad voor de Certificatie of 11 January 1993 and a letter of 11 March 1994 from the Association of Belgian Crane-Hire Firms. SCK has always accepted that registration abroad satisfies the condition requiring firms which wish to obtain a certificate from SCK to be registered with the Chamber of Commerce. Accordingly, difficulties encountered by foreign firms in entering the Netherlands market are due solely to differences in the countries' legislation.

128 The applicants add that, even though no reference is made thereto in SCK's rules, SCK recognizes other certification systems as equivalent, so long as they provide for guarantees analogous to those of the system at issue. SCK's certification system genuinely gives added value compared with the statutory scheme, both substantively and in its operation. Substantively, it imposes requirements relating to both technical matters and the management of the firm which go beyond the statutory requirements. SCK pursues a much more active monitoring policy than Keboma. That complementary function of a certification system is explained by a deliberate policy in the Netherlands of entrusting to the businesses active in the sector the monitoring of statutory requirements as much as possible. The added value of SCK's certification system was acknowledged by DG III in a memorandum of 18 August 1994 to DG IV. Accordingly, SCK cannot permit the hiring of cranes which meet only the statutory requirements without that affecting the coherence of its certification system. The fact that there are as yet no other private bodies which have set up a certification system comparable to SCK's in no way signifies that SCK is unwilling to recognize a comparable system were it to exist. Besides, the Commission's argument would make it impossible to set up a certification system in a sector where none yet exists, because the first system established would not have the possibility of recognizing other, comparable, systems.

129 In response to the applicants' arguments, the Commission states that, in paragraphs 23 to 30 of the contested decision, it carried out a detailed analysis of the prohibition on hiring in its legal and economic context, in order to determine whether such a prohibition is compatible with Article 85(1) of the Treaty (see Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235).

130 It maintains that the prohibition on hiring is not essential in order to maintain the coherence of the certification system in question. To underline the disproportionate nature of the prohibition, it points out that the prohibition excludes the possibility of using cranes certified by other bodies and does not allow the head contractor to demonstrate, even by a pre-prepared list, that his uncertified subcontractor meets all of SCK's requirements. Furthermore, the prohibition prevents the head contractor from using an uncertified subcontractor where the client

has expressly waived the quality guarantees associated with a certificate from SCK and has authorized the use of uncertified cranes.

131 SCK's certification system does not comply with the criteria set out in the first subparagraph of paragraph 23 of the contested decision. First, from the beginning and, at any rate in part, until 21 October 1993, it had the features of a closed system (paragraph 24 of the contested decision). Secondly, contrary to the applicants' contention, it did not allow other guarantee systems to be recognized. The amendment proposed by the applicants to the original version of the second indent of Article 7 of the rules on certification, for the recognition of certification by other bodies governed by private law (letter dated 12 July 1993 from the applicants' adviser to the Commission, marked for the attention of Mr Dubois), has no practical effect because, first, such bodies do not exist either in the Netherlands or in the neighbouring countries and, secondly, guarantees other than private certificates are not recognized. In particular, the Keboma mark and similar official certificates from the Belgian or German authorities remain unrecognized.

— Findings of the Court

132 Under the second indent of Article 7 of SCK's rules on the certification of crane-hire firms, firms certified by it are prohibited from hiring cranes from uncertified firms.

133 As regards the first section of this part of the plea, namely that the Commission erred in law with regard to the reference to the criteria of transparency, openness, independence and acceptance of equivalent guarantees offered by other systems in assessing whether a certification system is compatible with Article 85(1) of the Treaty, it should be noted that, in the contested decision (paragraph 23), the Commission took the view that the anti-competitive nature of the prohibition on hiring could be assessed only by reference to the nature of the certification system with

which that prohibition was associated. For that purpose, it laid down four criteria — namely openness, independence, transparency and acceptance of equivalent guarantees offered by other systems — which the certification system had to comply with in order for it to be possible for the prohibition on hiring to fall outside Article 85(1).

134 It is settled case-law that the assessment as to whether conduct is in accordance with Article 85(1) of the Treaty is to be carried out in the legal and economic context of the case (see, for example, *Société Technique Minière* v *Maschinenbau Ulm*, cited above, and Case T-77/94 *Vereniging van Groothandelaren in Bloemkwekerijprodukten and Others* v *Commission* [1997] ECR II-759, paragraph 140). Since the Commission was thus entitled to establish criteria giving effect to the requirements of Article 85(1) in a specific legal and economic context, it is necessary to examine whether the criteria to which it refers in the first subparagraph of paragraph 23 of the contested decision are pertinent.

135 However, in view of the fact that the Commission relies solely on the lack of openness in SCK's certification system and on the failure to accept equivalent guarantees offered by other systems in finding that, in this case, the prohibition on hiring distorts competition (second subparagraph of paragraph 23 of the contested decision and Article 3 of the operative part), it is sufficient to determine whether those two criteria are pertinent.

136 There is no doubt that the criterion of openness of the certification system is pertinent to the assessment of the prohibition on hiring from the point of view of Article 85(1) of the Treaty. The prohibition on hiring cranes from uncertified firms affects significantly the competitive opportunities of those firms if it is difficult to gain access to the certification system.

137 The second criterion, relating to the acceptance of equivalent guarantees offered by other systems, is also pertinent. The prohibition on hiring preventing certified firms from calling on the services of uncertified firms even if they provide guarantees equivalent to those of the certification system cannot be objectively justified by an interest in maintaining the quality of the products and services ensured by the certification system. On the contrary, the failure to accept equivalent guarantees offered by other systems protects certified firms from competition from uncertified firms.

138 The first section of the second part of the plea, alleging that the Commission erred in law, must therefore be rejected.

139 As regards the second section of that part of the plea, in which the applicants contend that the Commission committed an error of assessment in holding that SCK's prohibition on hiring restricts competition for the purposes of Article 85(1) of the Treaty, it should be noted that when the setting up of SCK was discussed at a meeting of the Noord Holland Region of FNK on 27 September 1983, those taking part did not have in mind at all an intensification in competition between them but rather an increase in market prices. The minutes of that meeting (produced by the applicants by letter of 10 April 1997) thus recorded one of the participants as saying: 'Such a [certification] institute is a very healthy thing. It should have an effect on prices if the proposal is implemented well.' Another participant at the same meeting considered that the certification proposal was a 'good idea'. He added that 'in a business, the turnover achieved is more important than the rate of use of the machines'. A crane-hire firm which does not increase the rate of use of its machines will achieve an increase in turnover only by increasing its charges.

140 Furthermore, the second section of the second part of the plea operates on a different plane from that on which the Commission assessed the prohibition on hiring in the contested decision. The Commission based its finding that competition was restricted on the fact that that prohibition applied within a certification system

which was not completely open and did not accept equivalent guarantees offered by other systems (second subparagraph of paragraph 23 of the contested decision).

141 The prohibition on hiring laid down by the second indent of Article 7 of SCK's rules on the certification of crane-hire firms not only restricts the freedom of action of certified firms but also, and above all, affects the competitive opportunities of uncertified firms. Having regard to the economic power of SCK, which itself states that it accounts for approximately 37% of the Netherlands mobile crane-hire market, there can be no doubt that competition is restricted appreciably for the purposes of Article 85(1) of the Treaty if, as the Commission states, the prohibition on hiring operates within a certification system which is not completely open and does not accept equivalent guarantees offered by other systems (see paragraphs 143 to 151 below). In such a case, the prohibition on hiring in fact reinforces the closed nature of the certification system (first subparagraph of paragraph 26 of the contested decision) and considerably impedes access by third parties to the Netherlands market (second subparagraph of paragraph 26).

142 At this stage, it is necessary to consider whether the factual premisses — namely the lack of complete openness in SCK's certification system and the failure to accept equivalent guarantees offered by other systems — upon which the Commission based its assessment are correct.

143 The Commission's finding that SCK's certification system was not open during the period at issue (from 1 January 1991, when the prohibition on hiring was introduced, until 4 November 1993, when the decision was made to suspend it, with the exception of the period from 17 February to 19 July 1992) is based on the following factors: it was more difficult for firms not affiliated to FNK than for firms affiliated to it to be admitted to the certification system because the costs of participation were higher for the former than for the latter; the requirements imposed by the certification system were drawn up on the basis of the position in the Netherlands, thereby hindering access by foreign firms. Thus, until 1 May 1993, it was necessary under SCK's certification system to register with the Chamber of Commerce and, until 21 October 1993, FNK's general conditions had to be applied (paragraph 24 of the contested decision).

144 The factors put forward by the applicants to demonstrate that SCK's certification system was open do not constitute persuasive proof.

145 First, the Commission stated in the contested decision that from 'September 1987 to 1 January 1992 participation in the SCK certification arrangements was roughly three times cheaper for FNK members than for non-members' (paragraph 9). The fact that FNK members enjoyed a substantial reduction (of approximately 66%) in their subscriptions to SCK until 1 January 1992 has not been disputed by the applicants either during the administrative procedure or in the proceedings before the Court. Even if, as they claim, that reduction was to compensate for secretarial services rendered by FNK to SCK, the effect of such a practice was none the less to make it more difficult for foreign firms than for Netherlands firms to be admitted to SCK's certification system, since almost all (more than 90%) of the firms certified by SCK were FNK members and only crane-hire firms established in the Netherlands could be admitted as FNK members (Article 4(a) of FNK's statutes). That 'barring' effect was also reinforced by the fact that if firms established in other Member States had nevertheless decided in favour of certification by SCK, they would, until 21 October 1993, have had to apply the general conditions of a body barred to them, namely FNK, and in the drafting of which they had been unable to participate. The closed or, at least, not entirely open nature of SCK's certification system as regards firms from other countries also follows from the undisputed fact that its requirements were established on the basis of the position in the Netherlands and, in particular, of Netherlands law.

146 As to the applicants' contention that it was still possible for a firm registered abroad to obtain a certificate from SCK, it is stated in the report of the Raad voor de Certificatie of 11 January 1993 (p. 5) that there is no barrier preventing foreign firms from being party to SCK's certification system. In order to reach that conclusion, reference is made in the report to an amendment of SCK's statutes which came into force on 1 January 1992 and reformulated the object of the foundation to the effect that it promoted and maintained the quality of crane-hire firms gener-

ally and no longer just in the Netherlands. However, although SCK's statutes no longer exclude the possibility that firms not established in the Netherlands might obtain certification from SCK, it does not automatically follow that its certification system is a completely open system for firms established in another Member State. In this case, the fact that the certification system is not completely open can be attributed to other factors, identified in paragraph 145 above.

147 The letter of 11 March 1994 from the President of the Association of Belgian Crane-Hire Firms states that the most significant obstacle to inter-State trade in the mobile crane-hire sector results from differences in the legislative provisions of the various Member States and that Belgian firms therefore do not feel, in relation to the carrying out of works within the Community, that they are obstructed by SCK's action. In that regard, SCK itself stated in its notification that the requirements imposed by the certification system correspond roughly to the obligations on crane-hire firms imposed by Netherlands law, so that certification constitutes a better safeguard that those legal requirements are actually complied with (paragraphs 26, 27 and 28 of SCK's notification). By reproducing a number of requirements of Netherlands law in its certification system, SCK has thus consolidated and reinforced the barriers to intra-Community trade resulting from any differences between national laws. When, pursuant to a Community directive, mutual recognition of the various national systems is achieved in a sector, the effect of a private certification body's requirement of compliance with Netherlands law in the same sector is to preserve or re-establish the barriers to intra-Community trade which the Community legislature intended to abolish. It is common ground that SCK carries out certain checks which Keboma performed previously but gave up after Directive 89/392 had been implemented (see paragraph 3 above). The applicants in fact acknowledged in paragraph 114 of their reply that: 'The introduction of the EC mark for hoisting cranes further reduced Keboma's statutory function. Hoisting cranes with an EC mark and a declaration of conformity are moreover not subject to inspection by Keboma before they are brought into service for the first time. That means that SCK's functions have grown. Under SCK's certification scheme, new hoisting cranes are well and truly checked to ensure that they comply with the applicable legislative provisions.' They cannot, therefore, claim that any obstacle which foreign crane-hire firms may encounter in entering the Netherlands

market arises exclusively from differences in legislative provisions as between the various Member States and not from SCK's certification system.

148 As to the question whether SCK's certification system allowed equivalent guarantees offered by other systems to be accepted, it should be noted that SCK proposed, in a letter of 12 July 1993 to Mr Dubois of DG IV, an amendment to that system under which it would recognize other certification systems fulfilling the conditions established on the basis of the European standards EN 45 011 and offering guarantees equivalent to those under its own system. It is thus clear from that proposed amendment that, in its original version, SCK's certification system did not provide for the recognition of such equivalent systems. Furthermore, even if, as the applicants allege, the amendment was merely a clarification of the original version of the second indent of Article 7 of the rules on certification, SCK's system makes no provision at all for the recognition of rules of public authorities which provide guarantees equivalent to those offered by SCK.

149 It follows from the foregoing considerations that the Commission did not commit an error of appraisal in finding, in paragraph 23 of the contested decision, that SCK's certification system was not completely open (or at the very least that it was not until 21 October 1993) and did not allow equivalent guarantees offered by other systems to be accepted. Accordingly, the prohibition on hiring which reinforced the non-open nature of the certification system and had the effect of raising a substantial obstacle to access by third parties to the Netherlands market, and in particular firms established in another Member State (see paragraphs 145 to 148 above), in fact constitutes a restriction of competition within the meaning of Article 85(1) of the Treaty. That conclusion would be no different if the applicants could show that the clause is necessary in order to preserve the coherence of SCK's certification system. The fact that the system is not open and equivalent guarantees offered by other systems are not accepted means that the system itself is incompatible with Article 85(1) even if it were proved, as the applicants claim, that it gave added value compared with the Netherlands legislation. A specific clause in such a system, such as the clause prohibiting hirings from uncertified firms, does not become compatible with Article 85(1) because it is needed to preserve the

coherence of that system, since the latter is by definition incompatible with Article 85(1).

150 It follows that the second part of this plea must be rejected.

151 At the hearing the interveners urged the Court to rule in addition on the lawfulness of the amendment to the second indent of Article 7 of the rules on certification agreed upon by the principal parties for the period until delivery of this judgment (see paragraph 26 above). However, in the context of an action for annulment under Article 173 of the Treaty, the Community judicature confines itself to reviewing the legality of the contested act. In this case, the contested decision necessarily contains no appraisal of the new version of the clause containing the prohibition on hiring, since the rules on certification were amended after the date of the decision. The request made by the interveners at the hearing thus exceeds the jurisdiction conferred by the Treaty on the Court in actions for annulment and must accordingly be rejected as inadmissible.

The third part of the plea, alleging that the Commission committed an error of assessment in finding that the system of recommended and internal rates had as its object or effect the restriction of competition within the meaning of Article 85(1) of the Treaty

— Summary of the arguments of the parties

152 The applicants contend that the publication of recommended rates and the formulation of internal rates do not amount, either, to restrictions of competition within the meaning of Article 85(1) of the Treaty, because those rates were intended to serve only as an aid to specific negotiations and had no binding force at all. The position on the market would therefore have been identical if the recommended

rates and the cost estimates had not been published. Every business active on the market was and would have remained free to determine its commercial policy independently (Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, paragraph 13). The applicants state that the market rates were substantially lower than the recommended rates published by FNK and differed depending on the firm, the client and the order.

153 Article 3(b) of FNK's internal rules, which imposes the obligation to charge reasonable rates at the risk of having membership withdrawn on the basis of Article 10 of the statutes, does not in any way imply that FNK's members were required to charge the recommended rates. Besides, no individual check has been carried out during all the years of FNK's existence to establish whether reasonable rates were being applied and membership has never been revoked for such a reason. The two judgments cited by the Commission in paragraph 20 of the contested decision are not relevant. The judgment in Case 8/72 *Vereniging van Cementhandelaren* v *Commission* [1972] ECR 977 was concerned with the application of 'recommended' rates under a mandatory system, non-existent in this case, which imposed stringent sanctions in the event of non-compliance and thus enabled all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors would be. The judgment in Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405 related to a situation where the agreement at issue had the object of influencing competition, whereas in this case the publication of recommended rates and cost estimates had a completely different object.

154 As regards the internal rates, the applicants do not deny that FNK performed incidental secretarial functions in connection with consultation on those prices. They consider, however, that FNK's involvement in the formulation of the internal rates was so marginal that it cannot assume responsibility for this. In so far as the formulation of the internal rates may be attributed to it, FNK did not in any event have any influence on the conditions of competition in the market. The market, characterized by the phenomenon of overnight contracting, in fact evolved without any prompting towards a situation in which parties who have regular commer-

cial dealings entailing the provision of identical and reciprocal services establish prices in advance, to which they refer whenever they provide a service. The Commission also failed to show that the internal rates were binding.

155 The Commission states in response that it is apparent from the relevant provisions of FNK's internal rules and statutes that the recommended and internal rates are binding as a result of the obligation on FNK members to charge reasonable rates, breach of which may be punished by loss of membership (Article 10(1)(d) of the statutes). Also, the phenomenon of overnight contracting makes it probable that those recommended rates served in fact as reference prices.

— Findings of the Court

156 It is necessary to determine first whether the Commission committed an error of assessment in finding that the system of recommended and internal rates restricts competition for the purposes of Article 85(1) of the Treaty ((a) below). It will then be necessary to determine whether FNK can be held responsible for the infringement alleged ((b) below).

(a) The system of recommended and internal rates

157 In the contested decision (paragraphs 20 and 21), the Commission effectively takes the view that the firms affiliated to FNK were required to adhere to the rates proposed by it. It considers that even if those rates were target prices, they still restricted competition because they made it possible to predict with a reasonable degree of certainty what the pricing policy of competitors would be.

158 Article 85(1)(a) of the Treaty expressly states that agreements, decisions and concerted practices which 'directly or indirectly fix purchase or selling prices or any other trading conditions' are incompatible with the common market.

159 During the period at issue, FNK's members were required, under Article 3(b) of its internal rules, to charge 'reasonable' prices and Article 10(1)(d) of the statutes provides that members may be expelled if they infringe the internal rules. FNK has confirmed that the published recommended rates (applicable to dealings with clients) gave substance to the concept of reasonable rates in Article 3(b) of its internal rules (paragraph 17 of FNK's notification). It must be accepted that the same applies to the internal rates (applicable to hirings between FNK members) determined within FNK, normally on a regional basis (see paragraph 167 below). It is difficult to imagine that FNK would have agreed to cooperate in the fixing of internal rates which were not reasonable rates within the meaning of Article 3(b) of the internal rules. Having regard to the fact that the recommended and internal rates give substance to the concept of reasonable rates which FNK members are required to charge under Article 3(b) of FNK's internal rules, the system of recommended and internal prices therefore was in fact a pricing system binding its members.

160 That finding is also borne out by the fact that, as the applicants themselves concede, FNK's system of rates was set up to remedy instability in the market which had resulted in a large number of insolvencies. In addition, various sets of minutes of meetings held by FNK's regions, submitted to the Court in response to the measure of organization of procedure ordered by it (see paragraph 31 above), stress the binding nature of FNK's recommended and internal rates. Thus, one of the participants at the meeting of the Noord Holland Region of 17 February 1981 stated 'that FNK membership has the disadvantage that you are obliged to charge an agreed rate' (point 4 of the minutes). It is likewise apparent from the minutes of the meeting of the Noord Holland Region of 22 February 1982 (point 6) that failure to adhere to the recommended rates would be treated as a breach of FNK's internal rules. One of the participants at that meeting added that 'provision should

be made for penalizing such breaches of the rules by the imposition of a fine' (see, to the same effect, the minutes of the meeting of the Oost Nederland Region of 16 April 1986, point 3).

161 Although there is no actual known case of a penalty having been imposed on a member for failure to comply with the understanding on prices, adherence to the rates was nevertheless monitored. It is clear from the minutes of meetings of FNK's regions that FNK members were brought into line. For example, the minutes of the meeting of the West Brabant/Zeeland Region of 8 December 1980 (point 6) report the following exchange after Mr Van Haarlem had failed to adhere to the agreed rates: 'The region disapproves of Mr Van Haarlem's action and Mr Van Haarlem acknowledges that it would have been preferable if it had not occurred' (see also the minutes of the meeting of the West Brabant/Zeeland Region of 21 February 1980, point 7).

162 Moreover, the very reason for which FNK gave its support to the formulation of internal rates (see paragraphs 165 to 170 below) was to ensure that its members adhered to its recommended rates. A crane-hire firm which reduces prices significantly will attract strong demand from clients and will be obliged to hire extra cranes from its competitors. The interest in setting internal rates thus followed from the fact that a crane-hire firm will necessarily take those rates into account when it sets its price with a client, in order to avoid any loss on extra cranes which it may hire (see, for example, the minutes of the meeting of the Noord Holland Region of 22 February 1982, point 6: 'It is good to have mutually agreed internal rates, because those rates will all the same have some effect on the rates charged to clients. If you in fact know that a crane can be hired from a fellow crane-hire firm only at a specified rate, you are doubly careful in offering clients prices substantially lower than those internal rates' (see, to the same effect, the minutes of the meeting of the West Brabant/Zeeland Region of 5 October 1987, point 4; the minutes of the meeting of the Oost Nederland Region of 10 October 1989, point 6; the minutes of the meeting of the Midden Nederland Region of 21 February 1990,

point 4; the minutes of the meeting of FNK members using tracked cranes, of 24 August 1989, point 2). Thus, to repeat the words used by Mr De Blank, FNK's director, the internal rates had an 'educational function' (minutes of the meeting of the West Brabant/Zeeland Region of 30 May 1988, point 3).

163 Furthermore, according to the documents in the case, FNK's system of rates had the object of increasing market rates. FNK itself stated in its notification that its recommended rates were higher than the market price (paragraph 18 of the notification). The setting of internal rates on the basis of the recommended prices had an effect in itself, namely an increase in the prices charged in dealings with clients (minutes of the meeting of the Zuid-Holland Region of 9 October 1990, point 7: the internal rates have an 'upward force in relation to market prices'; minutes of the meeting of the Noord Holland Region of 11 February 1987, point 5: 'Mr De Blank observes that the Noord Region has seen intense cooperation on rates. Initially in groups and then jointly with the three province-regions. That has certainly borne fruit'; minutes of the meeting of the Midden Nederland Region of 28 February 1991, point 4; minutes of the meeting of FNK members using tracked cranes, of 12 November 1991, point 3: 'There is the impression that the market rates also are increasing because of the agreements on internal rates'.

164 It follows from the above that the system of recommended and internal rates was a system of imposed prices which enabled FNK's members, even if some of them did not always adhere to the prices set, to predict with a reasonable degree of certainty the pricing policy pursued by the other members of the association. In addition, it has been established that it had the object of increasing market prices. The Commission was therefore right in finding that that system restricted competition for the purposes of Article 85(1) of the Treaty (*Vereniging van Cementhandelaren* v *Commission*, paragraphs 19 and 21, and *Verband der Sachversicherer* v *Commission*, paragraph 41).

(b) FNK's responsibility in the setting of internal rates

165 The applicants take the view that FNK cannot be held responsible for the formulation of the internal rates. Its role in setting them never went beyond ancillary secretarial duties. They were formulated at a local or regional level.

166 In that regard, it should be noted that, for certain categories of cranes, namely cranes of more than 150 tonnes and tracked cranes, internal rates were set at national level. It is clear from the minutes submitted to the Court that the internal rates were set in meetings at which all the FNK members which used such cranes were represented (see the minutes of the meeting of firms using tracked cranes, of 15 February 1979, point 4). The meetings were generally held at FNK's headquarters, in the presence of its director Mr De Blank, and the minutes were drafted on FNK headed paper.

167 The setting of internal rates at national level was the exception rather than the rule. However, FNK's management clearly would have wished internal rates for other cranes to be set at national level as well (see the minutes of the meeting of the Noord Holland Region of 4 September 1989, point 5: 'What the management would like best is for a single internal rate for the whole country to be achieved'). For practical reasons, however, national internal rates could be laid down only for cranes of more than 150 tonnes and for tracked cranes. FNK's management thus considered: '... the number of firms which use cranes of between 100 and 150 tonnes is too large for agreements to be reached at national level. The management thus decided that it was also necessary to draw up agreements for those cranes within the regions ...' (minutes of the meeting of the West Brabant/Zeeland Region of 15 October 1990, point 7; see also the minutes of the meetings of firms using hydraulic cranes of more than 150 tonnes, of 25 September 1990, point 6, and of 26 November 1991, point 6).

168 It follows that FNK itself decided whether an internal rate was to be set at national or at regional level.

169 As regards, next, FNK's involvement in the formulation of regional internal rates, it should be noted that, under the very terms of FNK's statutes, the regions are divisions of FNK (Article 16 of the statutes), that the minutes of the regions' meetings were drafted on FNK headed paper and that Mr De Blank, the director of FNK, took part in all the meetings of the regions for which the Court has received the minutes and at which internal rates were discussed. Furthermore, on a number of occasions during regional meetings, Mr De Blank informed the members of the region concerned of the internal rates laid down in other regions (see, for example, the minutes of meeting of the West Brabant/Zeeland Region of 4 March 1991, point 5; the minutes of the meeting of the Midden Nederland Region of 28 February 1991, point 4; the minutes of the meeting of the Noord Holland Region of 24 September 1990, point 7; the minutes of the meeting of the Noord Nederland Region of 26 September 1988, point 5). It thus played an active role in the setting of internal rates in certain regions. In addition, it is clear from the minutes of the meeting of the Midden Nederland Region of 28 February 1991 (point 4) that a circular from FNK relating to internal rates led in some cases to an increase in prices.

170 It follows from the above findings that FNK was actively involved in the formulation of internal rates, irrespective of whether they were set for the whole country or for one region or certain regions. Even though FNK as an association did not set the rates unilaterally but recorded the internal rates agreed between the cranehire firms at their meetings (minutes of the meeting of the management of FNK of 4 April 1990, point 8), the laying down of internal rates within a region or at a national level none the less corresponded to FNK's resolve to coordinate the conduct of its members on the market (*Verband der Sachversicherer* v *Commission*, paragraph 32).

171 Accordingly, the Commission did not commit an error of assessment in finding in Article 1 of the contested decision that FNK was responsible for the system of internal rates.

172 It follows from all the foregoing considerations that the third part of the second plea must also be rejected.

The fourth part of the plea, alleging that the Commission erred in its assessment of the effect on trade between Member States

— Summary of the arguments of the parties

173 The applicants submit that the practices complained of in Articles 1 and 3 of the contested decision are not capable of affecting trade between Member States (Case 22/79 *Greenwich Film Production* v *SACEM* [1979] ECR 3275, paragraph 11, and Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 222). According to them, the mobile crane-hire market is confined to the Netherlands because of limited market mobility and the phenomenon of overnight contracting, so that inter-State trade cannot be appreciably affected (Case 22/78 *Hugin* v *Commission* [1979] ECR 1869). The fact that the complainants include two undertakings established in another Member State is not sufficient proof that inter-State trade may be affected by the practices at issue. As regards SCK in particular, its certification system is open to firms from other Member States on a non-discriminatory basis, provided that they satisfy the system's requirements. The system, through its openness, thus encourages foreign firms to enter the Netherlands market. As regards FNK, it was involved only indirectly with the drawing up of internal rates, which applied solely at a local or regional level. Moreover,

those rates were of interest only to the firms which had formulated them. They therefore had no effect on inter-State trade in the mobile crane sector.

174 The Commission states in response that, even if mobile cranes can be moved only within a radius of 50 kilometres, it was entirely possible for trade between Member States to be affected in the Belgian and German frontier regions. The fact that the complainants include two Belgian undertakings shows that the market in question is not confined to the Netherlands.

— Findings of the Court

175 According to settled case-law, in order that an agreement, decision or concerted practice may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as to give rise to the fear that the achievement of a single market between Member States might be impeded (see Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 170, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 20).

176 The applicants are wrong in contending that inter-State trade cannot be affected by the practices which are the subject of the contested decision simply because, in the mobile crane-hire sector, any trade between Member States is precluded.

177 It is common ground that mobile cranes have an operating radius of roughly 50 kilometres. Inter-State trade can therefore develop in the frontier regions of the

Netherlands. That conclusion is borne out by the fact that two Belgian businesses located near the Netherlands border are among the undertakings which submitted a complaint to the Commission against SCK and FNK. It would be surprising if they took such a step if they had no possibility of entering the Netherlands market.

178 The other matters relied on by the applicants do not call into question the possibility of inter-State trade, but are intended to prove that the prohibition on hiring and the system of recommended and internal rates cannot have an appreciable effect on such trade.

179 In that regard, it should be borne in mind that practices restricting competition which extend over the whole territory of a Member State have, by their very nature, the effect of reinforcing compartmentalization of national markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about (*Vereniging van Cementhandelaren* v *Commission*, cited above, paragraph 29, *Remia and Others* v *Commission*, cited above, paragraph 22, and Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 229).

180 In this case, it is not disputed that SCK's prohibition on hiring and FNK's recommended rates apply to the whole of the Netherlands. The same is true of certain internal rates (see paragraph 166 above). Those practices, which restrict competition (see paragraphs 141 to 150 and 157 to 164 above), thus affect inter-State trade by their very nature. Furthermore, SCK itself acknowledged in its notification for the purpose of obtaining negative clearance or an exemption pursuant to Article 85(3) of the Treaty (see paragraph 7 above) that the rules on the certification of crane-hire firms could have a negative effect on trade between Member States (paragraph 4.3 of the notification).

181 As to the question whether the practices referred to in Articles 1 and 3 of the contested decision are capable of having an appreciable effect on inter-State trade, although the parties do not agree on the exact market share held by FNK's members and the firms certified by SCK, the applicants themselves have acknowledged that in 1991 the firms certified by SCK accounted for 37%, and FNK's members for roughly 40%, of the Netherlands mobile crane-hire market. Even if the market share of the firms certified by SCK and of FNK's members was 'only' 37% or 40% of the Netherlands market, the applicants were large enough and had sufficient economic power for their practices, to which the contested decision relates (including the prohibition on hiring and the recommended rates which applied to the whole of the Netherlands), to be capable of having an appreciable effect on trade between Member States (Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 10).

182 It follows from the above that the fourth part of the second plea must be rejected.

183 It follows from all of the above that the plea relating to infringement of Article 85(1) of the Treaty must be rejected in its entirety.

The third plea: infringement of Article 85(3) of the Treaty

Summary of the arguments of the parties

184 The applicants argue in the alternative that, by not declaring Article 85(1) of the Treaty inapplicable in this case, the Commission infringed Article 85(3), because SCK's certification system, the publication of recommended rates and of cost

estimates, and the setting of internal rates satisfied all the requirements of Article 85(3).

— Refusal by the Commission to exempt SCK's prohibition on hiring

185 The applicants submit that the certification system improves the position of mobile crane-hire firms in that it helps to create a transparent market in which firms comply with quality requirements exceeding the statutory requirements. That added value of the certification system (see paragraph 128 above), backed up by a much more active monitoring policy than the statutory monitoring, ultimately benefits clients. Since clients are represented within SCK, it is also clear that consumers are allowed a fair share of the resulting benefit. For the reasons already given (see paragraph 126 above), the prohibition on hiring is the only means of safeguarding the operation of the certification system in the particular circumstances of the market at issue, so that any restriction of competition is necessary in order to achieve the objective of implementing a certification system. The certification system does not eliminate competition but strengthens it, in that it permits keen competition between certified firms on price and other conditions, ensuring a high level of quality in a transparent market and, at the same time, not affecting the opportunity for competition between certified and uncertified firms.

186 The Commission states in response that paragraph 37 of the contested decision shows that two of the four conditions laid down in Article 85(3) of the Treaty were not met. As regards the condition requiring a contribution to the improvement of production or distribution, it has not been established that the certification system has an added value. In any event, the restrictions imposed on affiliated firms and the resulting disadvantages for non-affiliated firms clearly outweighed

any advantages. The Commission considers in fact that most of the conditions for certification of a crane-hire firm are statutory requirements monitored by several bodies. It also denies that, operationally, SCK adopts a more active monitoring policy than that pursued by Keboma. As regards the condition requiring that the restrictions imposed in order to attain the objectives of SCK's certification system be indispensable, the Commission relies on the arguments set out in paragraph 130 above to show that a prohibition on hiring was not indispensable.

— Refusal by the Commission to exempt the system of recommended and internal rates

187 The applicants take the view that the publication of recommended rates and cost estimates also complies with the conditions in Article 85(3) of the Treaty. It has thus been recognized in the Commission's decision-making practice (see Commission Decision 93/174/EEC of 24 February 1993 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.494 — Tariff structures in the combined transport of goods) (OJ 1993 L 73, p. 38) and Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ 1992 L 398, p. 7)) that the existence of a tariff structure contributes to transparency of the market and economic progress in the sector concerned inasmuch as consumers can make a better comparison of the undertakings operating in it. Consumers therefore obtain a fair share of that benefit. Such transparency of the market can be achieved only by the publication of those rates, so that any resulting restriction of competition is indispensable. Finally, publication does not lead to the elimination of a substantial part of competition, because the published rates are not mandatory, allowing the operators in the market to depart from them and, therefore, to compete with one another.

188 The internal rates must also be exempted under Article 85(3) of the Treaty. The situation of firms hiring out mobile cranes is comparable to that of banks

inasmuch as they regularly enter into bilateral relations with each other by such hiring. Since the Commission has declared Article 85(1) of the Treaty inapplicable to a tariff agreement entered into by banks in relation to services which they provide on a reciprocal basis (Commission Decision 87/103/EEC of 12 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.356 — ABI) (OJ 1987 L 43, p. 51)), equal treatment must be accorded to the applicants as regards the setting of internal rates. Those rates improve production and increase efficiency because they avoid price negotiations each time that crane-hire firms hire a crane from another certified firm. That gain in efficiency also benefits clients, so that a fair share of the benefit reverts to consumers. In so far as those rates create restrictions of competition, the restrictions are indispensable in order to attain that gain in efficiency. Finally, competition is not eliminated to a substantial extent because, on any specific transaction, any party who was involved in the formulation of the internal rates may always charge a different price or not enter into the transaction.

189 The Commission refers to paragraph 34 of the contested decision. It adds that FNK cannot rely on Decision 93/174 because the particular features of that case are lacking in this case. The recommended rates concern the total price and not one or other element of it and the need for transparency in the mobile crane-hire market is not as great as in the market at issue in that decision. Nor, finally, can FNK rely on the decision regarding inter-bank charges to prove that the internal rates are indispensable. The situation of the mobile crane-hire firms differs from that of the banks in a number of respects: banks are required to work in partnership because they have to cooperate with the bank chosen by their client to carry out a transfer, while mobile crane-hire firms themselves choose their subcontractors; banks are confronted with a number of much more significant transactions; finally, the internal rates are coupled with recommended rates applicable to clients, while the Commission, in Decision 87/103, did not authorize concerted action by banks on the rates charged to their customers.

Findings of the Court

190 It is settled case-law that the review undertaken by the Court of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, is necessarily limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62, *CB and Europay* v *Commission*, cited above, paragraph 109, Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104, and *SPO and Others* v *Commission*, cited above, paragraph 288).

191 In this case the Commission's refusal to exempt the rules and statutes of FNK and SCK respectively is based on the finding that two of the four conditions laid down in Article 85(3) of the Treaty are not satisfied. Since the four conditions for obtaining an exemption under Article 85(3) are cumulative (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 61, and *SPO and Others* v *Commission*, cited above, paragraph 267), the Commission was not in fact required to consider each of them.

— Refusal by the Commission to exempt SCK's prohibition on hiring

192 It is clear from paragraph 37 of the contested decision that the Commission rejected the application for exemption of SCK's certification system, and in particular of the prohibition on hiring, after finding that the first and the third conditions of Article 85(3) of the Treaty were not satisfied. It considered that SCK's certification system did not provide real added value, either substantively or in its operation, compared with the statutory requirements. The system accordingly did

not contribute to improving production or promoting technical or economic progress (the first condition in Article 85(3)). Moreover, even if the certification system yielded advantages which outweighed the resulting disadvantages for uncertified firms, the prohibition on hiring was not indispensable for the operation of that system (the third condition in Article 85(3)).

193 The applicants consider that the Commission infringed Article 85(3). In their view, SCK's certification system has sufficient added value to justify the restriction on competition alleged to result from the prohibition on hiring. First, SCK pursues a more active monitoring policy in relation to the statutory requirements than Keboma, the public body responsible for the inspection of cranes in the Netherlands and, secondly, SCK's certification system imposes requirements, relating both to technical matters and to the management of the firm, which go beyond the statutory requirements.

194 As regards, first, the allegedly more effective monitoring of the statutory requirements carried out by SCK (the alleged operational added value), it must be borne in mind that it is in principle the task of public authorities and not of private bodies to ensure that statutory requirements are complied with (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 118). An exception to that rule may be allowed where the public authorities have, of their own will, decided to entrust the monitoring of compliance with statutory requirements to a private body. In this case, however, SCK set up a monitoring system parallel to the monitoring carried out by the public authorities without there being any transfer to SCK of the monitoring powers exercised by the public authorities. Furthermore, the statement in the second subparagraph of paragraph 37 of the contested decision that 'firms which do not participate in the SCK certification system can likewise demonstrate that they meet the statutory requirements' is not seriously disputed by the applicants. Thus, it has not shown that there were gaps in the monitoring of the statutory requirements carried out by the public authorities which could have made it necessary to set up a private monitoring system. Even if it were shown that the monitoring of the statutory requirements carried out by SCK is more effective than that of the Netherlands public authorities, the applicants still have not in any way proved that the statutory monitoring system was insufficient. It should be noted that SCK, which was set up in 1985, did not insert the clause providing for

the prohibition on hiring into its rules on certification until 1 January 1991. In reply to a question put by the Court at the hearing, counsel for the applicants conceded that, before the introduction of the prohibition on hiring, not a single complaint had been made to SCK by clients regarding the use, by a certified firm, of cranes — which would necessarily have been inspected by the public authorities only — hired from uncertified firms. That being so, the Commission was entitled to take the view that 'the restrictions imposed on affiliated firms and the disadvantages which result for non-affiliated firms clearly outweigh any advantages claimed by SCK' (second subparagraph of paragraph 37 of the contested decision). Accordingly, the Commission's assessment to the effect that the added value claimed for the operation of the certification system did not satisfy the first condition in Article 85(3) of the Treaty was in any event not vitiated by a manifest error.

195 As regards, next, the substantive added value claimed for SCK's certification system and said to result from the imposition by the system in question of conditions, relating both to technical matters and to the management of the firm, going beyond the statutory requirements, the Commission found in the contested decision: 'It has not been established that the SCK certification system does provide real added value over and above the statutory rules applicable. The requirements imposed on the affiliated firms are virtually identical to the statutory ones ...' (first subparagraph of paragraph 37). The Commission thus stated that the majority of the safety requirements imposed by SCK were already imposed by Netherlands law. The same applied to 'most of the non-safety-related requirements which SCK imposes, such as those relating to the payment of tax and social security contributions, registration with the Chamber of Commerce, third-party insurance, creditworthiness and application of the collective labour agreements' (third subparagraph of paragraph 37). The Commission added that 'SCK goes beyond statute law by imposing requirements regarding the manner of conducting business, but that alone is insufficient to justify the restrictions of competition imposed' (end of the third subparagraph of paragraph 37).

196 The lawfulness of a decision refusing an exemption must be assessed in the light of the matters relied upon by the parties in the notification, as clarified in the course

of the administrative procedure (see, for example, Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraphs 39, 40 and 41).

197 In its notification SCK explained that the certification system imposed three kinds of obligation on firms: first, requirements relating to mobile cranes, secondly, general requirements relating to the firm and, thirdly, requirements relating to the firm's staff.

198 As for the first group of requirements, which correspond to the 'safety requirements' mentioned in the contested decision, SCK expressly states in its notification that those obligations 'also apply by virtue of national law' (paragraph 26 of the notification). It adds that the same applies to the requirements relating to the firm's staff. It explains: '... in issue are ... requirements which are already imposed by law. SCK seeks merely to ensure that certified firms can demonstrate that they satisfy those statutory obligations' (paragraph 28 of the notification).

199 As to the general obligations relating to the firm, SCK explains in its notification: '[they] relate to fiscal requirements, insurance requirements and solvency. Here also, the requirements are already largely imposed on the firms by national legislation, certification providing a further safeguard that those statutory requirements are actually complied with. That applies in particular to the requirements relating to the payment of tax and to registration with the Chamber of Commerce and to the obligation to be insured' (paragraph 27 of the notification). In its notification SCK mentions only three non-statutory requirements for certified firms: a solvency and minimum liquidity requirement, an obligation (since withdrawn) to apply FNK's general conditions and an obligation to take out third-party insurance.

200 As regards the added value claimed for the certification system in question, SCK concentrated in its notification on the need for increased monitoring of the existing

statutory requirements (operational added value) rather than on substantive added value. With regard to substantive added value, the Commission faithfully took up in the contested decision (see paragraph 195 above) the argument which SCK had put forward in its notification (see paragraphs 198 and 199 above), namely that the requirements imposed by its certification system roughly corresponded to the statutory requirements in force. In principle, such a finding should be sufficient to reject the claim that the Commission committed a manifest error of assessment in finding that SCK's certification system did not provide real substantive added value compared with the statutory requirements.

201 In the course of the administrative procedure, however, the applicants gave greater weight to the substantive added value claimed for the system. Thus, in their reply to the statement of objections of 16 December 1992, they contended, by reference to a table forming Annex 3 to that reply, that the certification system imposed a number of safety and performance requirements not laid down by Netherlands law (paragraph 9 of the reply). In their reply to the statement of objections of 21 October 1994, they referred to the same table in order to demonstrate that there was substantive added value (paragraph 32 of the reply; Annex 19 to the application). That table lists the conditions imposed by the certification system and indicates whether each is statutory or non-statutory. A similar explanation was set out in paragraphs 101 to 118 of the application to the Court.

202 In truth, it is difficult to reconcile the argument put forward by the applicants in their replies to the statements of objections and in their application to the Court with the description of the requirements of the certification system given by SCK in its notification (paragraphs 26, 27 and 28 of the notification; see paragraphs 198 and 199 above). The added value of a certification system does not derive merely from the fact that it imposes obligations not laid down by law. SCK's certification system could have real added value only if the conditions imposed by it were appropriate for the purpose of attaining the objective pursued, which is to guarantee clients increased safety (see, in that regard, paragraphs 80 to 87 of the application). The applicants have failed to explain why and to what extent the non-statutory conditions were appropriate for attaining the objective pursued.

Therefore, by concentrating, during the administrative procedure and in their reply, solely on proving that a number of requirements of the certification system were non-statutory, on the assumption that the system provides substantive added value in that way, they have not succeeded in proving that the Commission committed a manifest error of assessment in finding, first, that 'it has not been established that the SCK certification system does provide real added value over and above the statutory rules applicable' (first subparagraph of paragraph 37 of the contested decision) and, secondly, that the few non-statutory conditions imposed are not sufficient 'to justify the restrictions of competition imposed' (end of the third subparagraph of paragraph 37).

203 It follows that the applicants have not proved that the Commission's assessment to the effect that SCK's certification system and the prohibition on hiring associated with it do not satisfy the first of the four conditions set out in Article 85(3) of the Treaty is vitiated by a manifest error (see, for example, *Van Landewyck and Others* v *Commission*, cited above, paragraph 185). Since the four conditions for granting an exemption under Article 85(3) are cumulative, there is no need to consider whether the Commission manifestly erred in its assessment of the question whether or not the prohibition on hiring was indispensable under SCK's certification system (see, for example, the order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 48, and the judgment in *CB and Europay* v *Commission*, cited above, paragraphs 110 and 115).

204 The plea alleging infringement of Article 85(3) of the Treaty must accordingly be rejected in so far as it concerns the prohibition on hiring.

— Refusal by the Commission to exempt the system of recommended and internal rates

205 The Commission based its refusal to exempt FNK's system of recommended and internal rates on the finding that the first two conditions in Article 85(3) of the

Treaty were not satisfied. It thus found in paragraph 34 of the contested decision: 'It has not been established that the obligation to apply "reasonable" rates, irrespective of the alleged aim of increasing transparency on the market, contributes to improving the crane-hire business and that consumers, in this case the firms which hire cranes, enjoy a fair share of the resulting benefit. On the contrary, according to [an] independent sectoral survey ..., the recommended and internal rates applied, which were fixed by FNK in order to spell out what is meant by "reasonable" rates, were generally above the market rates. The authors of the survey saw part of the explanation in the fact that "on the market one has to deal with competition".'

206 It is settled case-law that, where an exemption is sought under Article 85(3) of the Treaty, it is incumbent upon the notifying undertakings to provide the Commission with evidence that the four conditions laid down in that provision are met (*VBVB and VBBB* v *Commission*, cited above, paragraph 52, and *Matra Hachette* v *Commission*, cited above, paragraph 104).

207 As regards, first, the internal rates, in the section of its notification relating to Article 85 of the Treaty FNK claimed solely that those rates did not eliminate competition (paragraph 25 of the notification). Likewise, in their replies to the statements of objections of 16 December 1992 and 21 October 1994, the applicants did not adduce any new evidence enabling the internal rates to be assessed with regard to Article 85(3). While the applicants adopted an approach during the administrative procedure which was perfectly in harmony with their analysis to the effect that FNK had nothing to do with the setting of the internal rates (paragraph 19 of FNK's notification), they did not submit to the Commission any evidence to prove that, as regards the system of internal rates, the first three conditions in Article 85(3) were satisfied. They cannot therefore claim that the Commission committed a manifest error of assessment in finding that 'it [had] not been established' (paragraph 34 of the contested decision) that the system of internal rates satisfied the first two conditions in Article 85(3).

208 As for FNK's recommended rates, the applicants have claimed in the procedure before the Court that such a system increases market transparency. Users, that is to say their members' clients, benefit from that transparency, which simplifies the comparisons which they may make between competing offers. The applicants consider that the two other conditions in Article 85(3) are also satisfied, since the restrictions of competition are indispensable to the attainment of those objectives and a substantial part of competition is not eliminated.

209 Although FNK did not seek in its notification to justify the grant of an exemption by claiming that the transparency of the market was improved, the applicants nevertheless used that argument in the administrative procedure, and particularly in their reply to the statement of objections of 21 October 1994 (paragraph 28 of that reply).

210 An increase in market transparency is in fact inherent in any system of recommended rates set and published by an association which represents a significant proportion of undertakings operating in a given market. Accordingly, demonstrating an increase in market transparency linked to a system of recommended rates is not sufficient proof that the first condition in Article 85(3) is satisfied. Besides, the applicants' line of argument and the Commission's assessment of the recommended rates in paragraph 34 of the contested decision operate on different planes. The Commission never contended that the system of recommended rates did not increase the transparency of the market. It merely considered that 'irrespective of the alleged aim of increasing transparency on the market', the first two conditions in Article 85(3) were not satisfied. In the contested decision, it rightly considered that FNK's members were obliged to adhere to the recommended rates (see paragraphs 159 to 164 above) because those rates gave substance to the concept of the reasonable rate which FNK's members were required to charge under Article 3(b) of its internal rules (paragraph 20 of the contested decision). In addition, it is not disputed that those rates were indeed higher than the market rates (paragraph 34 of the contested decision and paragraph 18 of FNK's notification).

211 The Commission, therefore, after finding that FNK's rates were mandatory and, moreover, higher than market prices, held in paragraph 34 of the contested decision that even if the system increased transparency — a point on which it did not have to rule — the possible advantages of the system, namely the increased transparency of the market, could not outweigh the harm to competition associated with mandatory prices and, in particular, the unquestionable disadvantage resulting from the system's object of increasing prices in relation to market prices. Accordingly, the applicants, who in their application stated merely that the advantage of the system of recommended rates was that it increased the transparency of the market, have not demonstrated that the Commission committed a manifest error of assessment in finding that, 'irrespective of the alleged aim of increasing transparency' (paragraph 34 of the contested decision), the first two conditions in Article 85 of the Treaty were not satisfied.

212 It follows from the above that the third plea, that Article 85(3) of the Treaty was infringed, must be rejected in its entirety.

The fourth plea: infringement of the rights of the defence

Summary of the arguments of the parties

213 There are three parts to this plea.

214 In the first part, the applicants submit that the Commission failed to comply with the requirement imposed by Article 6 of the European Convention on Human Rights to come to a decision within a reasonable time. They submit that the Commission deliberately caused the administrative procedure to last a long time, since it has acknowledged that it did not regard the case as a priority because it was also pending before the Netherlands court and because the infringements had ceased

once the Arrondissementsrechtbank, Utrecht, made its order of 11 February 1992. That state of affairs changed only after delivery by the Gerechtshof, Amsterdam, of the judgment of 9 July 1992 which allowed SCK to reintroduce the prohibition on hiring. The applicants also point out that, in the course of the administrative procedure, the Commission sent them two statements of objections. The second statement, served 22 months after the first, did not contain any change in the Commission's assessment of the facts and the application of the law to those facts. Such slowness in the decision-making process, when the applicants had emphasized the urgency of the matter in October 1994 by waiving their right to a hearing, constitutes a serious abuse of procedure.

215 In the second part of the plea the applicants submit that the Commission infringed the same article of the European Convention on Human Rights by adopting a decision under Article 15(6) of Regulation No 17 without an oral hearing.

216 Finally, in the third part of the plea, they submit that the Commission infringed their rights of defence by refusing to let them examine the file (see paragraph 24 above). The Commission cannot claim that they waived their right of access to the file because they failed to invoke it before replying to the statement of objections (see the 12th Report on Competition Policy). Furthermore, the position taken by the Commission is unreasonable, because it deprives the party concerned of the opportunity to prepare his defence to best advantage when the Commission's decision is reviewed by the Court, without it being clear what interest of the Commission is served by this. Finally, the applicants do not seek access only to the 'file' but also to the internal memoranda exchanged in this case by DG III and DG IV from 18 November 1993 to 27 September 1994 (see paragraph 28 above). Although, in principle, such memoranda are not open to inspection, the applicants claim that an exception is justified, because those memoranda could help to establish whether there has been a misuse of powers in this case (Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, at pp. II-869 and II-891).

217 In responding to the first part of the plea, the Commission refers to its defence in Case T-213/95. As regards the second part of the plea, its response is that, since there is no legislation requiring the undertakings or associations concerned to be given an oral hearing and there were no specific circumstances which meant that in this case the rights of the defence could in fact be safeguarded only by a hearing, it was not in any way required to seek the applicants' views at a hearing, having previously sought them in writing. As for the third part of the plea, it points out that, according to the case-law, the purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence (see Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 59). Since the applicants did not take advantage of the opportunity to examine the Commission's file after service of the statement of objections, there is no longer any reason to let them see the file at a subsequent stage in the procedure, and certainly not after the adoption of the contested decision.

Findings of the Court

218 The applicants have already put forward, in Case T-213/95, the first part of this plea, alleging a failure to comply with the requirement imposed by Article 6 of the European Convention on Human Rights to come to a decision within a reasonable time. That part of the plea must be rejected for the reasons set out in paragraphs 53 to 70 above.

219 As for the second part, to the effect that the applicants should have been given a hearing before the Commission adopted its decision of 13 April 1994 under Article 15(6) of Regulation No 17, it should be noted that even if Community law had required the Commission to give the parties concerned an oral hearing before the adoption of such a decision, the failure to comply with that obligation would have affected the legality of the Commission's decision of 13 April 1994 only, and not that of the contested decision, that being the only measure whose legality is under review in this case. It is not disputed that, in their reply to the statement of

objections of 21 October 1994, the applicants waived their right to a hearing before the adoption of the contested decision. The second part of the plea must also therefore be rejected.

220 As regards the final part of the plea, to the effect that the Commission refused the applicants access to the file, it will be observed that they did not request access until after the contested decision had been adopted. Consequently, the legality of the contested decision cannot in any circumstances be affected by the Commission's refusal to grant the requested access (see Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraph 30). Moreover, the applicants have not adduced any evidence to show that the file might contain information exonerating them. Nor have they contended that they have not had access to all the documentary evidence against them. They likewise do not claim, with regard to the exchange of views between DG III and DG IV, that those internal memoranda, which in principle are not available to third parties (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54, and Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 25), could exonerate them. They contend that those memoranda could help to establish whether there was a misuse of powers in this case. In their application, they did not even think it necessary to set out a plea based on misuse of powers in order to prove that the contested decision was unlawful.

221 Accordingly, the third part of the plea must also be rejected.

222 For the same reasons, the applicants' request of 9 July 1996 for measures of inquiry or measures of organization of procedure to be adopted (see paragraph 28 above) cannot be granted.

223 It follows that the fourth plea, that the rights of the defence were infringed, must be rejected in its entirety.

The fifth plea: infringement of Article 190 of the Treaty

Summary of the arguments of the parties

224 The applicants contend that the Commission infringed Article 190 of the Treaty. In this case, it was under a duty to give a fuller statement of reasons because it was faced for the first time with the question whether a certification system complied with the Community rules on competition. It also failed to take account of the comments made by the applicants in the course of the administrative procedure. The applicants consider in particular that the Commission's reasoning was inadequate on the following points: the classification of SCK as an undertaking within the meaning of Article 85(1) of the Treaty and the finding that the practices of SCK and FNK which were under investigation restricted competition and affected trade between Member States.

225 The Commission has not responded specifically to this plea.

Findings of the Court

226 According to settled case-law, the purpose of the statement of the reasons on which an individual decision is based is to give the person concerned sufficient information to enable it to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the legality of the decision. The extent of that obligation depends on the nature of the measure in question and on the context in which it was adopted (see, in particular, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, and Case T-504/93 *Tiercé Ladbroke* v *Commission* [1997] ECR II-923, paragraph 149). Accordingly, the Commission must explain its reasoning when it adopts a decision

which goes appreciably further than its previous decisions (Case 73/74 *Papier Peints* v *Commission* [1975] ECR 1491, paragraph 31).

227 As regards, first, the alleged need for a fuller statement of reasons in this case, it must be stated that although the Commission ruled, in the operative part of the contested decision, only on the prohibition on hiring and the system of recommended and internal rates, it nevertheless set out the criteria to be met by a certification system — openness, independence, transparency and acceptance of equivalent guarantees offered by other systems — in order for it to be regarded as compatible with Article 85(1) of the Treaty (paragraph 23 of the contested decision). The applicants cannot claim in relation to the infringements referred to in the operative part of the contested decision (the prohibition on hiring and the system of recommended and internal rates) that the decision goes appreciably further than the Commission's previous decisions. In any event, the Commission explained in detail in the contested decision why the system of recommended and internal rates and the prohibition on hiring constituted infringements of Article 85(1) of the Treaty (paragraphs 20 to 31 of the contested decision) and why those practices could not be exempted under Article 85(3) (paragraphs 32 to 39). It also gave sufficient explanation of the reasons for which it considered SCK to be an undertaking within the meaning of Article 85(1) (paragraph 17).

228 As to the argument that the Commission should have taken account of the comments made by the applicants in the course of the administrative procedure, it should be pointed out that, although the Commission is required under Article 190 of the Treaty to set out the circumstances justifying the adoption of a decision and the legal considerations which led it to adopt that decision, that provision does not require it to discuss all the matters of fact and of law which were raised during the administrative procedure (*BAT and Reynolds* v *Commission*, cited above, paragraph 72, and *Tiercé Ladbroke* v *Commission*, cited above, paragraph 150). In addition, it is not apparent from any document in the case that the Commission failed to take account of a fundamental matter which had been raised during the administrative procedure (see *Publishers Association* v *Commission*, cited above, paragraphs 41 and 42).

229 Accordingly, the plea that Article 190 of the Treaty was infringed is unfounded.

230 It follows from all of the above that the claim for annulment of the contested decision must be rejected.

3. *Subsidiary claims for annulment or reduction of the fines*

231 The applicants put forward three pleas in support of their subsidiary claims for annulment or reduction of the fines. The first alleges infringement of Article 15(2) of Regulation No 17, the second breach of the principle of proportionality and the third infringement of Article 190 of the Treaty.

The first plea: infringement of Article 15(2) of Regulation No 17

Summary of the arguments of the parties

232 The applicants submit that the imposition of fines was not justified. In their view the finding in paragraph 44 of the contested decision that 'FNK and SCK cannot have been unaware of the fact that the offending behaviour served to restrict competition, or at any rate has that effect' is incorrect.

233 SCK cannot be deemed to be aware of the object or, at any rate, the anticompetitive effect of the prohibition on hiring because, first, the Raad voor de Certificatie recognized that that prohibition constituted the only means of preserving the coherence of the certification system and, secondly, the Commission itself recognized, in its defence in Case T-213/95, the complexity of that case, both conceptually and in terms of competition policy. In any event, the Commission has accepted previously that the fact that it has never before ruled on a particular type of infringement is a sufficient reason for not imposing fines (Decision 88/501/EEC of 26 July 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.043 — Tetra Pak I (BTG licence)) (OJ 1988 L 272, p. 27)).

234 As regards FNK's recommended rates, the applicants refer to Article 5 of Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements (OJ 1988 L 359, p. 46), to Article 1(1) of Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ 1991 L 143, p. 1) and to the judgment of the Court of Justice in Case 161/84 *Pronuptia* [1986] ECR 353, according to which merely applying recommended rates, which are not mandatory in nature, was not to be regarded as contrary to Community law. In so far as FNK may be held responsible for the formulation of the internal rates, it could reasonably have been unaware that that practice constituted an infringement of Article 85(1) of the Treaty, since the Commission had already approved, on two occasions, identical internal rates arrangements in the banking sector (Decision 87/103 and Commission Decision 89/512/EEC of 19 July 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.499 — Dutch banks) (OJ 1989 L 253, p. 1)).

235 The Commission points out that, according to settled case-law, it is not necessary for an undertaking to have been aware that it was infringing Article 85 for an infringement to be regarded as having been committed intentionally. It is sufficient

that it could not have been unaware that the contested conduct had as its object the restriction of competition (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 41). Such a situation arose in the applicants' case. FNK cannot rely on the judgment in *Pronuptia*, on Regulations No 4087/88 or No 1534/91 or on the previous decisions of the Commission in the banking sector, because they concerned optional charging arrangements whereas, in this case, the recommended and internal rates were mandatory and applied to clients.

Findings of the Court

236 According to settled case-law, the infringements of competition law which are liable to be sanctioned are those which are committed deliberately or negligently and it is sufficient for this that the party committing the act in question must have known that its conduct would result in a restriction of competition (see Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 142, and the case-law cited).

237 SCK's arguments to the effect that it was unaware that the prohibition on hiring constituted a restriction of competition cannot be accepted. First, there is no document on the file in which the Raad voor de Certificatie stated that the prohibition on hiring constituted the only means of complying with the condition as to the coherence of the certification system in Paragraph 2.5 of its accreditation criteria. Its final report of 22 April 1992, to which the applicants refer, merely states that SCK no longer complies with that paragraph, having withdrawn the prohibition on hiring following the interim order by the national court without providing for an alternative solution ('SCK, acting on the court's decision, revoked the provision in question (prohibition on hiring), but does not yet have another provision to meet the underlying objective, namely that when use is made of other firms' cranes, there is no doubt that those cranes will also meet the conditions. SCK is thus in breach of the condition set out in Paragraph 2.5 of the accreditation criteria').

238 Nor, secondly, does the Commission's recognition of the complexity of the case constitute a justification for SCK's 'unawareness'. It is in fact inconceivable that SCK could have considered that the prohibition on hiring, which limits the contractual freedom of certified firms and affects the position of uncertified firms, was not liable to result in a restriction of competition in the market and to pose problems with regard to Community competition law.

239 Thirdly, the decision by the Commission not to impose a fine in Decision 88/501 because of the relatively novel nature of the infringements found does not grant 'immunity' to undertakings committing infringements which have not previously been penalized by the Commission. The Commission exercises its discretion in the specific context of each case when deciding whether it is appropriate to impose a fine in order to sanction the infringement found and to protect the effectiveness of competition law. In that regard, the applicants must have been aware of the anti-competitive effects of a prohibition on hiring within a certification system which was not open and made no provision for the acceptance of equivalent guarantees offered by other systems.

240 As regards FNK, the system of recommended and internal rates was mandatory in nature (see paragraphs 159 to 164 above) and was concerned not only with relations between FNK members (internal rates) but also with relations between them and clients (recommended rates). Those features make this case fundamentally different from the situations analysed in *Pronuptia*, in Regulation No 4087/88, in Regulation No 1534/91 as applied by Regulation No 3932/92 and in the Commission's previous decisions in the banking sector, to which the applicants refer (see paragraph 234 above). Furthermore, the system of recommended and internal rates was intended to increase market prices (see paragraphs 163 and 164 above). FNK must, therefore, have been aware that its system of recommended and internal rates was going to result in a restriction of competition.

241 It follows that the first plea must be rejected.

The second plea: breach of the principle of proportionality

Summary of the arguments of the parties

242 The applicants submit that the factors specified by the Commission in paragraph 45 of the contested decision for the purpose of determining the amount of the fines are inappropriate. First, the amount of the fine is not proportionate to the alleged disturbance of the common crane-hire market. Next, the Commission incorrectly assumes that there are close links between SCK and FNK, which, taken together, account for only 40% of the firms operating in the market and therefore do not occupy an important part of the crane-hire market. Finally, FNK voluntarily maintained the *status quo* which had resulted from compliance with the order of 11 February 1992, despite its being set aside on appeal on 9 July 1992. Such an attitude, which would have provided grounds for not imposing any fine (Commission Decision 79/934/EEC of 5 September 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.021 — BP Kemi — DSDF) (OJ 1979 L 286, p. 32)), is in any event sufficient reason for the fine to be substantially reduced.

243 Furthermore, the fines are excessive, because FNK and SCK do not possess the financial means to pay them. In the case of SCK, the short duration of the infringement (Commission Decision 75/75/EEC of 19 December 1974 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.851 — General Motors Continental) (OJ 1975 L 29, p. 14)) and the fact that the Commission had never precisely determined the application of the competition rules to certification systems (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 163) are mitigating circumstances justifying a reduction in the fine imposed. In the case of FNK, the Commission was not entitled to take account of the turnover of its members when setting the fine, because the contested decision was addressed to the association and not to its individual members. Finally, the fact that, in the administrative procedure, the Commission took more than a reasonable time to

adopt a decision, contrary to Article 6 of the European Convention on Human Rights, should result in a reduction in the fines imposed.

244 In their observations on the statement in intervention, the applicants also refer to Commission Decision 96/438/EC of 5 June 1996 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.983 — Fenex) (OJ 1996 L 181, p. 28) in which the Commission imposed a fine of only ECU 1 000 for an infringement with features comparable to those of the infringement allegedly committed by FNK.

245 The Commission responds by stating that the applicants cannot claim that a disturbance of the Community market did not take place. The two applicants, taken together, occupy an important part of the Netherlands market. Next, the system of recommended and internal rates had existed for more than ten years when FNK ended it following the interim order of the President of the Arrondissementsrechtbank, Utrecht, of 11 February 1992. The fines are not excessive because the turnover of the applicants' respective members amounts to more than ECU 200 million. Account is taken of the relatively short duration of the infringement in the case of SCK. Finally, no infringement of Article 6 of the European Convention of Human Rights was committed.

Findings of the Court

246 According to settled case-law, the amount of a fine must be fixed at a level which takes account of the circumstances and the gravity of the infringement and, in order to fix its amount, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 92).

247 In paragraph 45 of the contested decision, the Commission assessed the gravity of the infringements for the purpose of fixing the amount of the fines to be imposed on the applicants. It noted first that FNK's system of rates and SCK's prohibition on hiring 'artificially control or restrict the Netherlands crane-hire market and thus distort the Community market in crane hire'. It then took account of the fact that the applicants, 'which are linked closely to each other, comprise a great many undertakings which occupy together an important part of the crane-hire market' and that 'the restrictions were dropped only after a court order to that effect'.

248 Since there can be no doubt as to the appropriateness of those criteria for assessing the gravity of the infringements, it is necessary to consider whether the corresponding findings are substantively correct.

249 As already stated, SCK's prohibition on hiring and FNK's system of recommended and internal rates infringed Article 85(1) of the Treaty. The prohibition on hiring, which was associated with a certification system that was not completely open and did not provide for the acceptance of equivalent guarantees offered by other systems, restricted the competitive opportunities of uncertified firms, in particular firms from outside the Netherlands. In addition, FNK's system of rates substantially restricted competition between its members. The practices of FNK and SCK at issue thus considerably disturbed the common market in crane-hire. As regards the links between FNK and SCK, they themselves state in their application 'that FNK has roughly the same number of members as SCK and that they are largely the same firms'. The Commission did not err either by finding that FNK's members and the firms certified by SCK constituted an important part of the mobile crane-hire market. It considered that FNK and SCK accounted for 78% or 51% of the Netherlands crane-hire market (paragraph 6 of the contested decision). The figure of 51% had, moreover, been put forward by the applicants themselves during the administrative procedure. In paragraph 26 of their reply to the statement of objections of 21 October 1994, the applicants, disputing the figure of 75% put forward by the Commission, stated that FNK's members together held, on 31 December 1993, 1 544 mobile cranes out of a total of approximately

3 000 in the hire sector, that is to say a market share of 51%. The applicants' argument that FNK and SCK, which group together essentially the same firms, hold 'only' 40% of the Netherlands crane-hire market must therefore be rejected. In any event a market share of 40% constitutes an important part of the Netherlands crane-hire market. Next, FNK cannot secure the annulment of the fine or a reduction in its amount by claiming that it maintained the situation resulting from compliance with the order of 11 February 1992, even though that order was set aside on appeal on 9 July 1992. Since the fine covered the period up to 6 February 1992 only (paragraph 46 of the contested decision), the fact that FNK did not apply its system of recommended and internal rates after 11 February 1992 is in fact irrelevant when assessing the gravity of an infringement in the period prior to 6 February 1992.

250 It will be recalled that the plea regarding infringement of Article 6(1) of the European Convention of Human Rights is not well founded (see paragraphs 53 to 70 above). Accordingly, the argument that the fines should be reduced on the basis of the alleged breach of the principle that action must be taken within a reasonable time cannot itself be accepted.

251 Nor can the applicants use Decision 96/348 as an argument. It is clear from that decision that the rates proposed by Fenex were no more than guidelines. What was concerned was not, therefore, a system of rates which, such as the one in point in this case, was binding on members of the association by virtue of an obligation to adhere to reasonable rates (see paragraphs 159 to 164 above). Furthermore, it is not disputed that, unlike FNK (interim order of 11 February 1992 made by the President of the Arrondissementsrechtbank, Utrecht; see paragraph 8 above), Fenex was not required by a national court or other public authority to end its practice of circulating rates. Moreover, Fenex had already voluntarily stopped circulating recommended rates before the Commission decided, on its own initiative and not following a complaint, to initiate a proceeding against it.

252 As for the argument that the amount of the fines offends against the principle of proportionality in the light of the applicants' financial means, the use of the

general term 'infringement' in Article 15(2) of Regulation No 17, inasmuch as it covers without distinction agreements, concerted practices and decisions of associations of undertakings, indicates that the upper limits for fines laid down in that provision apply in the same way to agreements and concerted practices as to decisions of associations of undertakings. It follows that the upper limit of 10% of turnover must be calculated by reference to the turnover of each of the undertakings which are parties to those agreements and concerted practices or of the undertakings, as a whole, which were members of the said associations of undertakings, at least where, by virtue of its internal rules, the association is able to bind its members. The correctness of this view is borne out by the fact that the influence which an association of undertakings has been able to exert on the market does not depend on its own 'turnover', which discloses neither its size nor its economic power, but rather on the turnover of its members, which constitutes an indication of its size and economic power (judgments in *CB and Europay* v *Commission*, cited above, paragraphs 136 and 137, and in *SPO and Others* v *Commission*, cited above, paragraph 385).

253 In this case, it is not disputed that FNK is an association of undertakings (paragraph 8 of FNK's notification). Moreover, under Article 6 of its statutes it can bind its members. The applicants therefore cannot claim that the Commission was not entitled to take account of the turnover of FNK's members when it fixed the amount of the fine to be imposed on that association.

254 As for the fine imposed on SCK, however, the Commission correctly characterized SCK as an undertaking in the contested decision (paragraph 17) and not as an association of undertakings. It was accordingly not entitled to take account of the turnover of the certified firms to justify the amount of the fine. SCK's annual accounts for 1994 show a turnover of HFL 608 231, which is the equivalent of approximately ECU 288 750. Although the Commission complied with the upper limit in Article 15(2)(a) of Regulation No 17, it is apparent that the fine of ECU 300 000 imposed on SCK, which exceeds its total turnover in the year preceding the adoption of the contested decision, is disproportionate.

255 The Court, in the exercise of its unlimited jurisdiction, accordingly considers that it is appropriate to reduce the amount of that fine to ECU 100 000.

The third plea: infringement of Article 190 of the Treaty

Summary of the arguments of the parties

256 The applicants submit that the Commission's reasoning in support of the amount of the fines is incomplete (Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, point 53, Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 612, and Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 120).

257 The Commission relies on paragraphs 45 and 46 of the contested decision.

Findings of the Court

258 The purpose of the obligation to state the reasons on which a decision adversely affecting a person is based is to provide him with the necessary information so that he may establish whether it is well founded and to enable the Community judicature to carry out its review of the legality of the decision (see the case-law cited at paragraph 226 above and Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 65).

259 In paragraph 44 of the contested decision the Commission found that the applicants could not have been unaware of the fact that the offending behaviour had served to restrict competition, or at any rate had that effect. In paragraphs 45 and 46 respectively, it appraised the gravity and the duration of the infringements for the purpose of fixing the amount of the fines to be imposed on the applicants. The latter two paragraphs provided the applicants with the information which they needed in order to establish whether or not the fines imposed on them were well founded and enabled the Court to carry out its review as to legality.

260 The third plea therefore cannot be upheld.

261 It follows from all the foregoing considerations that the claims for annulment of the fines must be rejected and that the fine imposed on SCK must be reduced.

Costs

262 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 87(3) provides that the Court may order that costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. In this case, the applicants have been unsuccessful on all their heads of claim in Case T-213/95 and on their main heads of claim and on the essential aspects of their subsidiary heads of claim in Case T-18/96. It is accordingly not appropriate to apply Article 87(3) of the Rules of Procedure. The applicants must therefore be ordered to pay the defendant's costs, including those relating to the proceedings for interim measures. They must also be ordered to pay the interveners' costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. **Joins Cases T-213/95 and T-18/96 for the purposes of the judgment;**

2. **Reduces to ECU 100 000 the fine imposed on the Stichting Certificatie Kraanverhuurbedrijf by Article 5(2) of Commission Decision 95/551/EC of 29 November 1995 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.179, 34.202, 216 — Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven);**

3. **For the rest, dismisses the applications;**

4. **Orders the applicants to bear their own costs and to pay the costs incurred by the Commission, including those relating to the proceedings for interim measures, and the interveners' costs.**

Lenaerts Lindh Azizi

Cooke Jaeger

Delivered in open court in Luxembourg on 22 October 1997.

H. Jung P. Lindh

Registrar President

Table of Contents

Background and procedure ..... II - 1749

Forms of order sought ..... II - 1757

The action for damages (Case T-213/95) ..... II - 1759

1. The allegedly unlawful conduct of the Commission ..... II - 1759

The first plea: infringement of Article 6 of the European Convention on Human Rights ..... II - 1760

Summary of the arguments of the parties ..... II - 1760

Findings of the Court ..... II - 1763

The second plea: breach of the principle of legal certainty ..... II - 1769

Summary of the arguments of the parties ..... II - 1769

Findings of the Court ..... II - 1770

The third plea: breach of the principle of the protection of legitimate expectations ... II - 1771

Summary of the arguments of the parties ..... II - 1771

Findings of the Court ..... II - 1772

The fourth plea: breach of the *audi alteram partem* rule ..... II - 1773

Summary of the arguments of the parties ..... II - 1773

Findings of the Court ..... II - 1774

2. Causal link ..... II - 1776

Summary of the arguments of the parties ..... II - 1776

Findings of the Court ..... II - 1776

The action for a declaration that the contested decision is non-existent or for its annulment (Case T-18/96) ..... II - 1778

1. Claim for a declaration that the contested decision is non-existent ..... II - 1778

Summary of the arguments of the parties ..... II - 1778

Findings of the Court ..... II - 1779

2. Claim for annulment of the contested decision ..... II - 1781

The first plea: infringement of Articles 3, 4, 6 and 9 of Regulation No 17 ..... II - 1781

Summary of the arguments of the parties ..... II - 1781

Findings of the Court ..... II - 1782

The second plea: infringement of Article 85(1) of the Treaty ..... II - 1782

The first part of the plea, to the effect that SCK was mistakenly classified as an undertaking within the meaning of Article 85(1) of the Treaty ..... II - 1783

— Summary of the arguments of the parties ..... II - 1783

— Findings of the Court ..... II - 1784

The second part of the plea, alleging that the Commission, first, erred in law with regard to the reference to the criteria of transparency, openness, independence and acceptance of equivalent guarantees offered by other systems in assessing whether a certification system is compatible with Article 85(1) of the Treaty and, secondly, erred in its assessment when it found that the prohibition on hiring had as its object or effect the restriction of competition within the meaning of Article 85(1) II - 1785

— Summary of the arguments of the parties ..... II - 1785

— Findings of the Court ..... II - 1788

The third part of the plea, alleging that the Commission committed an error of assessment in finding that the system of recommended and internal rates had as its object or effect the restriction of competition within the meaning of Article 85(1) of the Treaty ..... II - 1795

— Summary of the arguments of the parties ..... II - 1795

— Findings of the Court ..... II - 1797

(a) The system of recommended and internal rates ..... II - 1797

(b) FNK's responsibility in the setting of internal rates ..... II - 1801

The fourth part of the plea, alleging that the Commission erred in its assessment of the effect on trade between Member States ..... II - 1803

— Summary of the arguments of the parties ..... II - 1803

— Findings of the Court ..... II - 1804

The third plea: infringement of Article 85(3) of the Treaty ..... II - 1806

Summary of the arguments of the parties ..... II - 1806

— Refusal by the Commission to exempt SCK's prohibition on hiring ..... II - 1807

— Refusal by the Commission to exempt the system of recommended and internal rates ..... II - 1808

Findings of the Court ..... II - 1810

— Refusal by the Commission to exempt SCK's prohibition on hiring ..... II - 1810

— Refusal by the Commission to exempt the system of recommended and internal rates ..... II - 1815

The fourth plea: infringement of the rights of the defence ..... II - 1818

Summary of the arguments of the parties ..... II - 1818

Findings of the Court ..... II - 1820

The fifth plea: infringement of Article 190 of the Treaty ..... II - 1822

Summary of the arguments of the parties ..... II - 1822

Findings of the Court ..... II - 1822

3. Subsidiary claims for annulment or reduction of the fines ..... II - 1824

The first plea: infringement of Article 15(2) of Regulation No 17 ..... II - 1824

Summary of the arguments of the parties ..... II - 1824

Findings of the Court ..... II - 1826

The second plea: breach of the principle of proportionality ..... II - 1828

Summary of the arguments of the parties ..... II - 1828

Findings of the Court ..... II - 1829

The third plea: infringement of Article 190 of the Treaty ..... II - 1833

Summary of the arguments of the parties ..... II - 1833

Findings of the Court ..... II - 1833