JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

16 December 2003 *

In Joined Cases T-5/00 and T-6/00,

Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied, established in the Hague (Netherlands), represented by E. Pijnacker Hordijk and S.B. Noë, lawyers,

applicant in Case T-5/00,

Technische Unie BV, established in Amstelveen (Netherlands), represented by P. Bos and B. Eschweiler, lawyers, with an address for service in Luxembourg,

applicant in Case T-6/00,

* Language of the case: Dutch.

Commission of the European Communities, represented by W. Wils, acting as Agent, assisted by H. Gilliams, lawyer, with an address for service in Luxembourg,

defendant,

supported by

CEF City Electrical Factors BV, established in Rotterdam (Netherlands),

and by

CEF Holdings Ltd, established in Kenilworth (United Kingdom),

represented by C. Vinken-Geijselaers and J. Stuyck, lawyers, with an address for service in Luxembourg,

interveners in Cases T-5/00 and T-6/00,

APPLICATION for the annulment of Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty (Case IV/33.884 — Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie) (OJ 2000, L 39, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, N.J. Forwood and H. Legal, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and following the hearing on 14 May 2002,

gives the following

Judgment

The contested decision

1 These proceedings are concerned with Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty (Case IV/33.884 — Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie) (OJ 2000, L 39, p. 1, hereinafter 'the contested decision'). By that measure the Commission imposed fines on Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (Netherlands Federation for Wholesale Trade in Electrotechnical Products, 'the FEG'), an association of wholesalers of electrotechnical fittings in the Netherlands, and on Technische Unie ('TU'), one of its members.

2 The term 'electrotechnical fittings' covers a group of products which are used in industry, building and public works. The products concerned are used in particular in infrastructural work (wire and cable, polyvinyl chloride (PVC) tubes, for example), technical material (switches, relays), lighting, safety systems and telephony (contested decision, paragraph 12).

3 CEF Holdings Ltd (hereinafter 'CEF UK'), a United Kingdom wholesale distributor of electrotechnical fittings, decided to establish itself in the Netherlands market, where for that purpose it established a subsidiary, CEF City Electrical Factors BV ('CEF BV'), in May 1989. Perceiving problems of supply in the Netherlands, CEF BV and CEF UK (hereinafter together referred to as 'CEF') lodged a complaint with the Commission on 18 March 1991, which the Commission registered on the following day.

4 The complaint concerned three associations of undertakings in the electrotechnical fittings sector, and the members thereof. In addition to the FEG, these were the Nederlandse Vereniging van Alleen Vertegenwoordigers op Elektrotechnisch Gebied (Netherlands Association of Exclusive Representatives in the Electrotechnical Sector, hereinafter 'NAVEG') and Unie van de Elektrotechnische Ondernemers (Union of Electrotechnical Undertakings, hereinafter 'UNETO').

5 CEF considered that those associations and their members had concluded reciprocal collective exclusive dealing agreements at all levels of the distribution chain for electrotechnical fittings in the Netherlands. Unless it joined the FEG, it would therefore be virtually impossible for a wholesale distributor of electrotechnical fittings to enter the Netherlands market. The manufacturers and their agents or importers supply only members of the FEG; fitting contractors purchase only from FEG members. By letter of 22 October 1991, CEF widened the scope of its complaint, so as to cover agreements between the FEG and its members concerning prices and price reductions, and agreements designed to prevent CEF from participating in certain projects. As from January 1992, CEF also complained of vertical price-fixing agreements between some manufacturers of electrotechnical fittings and FEG wholesalers.

6 In the meantime, between June and August 1991, the Commission sent to the FEG and to TU a number of requests for information on the basis of Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87). In particular, on 25 July 1991 the Commission sent a request for information to TU, which replied on 16 and 28 August 1991.

7 By letter of 16 September 1991, the Commission sent the FEG a warning letter concerning, among other things, pressure brought to bear on certain suppliers of electrotechnical fittings not to supply CEF, concerted practices engaged in by FEG members regarding prices and discounts and the turnover criterion applied for admission to FEG membership.

8 On 27 April 1993, the Commission questioned a number of suppliers of electrotechnical fittings, under Article 11 of Regulation No 17.

9 On 10 June 1994, the Commission requested information from the FEG, under Article 11 of Regulation No 17.

10 On 8 and 9 December 1994, the Commission carried out inspections under Article 14(3) of Regulation No 17 at the premises of the FEG and some of its members, including TU.

11 On 3 July 1996, the Commission notified its objections to the FEG and to seven of its members: Bernard, Brinkman & Germeraad, Conelgro, Schiefelbusch, Schotman, Wolff and TU (hereinafter 'the statement of objections'). The FEG and TU lodged observations in response to that statement, on 13 December 1996 and 13 January 1997 respectively.

12 The FEG and TU submitted several requests to the Commission for access to the file. After disclosure to them on 16 September 1997 of a number of supplementary documents contained in the file, on 10 October 1997 each of them sent to the Commission further submissions in response to the statement of objections.

13 A hearing was held on 19 November 1997, attended by all the addressees of the statement of objections and by CEF.

14 Subsequently, on 26 October 1999, the Commission adopted the contested decision, the operative part of which is worded as follows:

'*Article 1*

The FEG has infringed Article 81(1) of the Treaty by entering into a collective exclusive dealing arrangement intended to prevent supplies to non-members of the FEG, on the basis of an agreement with NAVEG, and of practices concerted with suppliers not represented in NAVEG.

Article 2

The FEG has infringed Article 81(1) of the Treaty by directly and indirectly restricting the freedom of its members to determine their selling prices independently. It did so by means of the Binding Decision on fixed prices, the Binding

Decision on publications, the distribution to its members of price guidelines for gross and net prices, and by providing a forum for its members to discuss prices and discounts.

Article 3

TU has infringed Article 81(1) of the Treaty by taking an active part in the infringements referred to in Articles 1 and 2.

Article 4

1. The FEG shall forthwith bring the infringements referred to in Articles 1 and 2 to an end, if it has not already done so.

2. TU shall immediately bring the infringements referred to in Article 3 to an end, if it has not already done so.

Article 5

1. For the infringements referred to in Articles 1 and 2, a fine of EUR 4.4 million is imposed on the FEG.

2. For the infringements referred to in Article 3, a fine of EUR 2.15 million is imposed on TU.'

Procedure and forms of order sought

15 By application lodged at the Registry of the Court of First Instance on 14 January 2000, the FEG brought the action registered under number T-5/00.

16 By application lodged on the same day at the Registry of the Court of First Instance, TU brought the action registered under number T-6/00.

17 By applications lodged at the Registry of the Court of First Instance on 24 and 28 August 2000, CEF BV and CEF UK applied jointly for leave to intervene in Cases T-6/00 and T-5/00 respectively, in support of the forms of order sought by the Commission.

18 By a document lodged at the Registry of the Court of First Instance on 25 September 2000, the FEG lodged under Article 242 EC an application for suspension of the application of the contested decision (Case T-5/00 R).

19 CEF BV and CEF UK ('the interveners') were granted leave to intervene in Cases T-5/00 and T-6/00 in support of the forms of order sought by the Commission, by order of the President of the First Chamber of the Court of First Instance of 16 October 2000.

20 By a document lodged at the Registry on 18 October 2000, the interveners applied to intervene in support of the forms of order sought by the Commission, in relation to the application for interim measures.

21 By order of 14 December 2000, the President of the Court of First Instance, after granting that application to intervene, dismissed the application for interim measures in Case T-5/00 R and reserved the costs. The appeal brought against that order by the FEG was dismissed by order of the President of the Court of Justice of 23 March 2001 in Case C-7/01 P(R) *FEG* v *Commission* [2001] ECR I-2559.

22 By letters received at the Registry of the Court of First Instance on 21 March 2001 (T-5/00) and 5 April 2001 (T-6/00), the applicants submitted their views, within the time-limits set, on the submissions in intervention lodged on 8 January 2001 in each of the two cases. The Commission waived its right to submit any observations on those submissions in intervention.

23 By decision of the President of the Court of First Instance of 7 May 2002, after the views of the parties were heard, Cases T-5/00 and T-6/00 were joined for the purposes of the oral procedure and judgment, in accordance with Article 50 of the Rules of Procedure.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure.

25 The parties presented oral argument and answered questions put to them by the Court at the hearing on 14 May 2002.

26 In Case T-5/00, the FEG claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, annul Article 5(1) of the contested decision;

— in the further alternative, reduce the amount of the fine in Article 5(1) of that decision to EUR 1 000;

— order the Commission and the interveners to pay the costs.

27 In Case T-6/00, TU claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, annul Articles 3 and 5(2) of the contested decision;

— in the further alternative, reduce the amount of the fine in Article 5(2) of that decision;

— order the Commission and the interveners to pay the costs.

28 In Cases T-5/00 and T-6/00, the Commission contends that the Court of First Instance should:

— dismiss the applications;

— order the applicants to pay the costs.

29 In Cases T-5/00 and T-6/00, the interveners claim that the Court of First Instance should:

— dismiss the applications;

— increase the amount of the fine;

— order the applicants to pay the costs.

Law

30 It is appropriate to examine first the pleas underlying the claim for annulment of the contested decision, then those relating to the claim for cancellation or reduction of the fines.

The claims for annulment

31 The applicants allege a number of breaches of the right to a fair hearing and contest the existence of the infringements of Article 81 EC imputed to them by the contested decision.

I — *The right to a fair hearing*

A — The right to be heard during the administrative procedure

32 At the outset, it must be borne in mind that in order to respect the right to be heard, which constitutes a fundamental principle of Community law and must be observed in all circumstances, in particular in all proceedings liable to give rise to penalties, including administrative procedures, the undertaking concerned must be in a position to make known its views on the truth and relevance of the facts, complaints and circumstances relied on by the Commission (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25).

33 According to the case-law, the statement of objections must contain an account of the objections couched in terms that, even if succinct, are sufficiently clear to enable the parties concerned properly to take cognisance of the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final

decision (judgment of 31 March 1993 in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42).

34 In principle, only documents cited or mentioned in the statement of objections constitute valid evidence (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 21; Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 55; and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 34). However, documents appended to the statement of objections, but not mentioned therein, may be used in the decision as against the applicant if the applicant could reasonably deduce from the statement of objections the conclusions which the Commission intended to draw from them (*Shell* v *Commission*, cited above, paragraph 56, and *ICI* v *Commission*, cited above, paragraph 35).

35 A document cannot be regarded as an adverse evidential document unless it is used by the Commission in support of its finding of an infringement by an undertaking. In order to establish a breach of its right to be heard, it is not sufficient for the undertaking in question to show that it was not able to express its views during the administrative procedure on a document used in a given part of the contested decision. It must demonstrate that the Commission used that document in the contested decision as further evidence of an infringement in which the undertaking participated.

36 In this case, the FEG and TU criticised the Commission for not giving them an opportunity to be heard on certain matters which, although relied on in the contested decision, did not appear in the statement of objections. They thus take exception, first, to the fact that the Commission failed to forward certain documents to them at the stage of the statement of objections and, second, that there was a divergence between the objections notified and the infringements found.

37 It is appropriate to examine these contentions in the light of the principles set out above.

1. Failure to forward certain documents with the statement of objections

38 The applicants claim that they were not in a position to make observations on the following evidential documents: first, the documents relating to Agenten-Grossiers-Contract (hereinafter 'the AGC') and, second, the report of the general assembly of NAVEG of 28 April 1986.

(a) Documents relating to the AGC

Arguments of the parties

39 The applicants criticise the Commission for not citing the documents relating to the AGC in the statement of objections or, at least, indicating, in the course of the administrative procedure, the conclusions it intended drawing from them. Those documents should therefore be withdrawn from consideration and the legality of the contested decision should be assessed without reference to them. Thus, the Commission's assertion that the conduct engaged in was merely a continuation of long-standing practices has no foundation. In that connection, the FEG contends that it is of no importance that the documents concerned do not relate to the period of the infringement since the infringement is based on the view that an unlawful agreement had existed since 1957 (see contested decision, recitals 44, 45 and 53).

40 The Commission considers those objections to be irrelevant since the contested decision does not blame the applicants for the existence of the AGC. The applicants had an opportunity to give their views on the origin of the collective exclusivity arrangement in their replies to the statement of objections and thereby effectively to safeguard their rights.

41 The interveners state that on 22 September 1997 they were granted by the Netherlands Ministry of Economic Affairs a right of access to the documents relating to the procedure by which that ministry annulled the AGC in 1957. Accordingly, the applicants cannot legitimately claim that they were not in a position to examine documents relating to the AGC.

Findings of the Court

42 Although the applicants have not specified the documents relating to the AGC on which they claim to have been unable to express their views, it is clear from paragraph 39 et seq. of the contested decision, forming part of the section relating to the origin of the infringements, that the Commission mentioned a number of documents in support of its allegation that the origin of the infringements dated back to the AGC. They are:

— the memorandum from the Ministry of Economic Affairs of 23 February 1959 concerning the 'investigation into the former Agenten-Grossiers contract in the electrotechnical sector' (contested decision, recital 41, and note No 42);

— the written answers from TU and the FEG to the statement of objections (p. 28 and p. 29 respectively), to which the Commission refers when alleging that TU and the FEG did not deny the existence of the AGC during the administrative procedure (contested decision, recital 42, and note No 44);

— the FEG's strategic plan, drawn up in 1993, in which there is an implied reference to the AGC (contested decision, recital 42, and note No 45).

43 In the context of this criticism, only the first of those documents might be relevant. The documents referred to in the second indent above emanate from TU and the FEG. The last document, of which the FEG is the author, was clearly known to TU as a member of the FEG and a member of the board of that association. TU and the FEG did not, moreover, specifically express any views on the latter documents in their written submissions.

44 The applicants' criticisms concerning the memorandum of 23 February 1959 must be rejected, since it is common ground that the FEG and TU learned of that document during the administrative procedure. The Commission disclosed the memorandum from the Ministry of Economic Affairs to the applicants before the hearing (see the application in Case T-5/00, paragraph 53, and the application in Case T-6/00, paragraph 110). The applicants thus had an opportunity to express their views on that document during the administrative procedure. Consequently, there can have been no breach of the rights of the defence.

45 It is clear, furthermore, that the memorandum of 23 February 1959 is relied on not in order to support the finding of an infringement concerning the collective exclusivity arrangement but rather to illustrate its origin. From a material point of view, that document refers only to the AGC, which does not form part of the

infringements found. From a temporal point of view, that document relates to a period before the period of the infringement. Whereas, in the statement of objections, the Commission indicated that the period of the infringement started in 1956, the contested decision finally adopted 11 March 1986 as the starting point.

(b) Report of the NAVEG General Assembly of 28 April 1986

Arguments of the parties

46 The applicants maintain that they were not apprised of the report of the General Assembly of the members of NAVEG of 28 April 1986. That document describes a meeting of 11 March 1986 between the board of the FEG and that of NAVEG and was, it is alleged, relied on by the Commission as evidence of the infringement concerning the collective exclusivity arrangement (contested decision, recital 46, third indent). The applicants claim that that document is not mentioned in the statement of objections and cannot be deemed to have been in their possession since it is an internal NAVEG document.

47 The applicants add that the Commission cannot rely on the letter sent by NAVEG to the FEG on 27 September 1989 to establish that there were discussions on the collective exclusivity arrangements, held on 28 April 1986. Although mentioned in the statement of objections, that letter nevertheless contains no information as to the date on which the wholesalers opposed supplies to CEF; the Commission did not therefore set out the conclusions which it intended drawing.

48 In addition, TU claims that, by relying on a document dating back to 1986, which did not appear in the statement of objections, the Commission overstated the duration of the infringement. The report of the General Assembly of the members of NAVEG of 28 April 1986 enabled the Commission to extend the duration of the infringement by three years, setting its starting point as 1986. TU states in that connection that the statement of objections is exclusively based on documents relating to the period from 1989 to 1993. Accordingly, the use of that document would have made a new statement of objections necessary. Consequently, TU asks the Court to withdraw the report of the General Assembly of the members of NAVEG of 28 April 1986 from the proceedings and to determine that the alleged infringement commenced no earlier than the time of the meeting between the FEG and NAVEG, on 28 February 1989 (contested decision, recital 46, first indent).

49 The Commission rejects those criticisms, on two grounds.

50 First, it states that the applicants were apprised of the report of 28 April 1986 by virtue of the procedure for access to the file, on 4 and 9 September 1996. Moreover, that document relates to facts referred to in the letter from NAVEG to the FEG of 27 September 1989 (see contested decision, recital 49), mentioned in the statement of objections in recital 25.

51 Second, the Commission observes that that document does not support any new objection and therefore the fact that it was not mentioned in the statement of objections has no impact on the validity of the contested decision. It is a new document, but is relied on in support of an existing objection.

52 As regards TU's arguments concerning determination of the starting point of the infringement, the Commission considers that TU could not have been unaware of the fact that it predated 1989 since, in the statement of objections, it was set at 1956.

Findings of the Court

53 It must be borne in mind that the report of the general assembly of NAVEG members of 28 April 1986 is relied on by the Commission, in the contested decision (recital 46), as evidence of an unlawful agreement in the form of a collective exclusivity arrangement, an agreement criticised in the statement of objections. It is common ground that the applicants were able to consult that document after the statement of objections, when they had access to the file (4, 6 and 9 September 1996). Consequently, TU was in a position to give its views on that document in its answer to the statement of objections, in its further submissions of 10 October 1997 and at the hearing of 19 November 1997. Similarly, the FEG expressed its views in its answer to the statement of objections of 13 December 1996. In those circumstances, there can be no question of any breach of the rights of the defence. Accordingly, the arguments concerning disclosure of the report of the NAVEG General Assembly of 28 April 1986 must be rejected, as must the request that that report be withdrawn from consideration. The relevance of that report will be discussed when the merits of the contested decision are examined.

2. Textual divergence between the contested decision and the statement of objections

54 The applicants claim, in essence, that the Commission is required to send them an additional statement of objections if it wishes to base its decision on matters not appearing in the statement of objections. The documents not mentioned in the statement of objections cannot thus be relied on as evidence (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 27 and 28, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 107). On a number of points, the applicants perceive a divergence between the contested decision and the statement of objections.

(a) Link between the two infringements (Case T-6/00)

Arguments of the parties

55 TU considers that, in recital 122 to the contested decision, the Commission asserted that the collective exclusivity arrangement was intended to underpin the price-fixing agreements. TU infers from that passage of the contested decision that the principal infringement derives from the price agreements and that the collective exclusivity arrangement is merely ancillary. TU states that, in recital 49 to the statement of objections, the Commission nevertheless took the opposite view, with the result that the contested decision contains a new objection. TU considers this to amount to a fundamental change, which had an impact on its defence. In its answer to the statement of objections, TU defended itself primarily against the accusations concerning a collective exclusivity arrangement and, to a lesser extent, against the allegations concerning price agreements.

56 The Commission refutes those allegations. Although it concedes that, in the contested decision, it may have concluded that the purpose of the collective exclusivity arrangement was to support the price agreements (recital 122), there was absolutely no question of a new objection.

Findings of the Court

57 TU's arguments are based on a misreading of the contested decision and of the statement of objections. The relationship between the collective exclusivity arrangement and the price agreements does not constitute an independent objection. The passages of the statement of objections referred to by TU are in the following terms:

'The object or effect of the collective exclusivity arrangement is a restriction of competition in the common market. By virtue of those arrangements, electrotech-

nical fittings can be traded in the Netherlands only between suppliers and wholesalers who are members of the FEG. For that reason, suppliers of those products cannot enter into contracts with wholesalers in the Netherlands who are not members of the FEG, whereas, on the other hand, wholesalers in the Netherlands who are not members of the FEG (because they have not been admitted by the FEG or because they do not wish to become members of the FEG) find that purchasing opportunities are limited because they cannot, or find it very difficult to, obtain electrotechnical fittings intended for the Netherlands market.

...

The collective exclusivity arrangement is supplemented by agreements and/or concerted practices between the members of the FEG regarding their pricing and discounting policy.'

58 As regards recital 122 to the contested decision, which is preceded by the heading 'The relationship between the collective exclusive dealing arrangements and the horizontal price agreements', it is worded as follows:

'There is a direct relation between the collective exclusive dealing arrangement and the price agreements within the FEG. As has been explained in recital 111, the price agreements are aimed at establishing an artificially stable price level with "healthy margins" for the wholesale trade. This can succeed only if the wholesalers observe a measure of price discipline. The FEG has therefore brought various forms of pressure to bear on its members to avoid any intense price

competition. This meant that intense price competition was to be feared only from wholesalers outside the FEG. The collective exclusive dealing arrangement prevented deliveries to these potential "price cutters", thus reducing the danger that the artificial price level might come under pressure. In this way the collective exclusive dealing arrangement helped to underpin the price agreements.'

59 It must be observed that both the contested decision and the statement of objections refer to two infringements, one relating to the collective exclusivity arrangement and the other to price-fixing agreements. Thus, the collective exclusivity arrangements were the subject of findings of fact in recitals 33 to 70 to the contested decision (section F, entitled 'Relation between FEG membership and supplies'). As regards the price agreements between FEG members, they were examined in section G of the contested decision (recitals 71 to 93). In its legal assessment, the Commission examined the conditions for the application of Article 81(1) EC as regards those two alleged infringements (contested decision, recitals 94 to 126). Similarly, with regard to determination of the amount of the fine, the Commission examined successively, in relation to each of the two infringements, their intentional nature, their duration, their seriousness and any attenuating or aggravating circumstances (contested decision, recitals 131 to 150).

60 Recital 122 to the contested decision and recitals 47 and 49 to the statement of objections, cited above, seek merely to illustrate the natural relationship between the agreements at issue and to show that the foreseeable and expected consequences of the exclusivity arrangement were the strengthening of the probability of maintaining prices, by means of the agreements fixing them, at a level higher than that which would have resulted from normal market forces in the absence of agreements. The merits of that assessment will be examined in connection with the plea alleging infringement of Article 81 EC. It follows that the applicants' arguments concerning the relationship between the two infringements can but be rejected.

(b) Artificially high prices on the Netherlands market

Arguments of the parties

61 TU claims that the Commission did not mention, in the statement of objections, the artificially high level of prices on the Netherlands market, a matter nevertheless relied on in the contested decision (recital 122). It considers that its views were not heard as to whether prices were too high.

62 The Commission replies that this criticism is based on a misreading of the contested decision.

Findings of the Court

63 It must first be noted that, in recital 122 to the contested decision, the Commission did not express any view on the increase of prices on the Netherlands market or on the question whether such prices were too high. In that connection, recital 140 to the contested decision concludes:

'The repercussions of the collective exclusive dealing arrangement on the market cannot be measured precisely. It is certain, however, that the infringement considerably delayed CEF's entry into the Dutch market and made it appreciably more difficult. Although there are indications that the price level for electrotechnical products on the Dutch market was relatively high, it should be pointed out

that it is equally impossible to determine precisely the repercussions of the horizontal price agreements. In general, the FEG and its members were not so concerned to fix uniform prices for all electrotechnical products as to keep the degree of price competition which existed under control and within limits, in order not to jeopardise price stability and wholesalers' margins.'

64 The above paragraph appears in the part of the contested decision concerning determination of the level of the fine. It does not contain any new objection to the effect that prices are too high. Accordingly, the applicants' argument concerning the level of prices on the Netherlands market must be rejected.

B — *Belated forwarding of documents (Case T-6/00)*

1. Arguments of the parties

65 TU submits that it did not have enough time before the hearing to give its views on the memorandum from the Minister for Economic Affairs of 23 February 1959 concerning the AGC or on the report of the General Assembly of NAVEG of 28 April 1986 (contested decision, recital 46). The late forwarding of those documents cannot in its view equate to the sending of a supplementary statement of objections (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraphs 56-61). Accordingly, the Commission is not entitled to rely on them in the contested decision.

66 The Commission considers that the disclosure of documents relating to the AGC is not something capable of undermining the applicant's rights. Those documents contain no new objection; they were used merely to clarify the context of the case. Moreover, it points out, the FEG board had agreed with the hearing officer, by

letter of 5 November 1997, that all parties would be allowed to produce new documents until one week before the hearing. TU and the FEG had an opportunity to give their views on those documents at the hearing, and therefore the rights of the defence were respected.

2. Findings of the Court

67 TU does not deny that it received, about two weeks before the hearing, the note from the Minister of the Economy of 1959 concerning the AGC. Moreover, it is common ground that, during the administrative procedure, the parties agreed with the Commission that any evidence could be forwarded up to one week before the hearing (see Annex 3 to the Commission's defence in Cases T-5/00 and T-6/00). As regards the report of the General Assembly of the NAVEG members of 28 April 1986, it has already been held that TU was able to familiarise itself with that document when it had access to the file on 4 and 9 September 1996. TU thus had a reasonable period in which to examine those documents and prepare its defence. Accordingly, TU's argument that the disclosure of those documents was belated and therefore undermined exercise of the rights of the defence must be rejected.

C — Breach of the requirement of a reasonable time-limit

1. Arguments of the parties

68 It is common ground that the procedure leading to the contested decision lasted 102 months, in other words nearly eight-and-a-half years. The parties accept that that period is considerable but differ as to the inferences which the Court should draw from that fact.

69 The applicants invoke the 'general principle of reasonable time-limits' which, in their view, applies to the adoption of decisions on conclusion of administrative procedures in competition policy matters. Such a principle, deriving from Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), was upheld in the judgments of the Court of First Instance in Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 56, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931 ('*PVC II*'), paragraph 120 et seq, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 276 et seq. They consider that the total duration of the procedure, and of each of its component stages, by far exceeds what may be regarded as reasonable. Accordingly, they claim that the contested decision should be annulled. In their view, no remedy other than annulment would be sufficient to guarantee the effectiveness of the principle of reasonable time-limits.

70 Since recollection of events necessarily fades with time, the applicants consider that they are no longer in a position fully to provide for their defence, since the conduct attributed to them dates back many years. They draw attention to the damage done to them by the pursuit of an investigation in the area of competition. They referred to their interest in securing a rapid conclusion of the procedure, in view of the prolonged uncertainty to which they were subject regarding the possibility of the imposition of a fine and the harm to their reputation resulting from the investigation. They add that the uncertainty is also exacerbated by the fact that, on 22 February 1998, CEF commenced proceedings against them before the Rotterdam Civil Court seeking damages for harm suffered as a result of allegedly anti-competitive conduct.

71 The Commission rejects that argument and considers that it has already drawn all the consequences of the considerable length of the procedure by reducing the amount of the fine by EUR 100 000 in the contested decision.

72 For their part, the interveners contend that annulment of the contested decision for failure to observe a reasonable time limit would, for them, constitute a penalty contrary to the principle of proportionality and would be tantamount to upholding a cartel contrary to Article 81 EC. As complainants, they consider that they have suffered as a result of the duration of the investigation. Annulment of the contested decision would place them in the situation they were in when they lodged their complaint. The adverse consequences of an annulment would be directly proportional to the duration of the procedure. In that connection, they refer to the consequences of the judgments in Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369 and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

2. Findings of the Court

73 Whilst it is true that the Commission is required, by virtue of the case-law cited by the applicants, to give a decision within a reasonable period in administrative proceedings in matters of competition under Regulation No 17 which are likely to lead to the penalties provided for by that regulation, the exceeding of such a time limit, if proved, does not necessarily justify annulment of the contested decision.

74 As regards application of the competition rules, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements, where it has been proved that infringement of that principle has adversely affected the ability of the undertakings concerned to defend themselves. Except in that specific circumstance, failure to comply with the principle that a decision must be adopted within a reasonable time cannot affect the validity of the administrative procedure under Regulation No 17 (see judgments of the Court of First Instance in '*PVC II*', cited above, paragraph 122; Case T-62/99 *Sodima* v *Commission* [2001] ECR II-655, paragraph 94, and Case

T-26/99 *Trabisco* v *Commission* [2001] ECR II-633, paragraph 52; see, to that effect, the Opinion of Advocate General Mischo in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, at I-8391, in particular points 75 to 86 of the Opinion in Case C-250/99 P).

75 In this case, the parties agree that the procedure was considerably protracted. The applicants consider that the Commission bears full responsibility for this, a view which the Commission contests. Moreover, the applicants maintain that the exceeding of a reasonable period undermined their rights of defence.

76 The Commission admits that a considerable period elapsed between the warning letter to the FEG of 16 September 1991 and the checks of 8 December 1994. It does not, however, give any explanation such as to clarify the reason for its inaction at that stage of the procedure. It contends that the procedure would have been shorter if the applicants had brought to an end the conduct imputed to them.

77 The latter argument cannot be accepted. It is for the Commission to carry out investigations with the requisite diligence. Regulation No 17 makes available to it resources enabling it, if need be by coercive means, to carry out searches and establish facts (regarding such resources, see the judgment in Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729). In this case, the Commission waited more than three years after sending a request for information to TU on 25 July 1991 under Article 11 of Regulation No 17 before carrying out the first on-site checks. In the absence of further explanation or information from the Commission regarding the measures of inquiry undertaken during that period, it must be accepted that such a time lapse is excessive and derives from inaction attributable to the Commission.

78 However, the excessive duration of this phase of the administrative procedure is not in itself such as to detract from the rights of the defence. As observed by Advocate General Mischo in points 40 to 53 of his Opinion in Case C-250/99 P *Limburgse Vinyl Maatschappij and Others*, followed by the judgment of 15 October 2002, cited above, it is necessary, for the purposes of applying the principle of reasonable time-limits, to draw a distinction between the investigative phase prior to the statement of objections and the remainder of the administrative procedure.

79 In that connection, it must be observed, first, that, in criminal matters the reasonable time referred to in Article 6(1) of the European Human Rights Convention runs from the time at which a person is charged (see European Court of Human Rights, *Corigliano* judgment of 10 December 1982, Series A No 57, § 34) and, second, that the fundamental rights guaranteed by the ECHR are protected as general principles of Community law. In a procedure relating to Community competition policy, of the kind at issue in this case, the persons concerned are not the subject of any formal accusation until they receive the statement of objections. Accordingly, the prolongation of this stage of the procedure alone is not in itself capable of adversely affecting the rights of the defence.

80 On the contrary, the notification of the statement of objections in a procedure intended to lead to a finding of infringement presupposes initiation of the procedure under Article 3 of Regulation No 17. By initiating that procedure, the Commission manifests its will to proceed to a decision finding an infringement (see, to that effect, Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 16). Also, it is only on receipt of the statement of objections that an undertaking may take cognisance of the subject-matter of the procedure which is initiated against it and of the conduct of which it is accused by the Commission. Undertakings thus have a specific interest in that second stage of the procedure being conducted with particular diligence by the Commission, without, however, their defence rights being affected (*PVC II* judgment, cited above, paragraph 132).

81 In this case, that phase of the administrative procedure took more than 39 months and comprised the following main stages:

— notification of the statement of objections: 3 July 1996;

— procedure for access to the file: 4, 6 and 9 September 1996;

— the FEG's observations in response thereto: 13 December 1996;

— TU's observations in response thereto: 13 January 1997;

— further file documents forwarded: 16 September 1997;

— additional statement in response to the statement of objections (the FEG and TU): 10 October 1997;

— hearing of the parties: 19 November 1997;

— contested decision: 26 October 1999.

82 The reasonableness of this stage of the procedure must be assessed by reference to the specific circumstances of each case and, in particular, the context thereof, the conduct of the parties in the course of the procedure, the importance of the case for the various undertakings and associations of undertakings involved and its degree of complexity.

83 In this case, the complexity of the facts must be emphasised, deriving in particular from the nature of the relevant market, the large number of undertakings belonging to the FEG and the difficulties in establishing proof of the participation of undertakings and of the association of undertakings in the alleged infringements. Thus, the Commission sent the statement of objections to seven undertakings and to the FEG and it is common ground that its file comprised more than 10 000 pages.

84 During the 16 months which elapsed between the statement of objections and the hearing of the parties, the Commission was not inactive. It examined the replies from the FEG and the undertakings to which the statement of objections was addressed and their additional statements lodged following its decision to organise a procedure intended to grant additional access to the file on 16 September 1997. The duration of that part of the procedure was not therefore excessive.

85 In contrast, about 23 months elapsed between the hearing of the parties and the contested decision. That period is considerable, and it is not possible to attribute responsibility for it to the applicants or to other undertakings to which the Commission addressed the statement of objections. By way of circumstances such as to justify the length of that period, the Commission confines itself to referring, unavailingly, to the opening of a new investigation, in response to information provided by CEF concerning the continuation of the infringements. Since the Commission has not put forward evidence to show that the period needed for preparation of the decision was attributable to factors other than its prolonged inaction, it is clear from the foregoing that, by allowing 23 months to elapse after the hearing of the parties, the Commission exceeded the period which in the normal course would be needed for adoption of the contested decision.

86 Accordingly, it is appropriate to consider whether the rights of the defence were affected by the duration of that phase of the procedure.

87 As regards the applicants' arguments relating to the loss of evidence because of the passage of time, it must be observed, first, that, by virtue of a general duty of care attaching to any undertaking or association of undertakings, the applicants are required to ensure the proper maintenance of records in their books or files of information enabling details of their activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or administrative proceedings. When the applicants received requests for information from the Commission under Article 11 of Regulation No 17, it was *a fortiori* incumbent on them to act with greater diligence and to take all appropriate measures in order to preserve such evidence as might reasonably be available to them.

88 Next, it must be stated that the infringements complained of were still continuing when the Commission made its first requests for information from the applicants under Article 11 of Regulation No 17, that is to say from June 1991 in the case of the FEG and 25 July 1991 in the case of TU. The infringements continued further until 1994: the Commission considered that they endured until 25 February 1994 in the case of the infringement referred to in Article 1 of the contested decision and until 24 April 1994 in the case of that referred to in Article 2. In those circumstances, the applicants cannot seriously claim that they encountered difficulties in preparing their defence when in fact the infringements at issue continued after the commencement of the administrative procedure.

89 Finally, it must be stated that the Commission was empowered to adopt a decision imposing a penalty or a fine at any time before the end of the limitation period applicable to the infringements. In accordance with Article 1(1)(b) and (2) and Article 2(3) of Regulation (EEC) No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319,

p. 1), the limitation period in proceedings expires if the Commission has not imposed a fine or a penalty within five years after the date on which it began to run where, during that time, no interruptive action is taken or, at the latest, within 10 years after the date on which it began to run where interruptive action has been taken.

90 In this case, involving continuing infringements, the limitation period runs from the day on which the infringement came to an end, by virtue of Article 1(2) of Regulation No 2988/74. Since the Commission considered that the infringements found came to an end in 1994, and in view of the interruptive action taken subsequently, the limitation period had not expired when the Commission adopted the contested decision, a fact which the applicants have not contested in any way in the present proceedings.

91 For so long as the limitation period provided for by Regulation No 2988/74 has not expired, any undertaking or association of undertakings which is the subject of a competition policy investigation under Regulation No 17 remains in a position of uncertainty as to the outcome of that procedure and the possible imposition of penalties or fines. Thus, the prolongation of the uncertainty alleged by the applicants concerning the action to be taken regarding them and the adverse effects on their reputation is inherent in the procedures for the application of Regulation No 17 and does not in itself constitute any impairment of the rights of the defence.

92 As regards the argument that the Commission's inaction was harmful to the applicants by reason of the proceedings brought by CEF against the FEG and TU before the Netherlands courts, it must be concluded that, for the purposes of the present action for annulment, those national legal proceedings have no impact on the legality of the contested decision. Furthermore, even if it were well founded, that argument could not prompt a finding that the rights of the defence had been infringed or call in question the validity of the reasons on which the contested decision was based.

93 Consequently, it must be concluded that the excessively protracted nature of the administrative procedure after the hearing did not affect the applicants' rights of defence.

94 In the context of the claims for annulment of the contested decision, it follows that all the arguments relating to non-observance of a reasonable time-limit must be rejected.

D — Breach of the 'favourable interpretation' principle (Case T-6/00)

1. Arguments of the parties

95 According to TU, the presumption of innocence embodied in Article 6(2) of the ECHR entails the result that any doubt concerning evidence should benefit the accused (see Court of Human Rights, *Barberà, Messegué and Jabardo* judgment of 6 December 1988, Series A No 146, § 77, and Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 265).

96 In this case, it is claimed that the Commission infringed that principle and breached its duty of care and of independence by systematically drawing conclusions from phrases in order to infer that serious infringements of the competition rules had been committed. In that connection, TU refers to the Commission's evidence and assessments in recitals 8, 37, 43, 44, 46 to 50, 57 to 66, 81 and 84 to the contested decision, which are not such as to found an absolute conviction as to the existence of infringements. Consequently, the applicant considers that those matters should be excluded from the proceedings and that the decision should be annulled or the fine reduced, or both.

97 For its part, the Commission contests the applicability to this case of the principle *in dubio pro reo*. It is for the Commission alone, in procedures governed by Regulation No 17, to produce evidence of the objections made by it (*PVC II* judgment, cited above, paragraphs 512 to 514).

98 In the alternative, the Commission denies having drawn conclusions from incomplete information and rejects the applicant's arguments.

2. Findings of the Court

99 Although presented from the standpoint of a breach of the rights of the defence, TU's complaints seek to call in question the probative value of the evidence relied on against it by the Commission. They are not separable from those concerning the existence of the infringements found. They will therefore be examined in connection with the plea alleging infringement of Article 81 EC.

II — *The existence of infringements of Article 81 EC*

100 It must be observed at the outset that, in its application, TU refers to the observations submitted in the course of the administrative procedure in response to the statement of objections (application, paragraph 64). That reference is to the annexes in general and does not make it possible to identify any arguments which could be regarded as supplementing the submissions put forward in the application. Accordingly, since it refers to the submissions in response to the statement of objections, the application does not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure and cannot be taken into consideration.

101 Whilst the body of the application may be supported and supplemented, in regard to specific points, by references to extracts of documents appended thereto, it is not for the Court to seek and identify in the annexes the grounds on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34). Thus, the submissions in response to the statement of objections must be excluded from the discussion of this case in so far as TU refers to them in general terms to supplement the arguments put forward in the application.

102 For the rest, the applicants have challenged in their submissions the definition of the relevant market, the existence of infringements of Article 81 EC and the attributability thereof.

A — Determination of the relevant market

1. Contested decision

103 After considering several definitions (contested decision, recitals 13 and 14), the Commission finally decided that the relevant market was the wholesale market in electrotechnical fittings. The contested decision uses the following wording:

'(15) The broadest market that can be distinguished concerns the market at wholesale level. In this market, competition takes place between individual wholesalers selling a wide range of products covered by the concept of electrotechnical fittings. Despite the fact that they are not all necessarily substitutable, whether seen from the customer angle or the

supply side, there are good arguments for concluding that all of these products are part of one single market. In order to arrive at this conclusion, it is necessary to have regard to the specific function(s) which wholesaling fulfils for a large number of its customers, such as fitters and the electrotechnical retail trade. This function consists, inter alia, in stocking a wide range of electrotechnical fittings. To carry out a project, fitters for example often need a large quantity of different products and, for various reasons, prefer to buy those products from a wholesaler rather than a supplier who only concentrates on one product or product group. This simplifies their purchasing policy and is more suitable from a logistical and financial viewpoint. Accordingly, competition takes place in particular between individual wholesalers... To be sure, wholesalers also experience competition from direct suppliers, but this is more limited in scope

(16) In the light, inter alia, of the Commission's established practice, the last definition of the relevant product market would seem the most appropriate...'

2. Arguments of the parties

104 The applicants claim that the analysis of the market is vitiated by a number of errors. By convention, they refer to manufacturers, agents and importers as 'suppliers'.

105 First, the applicants reject the Commission's view that the definition of the relevant market may be narrowed down to wholesale trade in electrotechnical fittings. They allege, first, that the Commission overlooked the importance of direct competition between wholesalers and their suppliers. The applicants consider that half of trade purchasers obtain supplies direct from suppliers, without using the services of wholesalers.

106 The FEG states in that connection that, with a market share of about 50%, there is no possibility of wholesalers being able to increase prices, even by only 5%, without demand being immediately transferred to the supplies provided directly by the suppliers. It is incorrect to consider that such sales made directly by the suppliers involve only a few very large customers or individual operations. Moreover, the suppliers do not all rely on a small number of resellers. On the other hand, the FEG emphasises that, where a supplier decides to select its resellers, membership of the FEG is not a decisive criterion for selecting them. Wholesalers who do not belong to the FEG do not encounter any particular supply problems.

107 Second, TU criticises the Commission for underestimating the complexity of the market in electrotechnical fittings in the Netherlands. TU states that the demand for electrotechnical fittings emanates from electrical fitting contractors and other operators in the industry, the building and public works sector and retailers. Among them it draws a distinction between primary purchasers (trade fitters and retailers) and secondary purchasers (fitters, processing industry, public authorities, associations involved in the building of housing and hospitals).

108 TU explains that purchasers insist on being able to order and receive supplies of a very large assortment of products within a very brief period, and to receive up-to-date information on the technical characteristics of the products, the prices thereof and available stocks. Responding to those requirements is, according to TU, the essence of the function of 'stockkeeping wholesalers' (annex 37a to the reply). Because of such specialisation and the distinction between primary and secondary purchasers, there is not a single market but at least nine separate markets.

109 As regards suppliers of leading brands of electrotechnical fittings, TU states that they prefer to use wholesalers who are capable of offering additional services (warehousing capacity, geographical cover, information and after-sales service). By selecting their wholesalers, suppliers are in a position to reduce their costs of

supervision, market surveys and training. They seek to establish a relationship based on partnership, in which wholesalers undertake promotion of the brand and invest in making products known and hold a large range of articles in stock.

110 Foreign manufacturers, according to TU, account for 52% of the market because of the technical standards and regulations in force in the Netherlands, which favour domestic manufacturers. The largest foreign manufacturers have their own establishments in the Netherlands, the others being represented by importers or agents. Finally, a number of wholesalers obtain supplies direct from abroad.

111 Third, TU criticises the Commission for overestimating the importance of NAVEG and its members, both qualitatively and quantitatively.

112 Fourth, the applicants draw attention to the commercial differences between CEF and the members of the FEG, to show that CEF's disappointments are exclusively attributable to the failure of its commercial policy, which they consider to be fundamentally inappropriate to the Netherlands market. That claim is supported by an independent expert, Mr Traas, whose report the Commission ignored. TU states that, over many years, it has been offering added-value services to suppliers and its customers because of the breadth of its range of products, the largeness of its stocks and its data-processing resources. In contrast, the applicants claim that CEF is not a genuine 'stockkeeping wholesaler' but more probably a retailer. They consider that such a policy, which is suitable for the British market, could not succeed in the Netherlands.

113 In those circumstances, it is natural that certain suppliers did not wish to entrust the distribution of their products to CEF. Years of negotiations are often

necessary before a well-known supplier decides to bring a wholesaler into its network. In that connection, TU relies on the testimony of a number of suppliers, collected by it, and FEG refers to the survey carried out by the Commission (application, annexes 20, 25 and 31).

114 The Commission contests those arguments. First, it states that agreements whose object is to restrict competition are prohibited by Article 81(1) EC, without there being any need to consider their effects (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 429, and Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 49). In view of the subject-matter of the infringements, an incorrect definition of the market cannot, moreover, give rise to annulment of the contested decision. It emphasises that such importance as purchasers may attach to the services offered by wholesalers supports the reasoning of the contested decision, according to which there is a specific market for services of that kind.

115 Next, the Commission queries the purpose and relevance of TU's allegations regarding the structure of the market and the size of NAVEG and its members, in relation to the definition of the relevant market.

116 Finally, as regards the allegations concerning the commercial failure of CEF, the Commission replies that they are nothing more than speculation. It adds that the view that CEF's services are profoundly different from those offered by the members of the FEG is manifestly contradicted by the efforts made by the latter, and by the FEG, to oppose the provision of supplies to CEF (see, in particular, paragraphs 53 to 66 of the contested decision).

3. Findings of the Court

117 The applicants contest the definition of the market adopted in the contested decision, contending that it is based on an excessively narrow definition of the relevant product. They do not however challenge the geographical aspect of the market definition.

118 First, the definition of the relevant product relates only to the business of wholesale distribution of electrotechnical fittings. It follows that the profusion of technical arguments put forward by TU concerning the complex structure of the electrotechnical fittings market is irrelevant: it concerns the production of electrotechnical fittings and not the specific business of distributing and selling those products on the relevant geographical market. Similarly, TU's arguments concerning overestimation of the economic importance of NAVEG are, at this stage of the analysis, entirely irrelevant.

119 Next, the applicants have not provided information such as to cast doubt on the fact that the distribution activities undertaken by the wholesalers display specific characteristics such as to distinguish them from other competing channels of distribution. On the contrary, their insistence, shared by the Commission, upon arguing by reference to characteristics such as storage capacity and delivery, as well as ancillary services (after-sales service, expertise of sales staff), support the finding that there is a specific market in the wholesale distribution business.

120 Although TU and, to a lesser extent, the FEG seek essentially to show that the business of the members of the FEG is distinct from that of CEF, such arguments are irrelevant. The infringements found in the contested decision do not directly concern the withholding of sales of which CEF regards itself as the victim but the

existence of agreements and concerted practices between wholesaler members of the FEG intended to detract from normal competition.

121 Finally, the applicants challenge the analysis of the substitutability of the distribution business of wholesalers with other competing distribution channels. They say that almost half the sales of electrotechnical fittings are made by manufacturers directly, without using wholesalers. On the basis of that statement, they emphasise the fungibility of those two types of distribution channel and, therefore, propose an alternative definition of the relevant market, encompassing the entire supply of electrotechnical fittings.

122 However, it must be pointed out that that argument was taken into account in the contested decision. First, in recital 23, the Commission states: 'Fittings for use by large fitting contractors and purchasing groups are often supplied direct by manufacturers or their agents/importers, without the involvement of wholesalers. The rest, about half according to the FEG's estimate, is distributed via wholesalers'. Furthermore, relying on FEG documents (listed in note No 24), the contested decision (recital 24) states that the members of that association hold about 96% of the market and that, if direct supplies by manufacturers are included, that share would be about 50%. The applicants have not contested those data.

123 In that connection, it must be borne in mind that, when Article 81 EC is applied, it is for the purpose of determining whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market that it is necessary to define the relevant market. That is why the objections to the definition of the market adopted by the Commission cannot be seen in isolation

from those concerning the impairing of competition (see Case T-29/92 *SPO* v *Commission* [1995] ECR II-289, paragraphs 74 and 75, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 90 to 105).

124 It must therefore be recognised that the Commission was right to take the view in recital 16 to the contested decision that:

'whichever market definition is chosen, it only has a limited influence on this case, since FEG members, as will be seen below, have a strong to very strong position on each of the different markets'.

125 Consequently, the objections relating to the delimitation of the relevant market must be rejected.

B — The collective exclusive dealing arrangement between the FEG and NAVEG (Article 1 of the contested decision)

126 The Commission decided that the FEG and TU had committed a first infringement of Article 81 EC by putting into effect an exclusive dealing arrangement intended to prevent supplies to non-members of the FEG (contested decision, Article 1). It considered that that infringement comprised two elements. It involved, first, an exclusive dealing arrangement between the FEG and NAVEG and, second, concerted practices whereby the FEG and its members sought to

extend that agreement to certain suppliers not belonging to NAVEG (contested decision, recitals 39 and 101). The objections relating to those two elements must be examined successively.

1. Gentlemen's agreement between the FEG and NAVEG

(a) Terms of the contested decision

127 The Commission considered that '[a] feature of [the gentlemen's agreement] [was] that the participating NAVEG members and suppliers [were] exclusively authorised to supply to wholesalers who [were] FEG members' (contested decision, recital 39). In recital 103, the Commission states that 'NAVEG assured the FEG that it would advise its members to supply only to wholesalers who were members of the FEG'. The exclusive dealing arrangement was not, however, reciprocal:

'FEG members are in principle free to purchase products also from firms which [were] not party to the arrangement.' (Contested decision, recitals 45 and 103).

128 In the contested decision, the Commission first emphasised the absence of a formal written agreement (contested decision, recital 40), a situation which it attributed to historical circumstances. Between 1928 and 1959, the FEG, NAVEG and the Bond van Grossiers in Elektrotechnische Artikelen (Association of Wholesalers of Electrotechnical Products, hereinafter 'BOGETA'), a third association representing wholesalers, were bound by a reciprocal exclusive dealing arrangement, the AGC. However, on 11 December 1957, the Nether-

lands Minister of Economic Affairs declared the AGC unlawful by reason of its anti-competitive nature (contested decision, recital 42).

129 According to the Commission, the parties to the AGC chose to ignore that decision and to continue cooperating on the basis of a gentlemen's agreement. Thus, according to the minutes of a meeting of BOGETA of 24 January 1958 (contested decision, recital 43):

'That which was expected has happened. Once it became clear in talks with Minister Zijlstra that the AGC would sooner or later become inoperative, the boards of the FEG, NAVEG and BOGETA agreed to determine a course of action to be followed if the AGC should indeed be declared inoperative. Actually, little will change, instead of the AGC there will be a gentlemen's agreement between manufacturers, agents and recognised wholesalers. The Agenten-Grossiers-Contract becomes an Agenten-Grossiers-Contact. It was generally agreed that the old state of affairs was good and worked satisfactorily'.

130 In the contested decision, the Commission considered that it had proved the existence of a gentlemen's agreement for the period between 1986 and 1994 (contested decision, recital 103, and the reference to recitals 44 to 52) on the basis of a collection of documentary evidence. In particular, it identified documents reporting remarks exchanged at two meetings during which the FEG and NAVEG had referred to the collective exclusive dealing arrangement.

131 The first of those meetings was held on 11 March 1986 (contested decision, recital 46). The report of the general assembly of NAVEG of 28 April 1986 indicates, with regard to that meeting:

'Given the agreements between both associations, the supplies to the firms Nedeximpo, Dego, van de Meerakker and Hagro are undesirable'.

132 The Commission points out that none of those companies was then a member of the FEG.

133 The second meeting was held on 28 February 1989. In recital 46 to the contested decision, the Commission relied on three documents as evidence of the observations exchanged there:

— the report of the general assembly of NAVEG of 24 April 1989;

— the NAVEG report on the meeting of 28 February 1989;

— the FEG report on the meeting of 28 February 1989 (contested decision, recital 46, document cited in note No 48).

134 According to the contested decision, the first of those documents indicates that on 28 February 1989 the FEG asked NAVEG to advise its members to stop supplies to undertakings in the event of their withdrawal from the FEG. According to the contested decision (recital 46):

'It was found that there is no obligation for NAVEG members to supply FEG members, but that "supply is based on a gentlemen's agreement, it being understood that supply to non-FEG members may be a hindrance".'

135 The second document indicates, according to the contested decision, that the FEG had questioned NAVEG as to how it would react to a situation where a wholesaler member of the FEG withdrew from that association. NAVEG then stated that 'the recommendation would be not to supply', a fact, moreover, confirmed by the third document.

136 The Commission attributes the existence of the exclusive dealing arrangement and, in particular, its unilateral nature, to the relative strengths of the FEG and NAVEG. It is common ground that FEG members have a market share of 96% on a narrow definition of the relevant market and 50% on a broader definition. According to the contested decision, that economic power explains the benefits for NAVEG members of the collective exclusive dealing arrangement. The Commission took the view that that benefit was also clear from the following (contested decision, recital 47):

— a letter which Hofte, a NAVEG member, sent on 23 August 1991 to Paul Hochköpper & Co, a manufacturer of electrotechnical fittings. That letter followed the request for information which the Commission sent to Hofte on 25 July 1991 and contains the following passage:

'... NAVEG has of course a somewhat more difficult position, since, although it does not have any official connection with the FEG, it does more or less have a notional one. However, our position in Brussels is: "In your documents you state that the FEG members account for 98% of the market.

It is therefore impossible for us as a NAVEG agent not to take account of the FEG's wishes, since that is virtually our entire turnover. If therefore you have problems in this respect, we can only refer you to the FEG"';

— the report of the general assembly of NAVEG of 9 May 1988, in the following terms:

'Since most of the turnover of member agents is generated with FEG members the importance of proper cooperation is very great'.

137 In the contested decision, the Commission referred to several examples of the implementation of the collective exclusive dealing arrangement.

138 First, the Commission observes that, for the gentlemen's agreement to operate properly, it was necessary for the two associations to exchange information, such as the FEG membership file. The Commission relies on several documents which record such exchanges of information (contested decision, recitals 48 and 49):

— '... a letter from NAVEG to the secretary of the FEG of 27 September 1989 inquiring about CEF's application for FEG membership. NAVEG points out that: "Various foreign factories, which are represented by our members, supply this organisation in other countries and wish to do so in the Netherlands as well. However, so long as [CEF] is not admitted to the FEG,

the board recommends that its members should of course not supply the company". That commercial risks also attach to such a recommendation is clear from the following passage: "In the past, various members acted vis-à-vis Nedeximpo in accordance with a similar recommendation, but now Nedeximpo has become a member of the FEG they are faced with the fact that they are no longer accepted as suppliers";

— according to the report of the discussions between the FEG and NAVEG on 28 February 1989, it was agreed that NAVEG would give the FEG the addresses of the wholesalers which NAVEG thinks should become FEG members.'

139 Second, the Commission drew attention to several examples of the implementation of NAVEG's 'recommendations' by its members. Thus, the contested decision states:

'(50) NAVEG members appear to apply the "recommendations" issued by the association in practice. For instance, Hateha, a NAVEG member that represents large manufacturers... informed CEF explicitly that it only supplies through wholesalers who are FEG members and that therefore supplies to CEF were refused... The observation of the parties that Hateha uses the FEG membership criterion to establish the solvency of the firm concerned is not convincing, especially since there are other more accurate methods of ascertaining the financial health of a firm: FEG membership by itself does not provide an absolute guarantee in this respect. Lastly, the managing director of Hateha at the time was also secretary of NAVEG, and NAVEG was established at the same address as Hateha. Furthermore, in the 1980s Hateha had already informed another FEG member, Frigé, that it could not be supplied because it was not a member of the FEG...

(51) Another NAVEG member, Hemmink... also refused — after discussions with among others the FEG, FEG member Schiefelbusch and other NAVEG members — to supply a non-FEG member (Van de Meerakker) direct. The managing director of Hemmink was at that time also secretary of NAVEG, and NAVEG was established at the same address as Hemmink... The argument put forward by the parties that this was a simple unilateral act by Hemmink which has no relation with a possible gentlemen's agreement between the FEG and NAVEG takes no account of the context in which it occurred... The managing director of Hemmink was, as secretary of NAVEG, indubitably aware of NAVEG's recommendations to its members to supply only FEG members. The abovementioned behaviour, i.e. inquiring whether a wholesaler is an FEG member before deciding whether to supply it, fits in with this policy.

(52) Obviously, NAVEG members were not supposed in so many words to reveal to the potential customer the reason for refusing to supply it. The following passage from the abovementioned letter from NAVEG member Hofte to Paul Hochköpper & Co is illustrative in this respect.

With regard to the complaint lodged by CEF with the Commission, Hofte observes that: "Besides, it has also of course sent documents, including some, unfortunately, from NAVEG agents who have acted without thinking, which state that the firm cannot be supplied because it is not a member of the FEG"...'

(b) The materiality of the facts

140 The applicants deny the existence of the gentlemen's agreement. TU contends first that a unilateral collective exclusive dealing arrangement, as described in the contested decision, would not be of any use. The applicants criticise one by one

the findings concerning the relative strengths of the FEG and NAVEG, the origin of the gentlemen's agreement, those concerning meetings between the FEG and NAVEG and, finally, those relating to its implementation.

141 In the light of those arguments, it is necessary to consider whether, in the contested decision, the Commission discharged the burden of proof incumbent on it when it concluded that there was a gentlemen's agreement for which there was evidence dating back to 11 March 1986. That assessment is based on an overall evaluation of all the relevant evidence and information.

The usefulness of a collective exclusive dealing arrangement

— Arguments of the parties

142 In the first place, TU maintained that the members of NAVEG could not conclude an agreement pursuing an anti-competitive object of the kind envisaged by the Commission. In their capacity as agents, they had no power to bind their principals in that way.

143 Second, TU adds that the alleged collective exclusive dealing arrangement was pointless in view of its unilateral nature. In so far as the members of the FEG remained free to obtain supplies from manufacturers not belonging to NAVEG, the members of that association had no interest in concluding such an agreement.

144 In the third place, if there had been a collective exclusive dealing arrangement, all the members of the FEG could have claimed an equal right to supplies from the suppliers. However, that was not the case.

145 In the fourth place, TU claims that suppliers do not to deal with the CEF because they prefer to limit their distribution network to a number of wholesalers capable of offering them added-value services.

146 The Commission replies that it is the members of NAVEG, and not their principals, who, in the great majority of cases, decide on their commercial policy on the Netherlands market. The Commission maintains that the collective exclusive dealing arrangement is the consequence of extremely unequal strengths as between NAVEG and the FEG, the balance being in favour of the latter. To dispose of their goods, NAVEG members have every interest in taking account of the wishes of the FEG. The collective exclusive dealing arrangement is designed to prevent NAVEG members from supplying electrotechnical fittings to wholesalers not affiliated to the FEG. However, the Commission concedes that the members of NAVEG were not required to obtain supplies from FEG members.

— Findings of the Court

147 As regards TU's first argument, it must be observed that the question whether the members of NAVEG, as agents, were authorised by their principals to conclude an exclusive dealing arrangement with the FEG is irrelevant. The only relevant issue, with regard to the contested decision, is whether that agreement existed. In that regard, it must be borne in mind that the exclusive dealing agreement at issue concerned only sales on the Netherlands market by the agents themselves and not sales concluded directly by their principals. In any event, TU's argument is insufficiently supported to call in question the findings of fact made in recitals 47 to 52 to the contested decision. That first argument must therefore be rejected.

148 TU's second argument concerns the question whether a unilateral collective exclusive dealing arrangement is devoid of purpose. In that connection, it need merely be pointed out that the members of the FEG enjoyed economic power in the relevant market which is enough to explain the unilateral nature of the exclusive link with NAVEG. With a share of the relevant market of around 96%, FEG members held a dominant position (see contested decision, recital 67). Even if the broader definition of the relevant market is adopted, FEG members enjoyed, with an aggregate market share of around 50%, considerable economic power in the electrotechnical fittings distribution market in the Netherlands (direct distribution and distribution through wholesalers and retailers). As the main purchasers of goods of that kind, FEG members thus had considerable economic strength, affording them purchasing power which NAVEG and its members could not disregard.

149 In those circumstances, the Commission was right to conclude that the members of NAVEG had an interest in meeting the requirements of FEG members when the latter adopted a coordinated position, since they were 'very largely dependent on the FEG for their turnover' (contested decision, recital 47). The collective exclusive dealing arrangement described in the contested decision thus constitute a means whereby FEG members could ensure exclusivity of supplies to suppliers who were members of NAVEG. Wholesalers of electrotechnical fittings not belonging to the FEG were consequently excluded from that collective exclusive dealing arrangement and were thus, as regards the procurement of supplies, in a disadvantageous economic situation as compared with FEG members.

150 Consequently, the unilateral nature of the collective exclusive dealing arrangement is not such as to cast doubt on the validity of the argument put forward by the Commission in the contested decision. On the contrary, it must be considered, in the light of the collective economic power of the members of the FEG, that such an arrangement was intended to limit the competitiveness of their rivals by restricting their access to certain sources of supply of electrotechnical fittings in the Netherlands. TU's second argument must therefore be rejected.

151 By its third argument, TU claims that the fact that the members of the FEG did not require of their suppliers 'an equal right to supplies' contradicts the view that there was a collective exclusive dealing arrangement. It must be pointed out that that argument is based on the premise that the collective nature of the exclusive dealing arrangement necessarily presupposed absolute equality in its implementation by those benefiting from it. However, the right to be placed on an equal footing thus invoked by TU is not an essential condition for the functioning of a collective exclusive dealing arrangement of the kind at issue in this case. Accordingly, that argument, which, moreover, is not supported by any tangible evidence, must be rejected.

152 Finally, as regards the fourth argument, to the effect that suppliers preferred to maintain business relations with members of the FEG because of the quality of their services, it must be pointed out that the Commission relied, in the contested decision, on documentary evidence showing that the refusal to sell to wholesalers not belonging to the FEG was the consequence of collusion between the members of that association. That argument cannot therefore be dissociated from those by which the applicants contest the probative value of the documents relied on against them, and those arguments will be considered below.

The relative strengths of the FEG and NAVEG

— Arguments of the parties

153 The FEG contests the Commission's findings concerning the imbalance between the economic strengths of the FEG and NAVEG. It contends that, in recital 47 to the contested decision, the Commission asserted without any basis that the economic strength of NAVEG was minimal compared with that of the FEG. However, it maintains, it is incorrect to think that FEG members act in a

coordinated manner and thereby enjoy any economic power. It adds that the two documents relied on by the Commission (the letter from Hofte, a member of NAVEG, to Paul Hochköpper & Co., dated 23 August 1991, and the report on the general assembly of NAVEG of 9 May 1988) have no probative value.

154 For its part, TU contends that the Commission overestimated the importance of NAVEG and its members, both qualitatively and quantitatively.

155 First, TU claims that the great majority of the members of NAVEG are agents of less well-known manufacturers (NAVEG's reply of 28 August 1991 to questions from the Commission; and annex 19 to the application). It contests the statement that '[t]he 30 or so NAVEG members represent some 400 — mainly foreign — manufacturers of electrotechnical fittings on the Dutch market' (contested decision, recital 21) and considers that only 10 members of NAVEG represent well-known brands (annex 41b to the reply).

156 Second, TU alleges that the members of NAVEG collectively represent only a small proportion of the market.

157 First, their market share (contested decision, recital 23) is overstated. TU states that the total annual turnover on the Netherlands market in electrotechnical fittings for 1992 to 1994 was between EUR 1.36 and 1.82 billion (contested decision, recital 23). With an aggregate turnover of EUR 84 million (contested decision, recital 21), the members of NAVEG thus have market shares of between 4.6 and 6.2%. TU contends that the Commission disregarded its own data by working on the basis of a provisional market share of 10% in recital 23 to the decision. The Commission then multiplied by two the market share of NAVEG agents, bringing it up to about 20% (contested decision, recital 23).

158 Second, TU considers that the evaluation of the turnover of NAVEG members as EUR 84 million in 1993 is too high and is based on a less than transparent method of calculation. In the first place, TU regards as unrealistic the Commission's statement (contested decision, note No 20) to the effect that that estimate is probably lower than the real amount. Next, it contends that, in so far as NAVEG members are only agents, the aggregate turnover is, largely, that of the manufacturers they represent. Finally, TU maintains that the NAVEG statistics, on which the Commission relied (note No 20 to the decision; annex 41a to the reply) were so unreliable that NAVEG was compelled to stop collecting them after 1994.

159 In conclusion, TU considers that the economic strength of NAVEG is fifteen times less than is suggested by the Commission in the contested decision.

160 The Commission rejects TU's arguments, which it considers for the most part to be irrelevant. Moreover, TU's allegations are contradicted by the FEG, which puts the market share of the NAVEG members at about 10% (contested decision, recital 23) and by TU's reply to the statement of objections in which that share is estimated as 7% (reply to the statement of objections, page 6). Similarly, the evaluation of the membership of NAVEG as 400 was taken directly from the FEG's reply to the statement of objections (file F-22-209).

— Findings of the Court

161 In response to the FEG's arguments, it must be borne in mind that, in the contested decision, the findings concerning the relative strengths of the FEG and NAVEG are partly founded on the fact that the members of the FEG together represent 96% of the relevant market. Since the objections relating to the

definition of the relevant market have already been dismissed, the FEG's criticisms challenging the Commission's assessment of the market power collectively exercised by its members must be rejected.

162 Moreover, the Commission concluded, in recital 47 to the contested decision, that the relative strengths of the FEG and NAVEG were unequal, relying on certain documentary evidence. That evidence comprises, first, the letter from Hofte to Paul Hochköpper & Co. of 23 August 1991, regarding which the FEG explains that it is perfectly logical for Hofte to consider that it has a 'notional connection' with the FEG, since the latter represents 96% of wholesalers in the Netherlands. The FEG nevertheless insists that neither that statement nor any other part of that letter proves the existence of an unlawful agreement between the FEG and NAVEG.

163 Those arguments are not convincing. The letter in question emanates from a company represented on the board of NAVEG and constitutes, at least, an indication of the existence of a privileged relationship between the FEG and NAVEG, and between their respective members. That relationship can reasonably be explained by the unequal economic strengths of the respective members of those two associations and, in particular, by the fact that the members of NAVEG depend, as to 96% of their sales, on FEG members.

164 As regards the report of the general assembly of NAVEG of 9 May 1988, referred to in recital 47 to the contested decision, the FEG maintains that that document does not prove the existence of an unlawful agreement. It admits nevertheless (application, paragraph 92) that that document demonstrates the importance which the members of NAVEG attached to proper cooperation with FEG members.

165 That argument is not convincing. It is clear that the extract from the report on the general assembly of NAVEG of 9 May 1988, cited in recital 47 to the contested decision, refers to the 'very great importance' which the members of NAVEG attach to 'proper cooperation' with the FEG, which derives from the fact that

'most of the turnover of member agents is generated with FEG members'. Such a statement constitutes a probative indication of the existence of close links between the associations and illustrates the economic dependence of the members of NAVEG on the wholesalers affiliated to the FEG.

Origin of the gentlemen's agreement

— Arguments of the parties

166 The applicants contest the statement in recitals 39 to 43 to the contested decision to the effect that the FEG and NAVEG continued to apply the AGC after 1957. They note that the only evidence cited by the Commission was the memorandum from the Ministry for Economic Affairs of 23 February 1959. That document certainly does not demonstrate that the AGC was kept in force until the end of the period of the infringement. Moreover, the FEG states that, since the time of that memorandum, the Netherlands authorities found no evidence of any illicit agreement between the FEG and NAVEG. The FEG states that it always acted in accordance with Netherlands law.

— Findings of the Court

167 In the contested decision, the Commission refers to the memorandum from the Ministry for Economic Affairs of 23 February 1959 (contested decision, Note No 42, recital 41) to illustrate the circumstances of the origin of the collective exclusive dealing arrangement. As far as the probative value of that document is

concerned, it is true that, in the contested decision, the Commission refers to a practice by virtue of which the parties to the AGC continued to adhere to it after 1957, subject to certain modifications, since the 'Agenten-Grossiers Contact' which succeeded the AGC no longer provides a unilateral commitment on the part of the agents (contested decision, recitals 41 to 43).

168 However, it must be pointed out that in recital 145 to the contested decision the Commission stated that the infringement relating to the collective exclusive dealing arrangement continued from 11 March 1986 to 25 February 1994. It is clear from the part of the contested decision dealing with the legal assessment that the Commission set the limits of that period by reference to documents which came into existence between 28 April 1986 and 25 February 1994. Thus, in recital 103 to the contested decision, the Commission stated that that legal assessment was based on the 'facts described in recitals 44 to 52'. It thus seems that the evidence concerning the AGC referred to in recitals 41 to 43 to the contested decision serves only to illustrate the background to the agreements or practices which gave rise to the contested decision, as has been stated in paragraph 45 above. It follows that the applicants' arguments relate to a period before the period of the infringement specified in the contested decision, the starting point of which was fixed as 1986. Thus, even if those arguments were well founded in so far as they relate to the period between 1957 and 1986, they are not capable of casting doubt on the Commission's assessments as to the existence of an unlawful agreement between 1986 and 1994. Accordingly, those arguments must be rejected.

Meetings between the FEG and NAVEG

169 The applicants contest the probative value of the documents relied on in recital 46 to the contested decision concerning the alleged meetings between the FEG and NAVEG on 11 March 1986 and 28 February 1989.

Meeting of 11 March 1986

— Arguments of the parties

170 TU has not put forward specific arguments against the probative value of the report of the general assembly of NAVEG held on 28 April 1986.

171 For its part, first, the FEG doubts whether there was a meeting on 11 March 1986 on the ground that it can find no written record thereof. Second, the FEG considers that the report on the general assembly of 28 April 1986 cannot be relied on as evidence against it since it emanates from NAVEG. Third, the FEG adds that the Commission cannot use a single meeting as a basis for establishing the existence of an agreement with NAVEG.

172 The Commission rejects those arguments and contends that the report on the general assembly of NAVEG of 28 April 1986 demonstrates the existence of an agreement between the FEG and NAVEG by virtue of which the latter's members were obliged not to supply fittings to undertakings not belonging to the FEG.

— Findings of the Court

173 As regards the FEG's first argument, it must be emphasised that the fact that the latter did not retain documents concerning the meeting of 11 March 1986 is no basis whatsoever for casting doubt on the holding of that meeting, which is evidenced by the report on the general meeting of NAVEG of 28 April 1986, the authenticity of which is undisputed.

174 Second, as regards the contention that that document cannot be relied upon as evidence, it must be emphasised that the status of addressee of a document

unfavourable to a party cannot determine its probative character. It is for the Commission to assess the probative value of the documents it seeks to use as evidence, by reference to their content and scope, subject to supervision by the Court. In this case, the Commission relied on the report on the general assembly of NAVEG of 28 April 1986 as proof of the meeting of 11 March 1986 between the FEG and NAVEG. That document dates back to the same time as the meeting whose existence and proceedings it is being used to prove. It contains the following passages:

'Report of the NAVEG-FEG discussions at board level

An informal meeting was held on 11 March 1986 at the Euromotel, Oude Haagseweg, Amsterdam. Present were: for the board of the FEG: Messrs Schuurman, Brinkman, Coppoolse, van de Meer, Goedhart, Schiefelbusch, Vos and van Diessen. For the board of NAVEG: Messrs Gunneman, Amesz, Hofte and Onstee.

Mr Schuurman (FEG) reported successful operations with product committees (names are known to the board of NAVEG).

Under agreements between the two associations, it is not desirable to supply the firms Nedeximpo, Dego, van de Meerakker and Hagro.

We really wish to know which members of the FEG are dealing with contractual fittings from the firm Heinrich Kopp; it is then wished to take measures.

The FEG remains very interested in cooperation with NAVEG and hopes that it will be pursued within an open relationship.

Mr Gunneman (NAVEG) raised the following questions:

— Notice concerning the FEG's admission policy following the membership of the firms Timmermans and Gro-Ham.

— A summary of the concessions and exclusive sales of and by the FEG.

— Supplies of contractual fittings to undertakings which are not members of the FEG, namely Olpa-Ardomy and Jan de Vries.

Timmermans and Gro-Ham are members for apparatus; the FEG requests that no installation equipment should be offered or sold.

The FEG will send lists of wholesalers for apparatus and installation fittings (they have not yet been received).

The FEG will send the list of wholesalers' exclusive sales and a list of deliveries by FEG members to non-members of the FEG (not yet received to date).

The relationship between the FEG and NAVEG vis-à-vis other countries (Germany, England) must be considered satisfactory.'

175 At this stage, it must be concluded, on the basis of that document, viewed in context, that certain members of the boards of the FEG and NAVEG met on 11 March 1986 and broached 'in the context of [their] agreements' the question of supply by NAVEG members to firms not belonging to the FEG (Nedeximpo, Dego, van de Meerakker, Hagro, Olpa-Ardomy and Jan de Vries). The foregoing represents documentary evidence of the existence of 'agreements' and of meetings between the two associations as from 11 March 1986, and that evidence has been taken into account by the Court in its overall conclusion concerning the gentlemen's agreement in paragraph 210 below.

The meeting of 28 February 1989

— Arguments of the parties

176 The FEG contests the interpretation and the probative force of the report on the meeting of 28 February 1989 drawn up by NAVEG, on which the Commission relied for its view that NAVEG was advising its members not to supply wholesalers not belonging to the FEG. Subsequently, at its general assembly of 24 April 1989, NAVEG confined itself to informing its members of that exchange, without any recommendation or decision being adopted.

177 For its part, TU claims, first, that it was not present or represented at the meeting of 28 February 1989. Its employee, Mr Coppoolse, who was then on the board of the FEG, had, it says, been prevented from attending. In those circumstances, the Commission could not deduce from that meeting that TU had participated in an infringement. Second, TU maintains that the evidence of that meeting cannot be relied on against it. The evidence comprises the report on the general assembly of NAVEG of 24 April 1989 and an internal NAVEG memorandum reporting on that meeting (contested decision, recital 46). It claims not to have been in possession of those documents, addressed to NAVEG members. Moreover, it denies having been informed of the proceedings of the meeting of 28 February 1989 by the FEG, contrary to the Commission's contention in recital 46 to the contested decision.

178 Finally, the applicants invoke the absence of any reference to the meeting of 28 February 1989 between the FEG and NAVEG in the minutes of the meeting of the board of the FEG of 11 April 1989. The FEG and TU contend that that document contains no indication of any exclusive dealing agreement allegedly referred to at the meeting of 28 February 1989. This, they consider, detracts from the existence of a gentlemen's agreement.

179 The Commission refutes those arguments and, essentially, refers to the text of the contested decision as regards the inferences to be drawn from the meeting of 28 February 1989.

— Findings of the Court

180 At this stage, it is appropriate to limit the analysis to evidence of the existence of the alleged infringement. Thus, the argument that the Commission was not entitled to rely, as against TU, on the statements exchanged at the meeting of 28 February 1989, on the ground that TU was not represented there, will be examined with those concerning the attributability of the infringements. For the rest, the absence of a TU representative at the meeting of 28 February 1989 is not in itself sufficient to cast doubt on the value of the evidence relied on by the Commission concerning the existence of the meeting and the nature of the statements which may have been made there.

181 Next, the Court must reject TU's allegation that the report of the meeting of 28 February 1989, drawn up by NAVEG, and the report of the general assembly of NAVEG of 24 April 1989 cannot be used against it on the ground that it was not an addressee thereof. As stated earlier, the status of addressee of the documents at issue is not a matter that can affect their probative value, that being for the Commission to assess by reference to their value and the scope, subject to supervision by the Court. According to the general rules of evidence, it is

necessary, on the contrary, to attach great importance to the fact that those documents were drawn up in close connection with the events.

182 Similarly, the absence of any mention of the meeting of 28 February 1989 in the minutes of the board meeting of the FEG of 11 April 1989 neither undermines nor supports the probative value of the indicia relied on by the Commission concerning the discussions between the FEG and NAVEG during the meeting. Consequently, the applicants' argument on this point must be rejected.

183 For the rest, only the FEG has contested the well-foundedness of the Commission's assessments as to the value and scope of the report of the meeting of 28 February 1989 drawn up by NAVEG and of the report of the general assembly of that association of 24 April 1989. It considers that those documents do not prove the existence of an agreement. Moreover, in its view, those documents display discrepancies; there is no basis for considering that NAVEG or the FEG gave instructions to their members.

184 Those arguments cannot be upheld. It is explicitly clear from the report drawn up by NAVEG on the meeting of 28 February 1989 that a member of the FEG sought information from the representatives of NAVEG as to how that association intended treating those wholesalers who withdrew from the FEG. NAVEG considered that, in such circumstances, 'the recommendation [would be] not to supply'. Those remarks are also evidenced by the report of the meeting of 28 February 1989 drawn up by the FEG (contested decision, recital 46, documents cited in note No 48, annex 17 to the application), which contains the following passage:

'Mr Schiefelbusch asks what NAVEG is doing with those wholesalers who have terminated their membership of the FEG. NAVEG may advise its members to cease deliveries to wholesalers who have terminated their membership.'

185 Finally, it must be emphasised that, in the report of its general assembly of 24 April 1989, NAVEG expressed its views on the question of supplies to wholesalers who leave the FEG by saying that NAVEG members are admittedly not obliged to supply those of the FEG, but that 'supply is based on a gentlemen's agreement, it being understood that supply to non-FEG members may be a hindrance' (contested decision, recital 46).

186 In view of the foregoing, it must be concluded that those indications provide a basis for establishing the fact that, at their meeting of 28 February 1989, the FEG and NAVEG acted in concert regarding the conditions under which NAVEG members should deal with wholesalers who withdrew from the FEG, NAVEG referring in that connection at a later stage to the existence of a gentlemen's agreement between the two associations. On the basis of all that information, the arguments by which the applicants sought to deny the probative value of the documentary evidence concerning the meeting of 28 February 1989 must be rejected.

Implementation of the gentlemen's agreement

— Arguments of the parties

187 The applicants contest the evidence relied on by the Commission in recitals 48 to 53 to the contested decision as providing examples of the implementation of the gentlemen's agreement.

188 First, they contest the Commission's allegation that the FEG forwarded to NAVEG an updated list of its members in order to facilitate application of the

collective exclusive dealing arrangement. According to the applicants, the exchanges of information in question between the FEG and NAVEG had no connection with any gentlemen's agreement but formed part of legitimate initiatives within their field of business. They contend that the Commission failed to take account of the report of the meeting between the FEG and NAVEG of 25 October 1991, drawn up by the FEG (note No 53, recital 48 to the contested decision, annex 44 to TU's reply and annex 23 to the FEG's reply), the following passage from which, in their view, demonstrates the lack of any gentlemen's agreement:

'Since a short time ago, the FEG has, in addition to ordinary members, also associate members. NAVEG has not been formally informed of this, because NAVEG members are free to do business with non-members of the FEG as well.'

189 Moreover, the FEG emphasises that the Commission found only five examples of meetings between the two associations between 1987 and 1992. Those meetings, it submits, were of little interest to the FEG and are in any event insufficient to establish the existence of a gentlemen's agreement.

190 Second, TU (application, paragraph 112) denies that NAVEG advised its members not to supply wholesalers who did not belong to the FEG. It relies on the following passage from a letter from Spaanderman Licht to NAVEG dated 14 August 1991 (annex 6 to TU's reply to the statement of objections, and annex 25 to TU's application). In that letter, Spaanderman Licht, a NAVEG member, stated:

'Our firm has never decided by reason of its membership of NAVEG not to supply CEF. No such recommendation within NAVEG is known to us.'

191 Third, the applicants contest the proposition in recital 50 to the contested decision that NAVEG members in practice refused to supply wholesalers not belonging to the FEG, in particular CEF. They refer to the replies by 20 suppliers to the Commission's questions to demonstrate that their refusal to deal with CEF is not due to a collective exclusive dealing arrangement. TU also refers to the letters from ABB and Spaanderman Licht, dated 2 April and 22 May 1991 respectively, in which those suppliers indicated to CEF that they did not intend using its services on the ground that their distribution network already comprised a sufficient number of sales outlets (TU application, paragraph 139, and documents in annex 31 thereto).

— Findings of the Court

192 First, it is common ground that the FEG and NAVEG maintained periodical contacts, the Commission's investigation having shown that there were five meetings between those associations between 1987 and 1992 (on 3 November 1987, 28 February 1989, 5 December 1990, 17 September 1991 and 25 October 1991).

193 Second, with reference more particularly to the circumstances surrounding the meeting of 25 October 1991, it is common ground that it was convened after several FEG members had expressed the wish to leave that association. The FEG's reaction was then to consider amending its internal rules by providing for the creation of a new category of members, namely 'associate members'. At the meeting of 28 February 1989, NAVEG asked about the consequences of such a change for the application of the collective exclusive dealing arrangement. When questioned again on this point by NAVEG at the meeting of 25 October 1991, the FEG representative stated that the change in the composition of that association 'would not have any consequences for NAVEG, which means that the existing contacts [would] be kept unchanged'. The report of the meeting of 25 October 1991 drawn up by NAVEG (document No 1379b of the file, mentioned in note No 53 to the contested decision) indicates that the FEG then disclosed to NAVEG the name of those of its members who had expressed the wish to become associate members.

194 The applicants' arguments cannot thus detract from the interpretation adopted by the Commission in recital 48 to the contested decision, on the basis of the reports of the FEG and NAVEG on the meeting of 25 October 1991, according to which the FEG forwarded to NAVEG the names of the wholesalers who were no longer members of the association.

195 Furthermore, those indications of the forwarding to NAVEG by the FEG of the names of the undertakings which were members of it are also supported by the documents relating to the meeting of 28 February 1989, which have been examined earlier in connection with the present plea, and in particular the report drawn up by the FEG, mentioned in recital 49 to the contested decision.

196 Third, as regards the letter from Spanderman Licht of 14 August 1991, its terms appear to indicate that the refusal by that member of NAVEG to supply CEF is not attributable to the existence of a gentlemen's agreement between the FEG and NAVEG. However, it is nevertheless necessary to see the terms of that letter in the context in which it was drawn up. It must be observed, first, that that letter was sent to NAVEG in response to a question put by the latter two days earlier. It was therefore NAVEG which took the initiative to question Spanderman Licht as to the latter's motives for not supplying CEF. Second, that exchange of correspondence took place after initiation of the administrative procedure, when the Commission investigation was already in progress. Indeed, it post-dates the requests for information sent by the Commission to the FEG and to TU on 25 July 1991 and, therefore, carries no conviction.

197 Fourth, as regards the question whether the refusals of several suppliers to supply CEF were attributable to the existence of a gentlemen's agreement or to

legitimate commercial reasons, it must be observed first of all that, in a letter dated 27 September 1989, NAVEG wrote to the FEG in the following terms:

'Certain NAVEG members have asked the management for an opinion on possible supplies to [CEF]. Various foreign factories, which are represented by our members, supply this organisation in other countries and wish to do so in the Netherlands as well. However, so long as [CEF] is not admitted to the FEG, the board recommends that its members should of course not supply the company. In the past, various members have acted vis-à-vis Nedeximpo in accordance with similar recommendations but now Nedeximpo has become a member of the FEG and they are faced with the fact that they are no longer accepted as suppliers. In the case of [CEF], it is desirable to avoid repetition of the same situation and we are asked to react rapidly on this point. We ask you to let us know as quickly as possible what stage the FEG and [CEF] have reached in their negotiations. We consider it necessary to inform our members of your views within two weeks, and therefore we ask you to react in an appropriate time.'

198 The Commission was right to consider that that letter constituted likely evidence of exchanges of information between the FEG and NAVEG 'with a view to preventing supplies to non-FEG members in accordance with the gentlemen's agreement' (contested decision, recital 49).

199 Fifth, as regards the statements from about 20 suppliers referred to by the applicants, it appears that only three of them are NAVEG members: Hofte, Technische Handelsmaatschappij Regoort BV and Hateha. It follows that the letters from the other undertakings are not relevant to examination of the evidence of an agreement between the FEG and NAVEG.

200 As regards Hofte, the applicants refer to the following passage from its replies to the Commission (28 June 1993 and 30 May 1997: see the file, document 1614.20, 2c, annex 1 and annex 20 to TU's application):

'In response to your question as to whether we take into account whether or not a purchaser is a member of the FEG, our reply is that we do not regard that as a criterion.'

201 That is a response to a Commission measure of inquiry. Moreover, it must be set against the remark made by Hofte on 23 August 1991 to the manufacturer Paul Hochköpper shortly after being questioned by the Commission. Extracts from that letter appear in recitals 47 and 52 to the contested decision. In particular, the Commission indicated, in recital 52 to the contested decision:

'The following passage from the abovementioned letter from NAVEG member Hofte to Paul Hochköpper & Co is illustrative in this respect.

With regard to the complaint lodged by CEF with the Commission, Hofte observes that: "Besides, it has also of course sent documents, including some, unfortunately, from NAVEG agents who have acted without thinking, which state that the firm cannot be supplied because it is not a member of the FEG"....'

202 As regards Hateha, TU relies on the following statement (application, paragraph 84):

'Our choice of purchasers is determined in particular by commercial considerations relating to the function and place of establishment of the undertaking, as well as market coverage, in addition to requirements concerning solvency.

...

In principle we do not give any consideration to whether or not a purchaser is an FEG member. The main criteria are those referred to above, amongst which solvency plays an important part. Since the FEG lays down conditions relating to the financial situation of the wholesalers affiliated to it, membership of the FEG provides some guarantee as to the solvency of the undertaking concerned. In that regard, the question whether the undertaking is or is not a member of the FEG plays a limited role.'

203 It must be pointed out that the Commission refuted the relevance of that statement in a sufficiently convincing and detailed manner in recital 50 to the contested decision, reproduced in paragraph 139 above. The fact remains that Hateha expressly indicated to two undertakings, Frigé and CEF, that it would not supply them because they did not belong to the FEG (see letters from Hateha to CEF of 24 May 1989 and to Frigé of 12 March 1981, contested decision, recital 50, and notes Nos 57 and 58), although TU objects (reply, paragraph 158) that that was a 'facile excuse to get rid of CEF'.

204 As regards, finally, the supplier Technische Handelsmaatschappij Regoort BV, the FEG relies on the reply sent by that undertaking to the Commission on 28 May 1997. In that reply, that supplier indicated that it did not take account of its customers' membership of the FEG and explained, in that connection, that 1 214 of its 1 257 customers did not belong to that association.

205 The Commission emphasised (rejoinder in case T-5/00, paragraph 61) that, whilst that supplier has more than 1 000 customers, the FEG has only about 50 members. That supplier sells its goods to wholesalers and to retailers, to industrial concerns, to public entities and to exporters. The Commission recognises that that supplier has supplied CEF.

206 The foregoing could, at most, be a basis for concluding that that supplier did not apply the agreement between the FEG and NAVEG. Although that document shows that one of the members of the latter association did not perhaps systematically comply with that agreement, it does not on the other hand appear to constitute evidence such as to cast doubt on the actual existence of that agreement.

207 Finally, it must be emphasised that the applicants have not convincingly denied the fact that another member of NAVEG, Hemmink, refused to supply the undertaking Van de Meerakker, after consulting the FEG and one of its members, the Schiefelbusch company (contested decision, recital 51). The Commission relied on the report of an internal Hemmink meeting of 25 February 1994 (contested decision, note No 59). The FEG admits (reply, paragraph 120) that the latter document demonstrates that Hemmink, after having checked with the FEG whether Van de Meerakker had applied to join that association, decided not to supply that undertaking. The FEG nevertheless considers that that document does not demonstrate the existence of any instructions given by it to Hemmink not to supply Van de Meerakker. That objection must be rejected, since the report emanates from Hemmink and constitutes an objective indication of the existence of a refusal to supply undertakings which were not members of the FEG.

208 Similarly, with regard to the letters from ABB and Spanderman Licht relied on by TU, it must be emphasised that only the latter belongs to NAVEG, so that the letter from ABB is, at this stage of the discussion, irrelevant. In its letter to CEF of 22 May 1991, Spanderman Licht confined itself to saying that it did not wish to extend its retailer network. It must, however, be pointed out that that letter was written when the Commission investigation was already under way.

209 In view of those various points, it must be concluded that the Commission was right to rely on the documentary evidence referred to in recitals 48 to 52 to the contested decision in support of the conclusion that the documentary evidence of the implementation of the gentlemen's agreement between the FEG and NAVEG was probative.

(c) Overall conclusion

210 It is clear from the foregoing that the applicants have not succeeded in demonstrating to a sufficient legal standard that the Commission's findings regarding the gentlemen's agreement are vitiated or contain material inaccuracies of such a kind as to render them invalid. TU's objection that certain documents adverse to it are ambiguous and that it should be granted the benefit of the doubt pursuant to the maxim *in dubio pro reo* must be rejected. However, an overall assessment shows that that criticism and the applicants' specific objections are not such as to call in question the convincing, objective and consistent nature of the evidence relied on in the contested decision.

211 Moreover, the findings based on an examination of that evidence cannot be called in question by the FEG's allegation that NAVEG took the initiative regarding contacts with the FEG. Even if well founded, such an allegation would at most confirm the existence — already established — of a gentlemen's agreement between the two associations.

212 It must therefore be concluded that the Commission was right to conclude that NAVEG had given a commitment to the FEG that it would advise its members not to sell electrotechnical fittings to wholesalers not belonging to the FEG, by virtue of a gentlemen's agreement between those two associations, for which there is evidence dating back to 11 March 1986.

2. Extension of the gentlemen's agreement to suppliers not belonging to NAVEG

213 In the contested decision, the Commission considered that the FEG and TU had tried to extend the scope of the gentlemen's agreement to suppliers who were not represented by agents or importers within the NAVEG membership. It referred to

various examples of pressure brought to bear on suppliers such as Draka Polva, Holec, ABB and Klöckner Moeller (hereinafter 'KM') (contested decision, recitals 53 to 66 and 104 to 106). It also stated that the FEG had sought to extend the collective exclusive dealing arrangement to the firm Philips, a supplier of electrical equipment to the general public.

(a) The materiality of the facts

Arguments of the parties in case T-5/00

214 According to the FEG, the contested decision contains no proof of any pressure brought to bear by it on its members' suppliers. It submits that it was not involved in any of the examples relied on by the Commission and that it never sought to interfere in relations between its members and their suppliers.

215 First, the FEG considers itself exonerated by the minutes of its board meeting of 29 January 1991 (annex 28 to the reply in Case T-5/00), from which it is clear that its policy was not to intrude into relations between its members and their suppliers. Those minutes state as follows:

'The documents attached to the agenda were discussed:

— a letter from Mr Duk to Mr Fillet (CEF): the secretary added that it was unacceptable, in any form whatsoever, for the FEG, as an association, to tell suppliers that they must supply only FEG members.

This was emphasised by the meeting. It was pointed out that the association has never complained or will never complain to suppliers regarding supplies.'

216 Second, with regard to the FEG's alleged opposition to Draka Polva's supplying CEF, mentioned in recital 54 to the contested decision, The FEG maintains that the Commission has no direct evidence of pressure brought to bear on that undertaking. It emphasises that the only document relied on in the contested decision is a report emanating from the TU (contested decision, recital 54, and documents mentioned in note No 62), which cannot suffice to prove its direct participation in the action at issue.

217 In addition, the FEG maintains that Draka Polva did not refuse to supply CEF. Thus, in a letter dated 15 June 1993 (contested decision, recital 27, note No 29), Draka Polva is said to have told the Commission:

'We would point out, no doubt needlessly, that we have supplied City-Electrical-Factors since that undertaking established itself in the Netherlands.'

218 Moreover, the minutes of the meeting of the board of the FEG of 25 June 1990 stated as follows:

'7. CEF's membership application

If CEF wishes to become a member of the FEG, CEF must meet the admission criteria. This fact will be notified to CEF in writing.

The letter from Draka Polva concerning supplies to CEF was dealt with.

The chairman considers that the FEG cannot oppose this. The item "suppliers to supply non-members of the FEG" will be placed on the agenda.'

219 At its next meeting, on 11 September 1990, the board of the FEG made only a brief observation on the subject, recorded in the minutes in the following terms:

'12. Suppliers who supply non-members of the FEG

With regard to the letter from Polva regarding supplies to CEF, it was noted that, formally, the FEG, as an association, can do nothing about it.'

220 Those documents show, in the FEG's opinion, that it had no way of opposing Draka Polva's decision to supply goods to CEF.

221 Third, with regard to the intention attributed by the Commission to the FEG to extend the scope of the collective exclusive dealing arrangement to suppliers of electronic equipment to the general public (contested decision, recital 55), the FEG considers that the Commission's contention is based on only one document, namely the letter of 29 August 1989 from one of the members of the board of the FEG to a committee of the Philips equipment wholesalers. The FEG objects that that letter reflected the personal position of one of the members of its board. Moreover, the FEG and TU also maintain that that letter is not relevant, in so far

as the allegations in question concern not the relevant market but the market comprising sales of electronic equipment to the general public.

222 Fourth, the FEG denies having taken part in the actions of certain of its members vis-à-vis the suppliers Hager, Holec and ABB, mentioned in recitals 56 to 59 to the contested decision. Similarly, it had nothing to do with the pressure brought to bear on KM. It recognises that some of its members and some of its previous management were members of the delegation of wholesalers which visited KM. It objects, however, that that fact does not allow the inference that it participated in any such action or that it should be held responsible for it. In the alternative, the applicant associates itself with TU's argument as set out in recitals 62 and 63 to the contested decision.

223 Fifth, the FEG criticises the Commission for disregarding the results of its inquiry, from which it is clear that the 20 or so suppliers questioned unanimously told the Commission that the FEG had never asked them to 'adjust their distribution policy'. Thus, the file contains no indication of contacts between the FEG and suppliers and for those suppliers a wholesaler's membership of the FEG had never represented a decisive factor for the establishment of commercial relations.

224 The Commission rejects those arguments and considers that the information examined in recitals 53 to 66 to the contested decision shows that the FEG intended to extend the collective exclusive dealing arrangement to suppliers who had no connection with NAVEG. It recognises that it was clear that it was FEG members which took the initiative and took steps to extend the collective exclusive dealing arrangement to suppliers who were not members of NAVEG. Since the FEG could approach only other associations of undertakings, such as NAVEG, it was much easier for undertakings like TU, which have significant commercial influence over their suppliers, to engage in such discussions. However, that factor cannot detract from the responsibility of the FEG and of TU.

Findings of the Court

225 It is appropriate to defer examination of the FEG's arguments to a later stage of this analysis in so far as they purport to contest the attributability of the infringement referred to in Article 1 of the contested decision and not the materiality of the findings on the basis of which the Commission took the view that the FEG had tried to extend the collective exclusive dealing arrangement to suppliers not belonging to NAVEG. Thus, since the FEG did not contest the materiality of the events involving the undertakings Hager, Holec, ABB and KM, the arguments relating thereto will be analysed at the same time as the other grounds on which the attributability of the infringements is based.

226 For the rest, the terms of the minutes of the board meeting of the FEG of 29 January 1991 are indicative of the FEG's wish not to deal directly with its members' suppliers for the purpose of ensuring that they did not supply non-member wholesalers. However, this finding is not irreconcilable with the position taken by the Commission in the contested decision, namely that the FEG sought to extend, for the benefit of its members, the application of the collective exclusive dealing arrangement to third parties. Moreover, it must be balanced against TU's statements in an internal memorandum of 12 September 1990, after Draka Polva proposed supplying CEF, according to which the 'FEG has reacted to this since this proposal runs counter to the agreement between the members and the FEG' (contested decision, recital 54). Those words give an indication of the existence of an agreement between the members of the FEG and of the latter's direct role in finalising the position envisaged as a reaction to CEF's entry into the Netherlands market.

227 Moreover, although the Commission did not mention other indications of the FEG's direct involvement in the incidents relating to extension of the collective exclusive dealing arrangement, it must be emphasised that it is clear from a number of consistent sources that several of its members sought, individually or in concert, to secure from suppliers outside NAVEG commitments for the benefit of all the members of the FEG, so that those suppliers could legitimately conclude that such action was undertaken under the aegis of the FEG or with its consent.

228 In that connection, it is important to note that the author of the letter of 29 August 1989, addressed to the committee of wholesalers of Philips electric products to the general public, mentioned in recital 55 to the contested decision, was at that time a member of the board of the FEG. Although it is agreed that that letter did not emanate from the FEG officially, it is clear that its author expressly relied on his status as a member of the board of that association ('You know that I recently became a member of the FEG board. My main purpose in so doing is to promote the interests of equipment wholesalers.'), in order to call on the addressee to cease supplying wholesalers who were not members of the FEG. In making that request, the author of the letter was not acting in his personal capacity but in the joint interest of FEG members, since he sought to secure, for the benefit of the latter, cessation of deliveries to wholesalers who were not members of that association.

229 It must nevertheless be emphasised, as the applicants have contended, that the Commission's assessment as to extension of the collective exclusive dealing arrangement to the distribution of electronic equipment to the general public does not relate to the relevant market defined by the Commission, which is limited to the wholesale distribution of electrotechnical fittings. In the contested decision, therefore, those assessments are superfluous.

230 Nevertheless, it must be added that the joint interest which prompted the FEG and its members to act can also be highlighted by the incident relating to the company KM. That incident involved joint action by 26 members of the FEG, including several members of its board, taken in the joint interest of the members of that association as a whole, as is clear from the extracts from the draft letter to KM cited in recitals 62 and 63 to the contested decision. Furthermore, the draft letter was intended to inform KM of the 'concern' of the 26 members of the FEG involved, after KM became 'one of the first large suppliers in the electrotechnical sector to distribute to a non-FEG member'. By thus referring expressly to the FEG, the draft letter to KM was not intended to leave its addressee with any other impression than that it had received backing from the FEG.

231 In view of the foregoing, the FEG cannot take refuge behind the fact that, among the indications relied on by the Commission, only the internal TU memorandum examined earlier referred to its direct implication in the efforts of its members to secure extension of the collective exclusive dealing arrangement to third-party suppliers. It is clear the from the joint action of certain members of the FEG — including several of its executives on the board — that they were acting not individually but on behalf of the members of the association as a whole, although without acting directly in the latter's name. Consequently, it must be held that the Commission was entitled to deduce from those actions that the FEG had manifested its intention to extend the collective exclusive dealing arrangement to suppliers outside NAVEG.

Arguments of the parties in Case T-6/00

232 First, TU endorses the FEG's argument in Case T-5/00 and adds that the operative part of the contested decision relates only to its participation in the infringements committed by the association. TU infers from this that, in the absence of direct evidence of the FEG's participation in the pressure allegedly exerted on third parties, its contact with suppliers outside NAVEG cannot serve as a basis for a finding of an infringement in its case.

233 Second, TU admits having discussed the case of CEF with the suppliers KM, Draka Polva, ABB and Holec, but denies having brought pressure to bear on them to cease supplying CEF. It admits having let those undertakings know that it was unhappy about what it perceived as non-compliance with their agreements. TU considered in particular that it was unfair for those suppliers to grant a new entrant to the market, such as CEF, the same discounts as those which it was entitled to claim after years of effort. Consequently, TU considers that those contacts had neither the object nor the effect of restricting competition.

Findings of the Court

234 At the outset, it must be emphasised that TU's arguments are based on the premise that the operative part of the contested decision relates only to its participation in the infringements committed by the FEG. In so far as those arguments do not directly concern the materiality of the facts found by the Commission, examination of them must be deferred to the stage at which the causes of the attributability of the infringements are examined.

235 Moreover, it must be pointed out that TU is not calling in question the existence of the contacts which it had with suppliers not belonging to NAVEG but is challenging the legal classification which the Commission applied to the latter, in particular in its assessment of their object or their anti-competitive effect. Accordingly, those arguments will be examined in more detail together with those concerning the legal classification of the facts.

(b) Overall conclusion

236 In the light of the foregoing considerations, it must be concluded that none of the arguments examined is such as to call in question the materiality of the facts relied on in the contested decision as evidence of the pressure exercised by the FEG and TU vis-à-vis certain suppliers not linked with NAVEG. In those circumstances, the Commission was entitled to find, on the basis of objective and consistent indications, first, that the FEG had sought to extend the scope of the gentlemen's agreement to suppliers who were not linked with NAVEG and, second, that TU had participated in several actions designed to attain that objective.

237 All the applicants' arguments purporting to contest the materiality of the facts found in the contested decision as regards the collective exclusive dealing arrangement must therefore be rejected.

3. Conditions for membership of the FEG

(a) Arguments of the parties

238 The FEG contests the information on the basis of which the Commission took the view that the conditions for membership of the FEG could restrict access to the Netherlands wholesale market in electrotechnical fittings.

239 First, the FEG considers it natural that its ranks should be open only to undertakings which have achieved a turnover of at least 5 million Netherlands florins (NLG) within Netherlands territory over a period of three consecutive years. Since the FEG has the mission of representing the interests of wholesalers on the Netherlands market, it has no reason to take account of turnover achieved outside the Netherlands.

240 Next, the FEG rejects the Commission's allegations that it used arbitrary criteria to deny certain candidates membership (contested decision, recital 109). The applicant criticises the Commission for relying on the only two examples of applications for membership which had raised difficulties over the previous 20 years. In both cases, the business of the undertakings concerned did not correspond to that of its members.

241 Finally, the FEG states that, in 1989 and 1990, several wholesalers whose turnover was less than NLG 10 million terminated their membership. Those examples contradict the view that the membership criteria were used to maintain a collective exclusive dealing arrangement and were a necessary precondition for entry to the Netherlands market.

242 The Commission replies that the conditions for admission of new members are liable to make access to the Netherlands market more difficult (contested decision, recital 108). The collective exclusive dealing arrangement constitutes a barrier to entry which those admission conditions merely reinforce. It points out that it stated in recital 108 to the contested decision that certain FEG members did not satisfy those admission conditions.

(b) Findings of the Court

243 The parties do not differ as to the substance of the criteria on the basis of which the FEG decides whether or not to admit new members. On the other hand, the FEG denies that those criteria made access to the Netherlands market more difficult, a finding made by the Commission in recitals 108 and 109 to the contested decision in support of the contention that those conditions constituted an additional obstacle for new entrants to the Netherlands wholesale electrotechnical fittings distribution market.

244 In the contested decision, the essential point regarding membership criteria is the arbitrary character attributed to them. The Commission observed, in recital 109 to the contested decision, that the FEG used the criterion of 'interest of the

association' which, in view of the requirement of a unanimous vote by the members of the board to authorise any new membership, conferred on that managing body a wide discretionary power (see, in the contested decision, the references in note No 126 to the discussions relating to the admission of Van de Meerakker and the FEG reports of 27 September and 15 November 1994) in deciding whether to admit new members.

245 That alleged arbitrariness is also connected with the fact, which has not been contested, that the FEG accepted as members certain wholesalers who did not satisfy the minimum turnover condition.

246 Finally, with reference more specifically to the condition concerning a turnover of NLG 5 million over the three financial years prior to the application for membership, it must be accepted that it may constitute an obstacle for new entrants since it operates in favour of the largest wholesalers who, as FEG members, also benefit from the gentlemen's agreement. That obstacle is even more effective as against foreign undertakings since turnover achieved outside the Netherlands is excluded when applications for membership are examined.

247 In view of those factors, the Commission was right to state in recitals 108 and 109 to the contested decision that the FEG membership criteria had the effect of making 'access to the market even more difficult for newcomers' and thereby strengthened the effects of the collective exclusive dealing arrangement. Consequently, the FEG's arguments concerning the impact of its membership conditions on competition must be rejected.

4. Legal classification of the facts concerning the collective exclusive dealing arrangement

248 The applicants' arguments concerning the legal classification of the facts concerning the collective exclusive dealing arrangement fall into two parts. First, they contend that, by reason of the NAVEG members' very weak position on the market, the gentlemen's agreement could have no appreciable effects on competition. Second, TU denies that the action in which it participated vis-à-vis suppliers not belonging to NAVEG had the object or effect of restricting competition.

249 Since the applicants have not contested other aspects of the classification of the collective exclusive dealing arrangement under Article 81 EC, it is necessary to examine those arguments in the light of the delimitation of the relevant market and the facts as they have just been established.

(a) The gentlemen's agreement

Arguments of the parties

250 The applicants maintain, in essence, that the very weak position of NAVEG members on the market meant that the collective exclusive dealing arrangement could not have appreciable effects on competition.

251 TU contends in particular that the distribution activity of NAVEG members accounted for less than 1% of the market. As agents, NAVEG members represented only 16 famous brands representing a turnover estimated as, at most,

NLG 20 million out of a total market of NLG 3 to 4 billion (0.5—0.6%). At the time of the AGC, NAVEG members no longer held the position they had held in the 1950s.

Findings of the Court

252 The contested decision relies on a number of statistics concerning the market in electrotechnical fittings ('primary market'), on the one hand, and, on the other, the wholesale market in such fittings ('relevant market'). Thus, it appears that the turnover of the undertakings active in the primary market (1992-1994) represents in all EUR 1 590 million (contested decision, recitals 23 and 24). Within that market, that of NAVEG members is EUR 84 million, that is to say 5% of the primary market (contested decision, recitals 21 and 23). In the same period, the undertakings active in the wholesale electrotechnical fittings market, the only relevant market in this case, had a turnover of between EUR 680 and 910 million, namely about 50% of the primary market. FEG members accounted jointly for 96% of the relevant market (contested decision, recital 24).

253 Without contesting those data, the applicants nevertheless contend that the Commission overestimated the importance of NAVEG members.

254 Thus, TU states that, in recital 23 to the contested decision, the Commission estimated that NAVEG members held 10% of the primary market, whereas it was clear from the figures referred to above that that figure was about 5%. It then states that the Commission, by an inexplicable calculation, multiplied that share of the market by two so as to determine NAVEG's market share in the wholesale trade as 20%.

255 Those arguments are not tenable.

256 First, the Commission possessed gross figures enabling it to calculate the primary market share of NAVEG members (5%). However, it only took into account the estimate submitted by the FEG, which was twice as high (10%). In that regard, it stated clearly in notes Nos 20, 23 and 25 that the calculation made by NAVEG concerning its members' turnover was 'based on data from only 15 of the 30 NAVEG members'. The Commission therefore estimated that 'in all probability, therefore, the actual turnover of NAVEG members [was] considerably higher than the amount given'. The Commission was therefore fully entitled to deduce from that information that 'the FEG's estimate of the market share of NAVEG members, 10%, [was] therefore not unrealistic' (contested decision, note No 23).

257 Apart from the apparent imprecision alleged by TU, it appears that the Commission sought to draw attention, in relation to purchases made by wholesalers, to the relative importance of NAVEG and the other suppliers.

258 The contested decision gives a number of indications to that effect. Thus, in recital 23, the Commission states that 'NAVEG members generally prefer to supply their products through the wholesale trade', adding that that association accepts only members who distribute via wholesalers (note No 22). Thus, in the contested decision, the Commission took the view that all or almost all the fittings sold by NAVEG members were distributed by wholesalers. It is therefore correct that the fittings from NAVEG members account for a proportion of the relevant market (wholesale sales) which is twice as large as that in the primary market. That share is therefore 20% on the basis of the FEG's estimates and 10% if the gross figures available to the Commission are relied on.

259 TU appears, however, to challenge that reasoning and, in its reply, put forward several arguments to show that the figures concerning NAVEG members used by the Commission were not reliable. It contends, in particular, that the turnover of NAVEG members was in fact attributable to their principals. Whatever the sense of that argument, TU contends that, according to Hemmink, a NAVEG member, supplies invoiced in the wholesale trade accounted for at least 90% of the 'turnover of the principals' (Reply, paragraph 39). Although that argument may be understood as purporting to say that 90% of the turnover of NAVEG members derives from sales involving wholesalers, it is not capable of undermining the legality of the contested decision. Even if 90% rather than 100% of the turnover of NAVEG members derives from sales to wholesalers, the fact remains that the market share attributable to those undertakings at wholesale level is twice as big as that which they hold in the primary market.

260 TU also alleges that the estimate of the turnover of NAVEG members was not reliable. However, its arguments are limited to general unsupported propositions. Accordingly, it need merely be stated that, in the absence of any tangible evidence, TU's arguments on this point must be rejected.

261 Consequently, all the applicants' arguments concerning the lack of an appreciable effect of the gentlemen's agreement on competition must be rejected.

(b) Extension of the gentlemen's agreement to suppliers not belonging to NAVEG

262 In making its legal assessment, the Commission considered that the FEG and its members, in particular TU, had sought to extend the scope of the collective

exclusive dealing arrangement by bringing pressure to bear on suppliers who were not represented within NAVEG. It also inferred from the facts of the case that those manœuvres were successful, since 'a substantial number of suppliers [had] acted in accordance with the collective exclusive dealing arrangement' (contested decision, recital 104).

Arguments of the parties

263 TU states that its contacts with the suppliers Draka Polva, KM, ABB and Holec had neither the object nor the effect of restricting competition.

264 The Commission rejects that view and refers both to the relevant passages of the contested decision and to the settled case-law of the Court concerning interpretation of Article 81 EC.

Findings of the Court

265 First, as regards the contacts between TU and Draka Polva, it is common ground that TU took action vis-à-vis Draka Polva when the latter wished to enter a business relationship with CEF (contested decision, recital 54). In the report of the internal meeting of 13 December 1989, TU summarised its policy in that connection in the following terms '... it may be concluded that efforts should be made to prevent TU manufacturers from supplying CEF'. It is clear in particular from the contested decision that, after learning that Draka Polva proposed supplying CEF, 'the FEG has reacted to this since this proposal [ran] counter to

the agreement between the members and the FEG' (report of an internal meeting of TU of 12 September 1990). In a letter dated 16 July 1990 to Draka Polva, TU stated 'we regard your decision as a threat to the stockkeeping wholesale trade and therefore regard your involvement as undesirable'. Finally, the contested decision notes that the applicant's action had the desired effect, since in a report of a meeting of 9 October 1990 TU states: 'following talks which Draka Polva had with Mr van der Meijden, they withdrew their announced intention of supplying CEF' (contested decision, recital 54).

266 In the light of the foregoing, the Commission was right to consider that the steps taken by TU were intended to bring pressure to bear on Draka Polva, one of its suppliers, to cease supplying a new entrant to the relevant market.

267 For the rest, TU maintains that its approaches to Draka Polva did not produce the intended results since that supplier had not acted to the detriment of CEF by interrupting its supplies to it or by granting it less advantageous conditions than in the past. That argument is thus confined to the contention that there were no anti-competitive effects, examined in paragraph 275 below, and therefore does not call in question the anti-competitive purpose of those measures.

268 Second, with regard to contacts with ABB and KM, TU maintains that those contacts concerning CEF were intended to safeguard its legitimate interests; it sought, it contends, to express its discontent regarding the conditions granted by those suppliers to CEF. It considers that those steps did not pursue the purpose of restricting or distorting competition.

269 As regards ABB, in recital 58 to the contested decision the Commission indicates that TU pressured that supplier to stop supplying CEF. TU considers that the Commission distorted the evidence on which it relied. Its argument is similar to that put forward by it in the administrative procedure, which the Commission rejected in recital 59 to the contested decision. Specifically, the parties differ as to the interpretation of the report drawn up by the applicant on 13 March 1991, the relevant passage of which states:

'Supply by ABB to CEF

ABB supplied only one lot — what is known as a dead transaction — to CEF. The argument used was that of the relationship which one had in England. When the CEF approaches ABB again, the latter will offer fitting-contractor prices.'

270 In the contested decision, the Commission emphasises in particular that to sell electrotechnical fittings to CEF at fitting contractor prices (that is to say without any discount) would deprive such transactions of any commercial interest (contested decision, recital 58). TU does not put forward any arguments to counter that interpretation. On the contrary, in its arguments against the second infringement, it contends that a sale without a discount would be unthinkable (application, paragraph 165). The Commission was therefore right to conclude that TU's approach to ABB was intended to stop the latter supplying CEF.

271 As regards KM, it is common ground that TU, in concert with 25 members of the FEG, actively opposed that supplier's action when it granted CEF the same discounts as those granted to FEG members. It is undisputed that TU, accompanied by 10 other FEG members, visited KM on 27 June 1991 to complain about the latter's relations with CEF (contested decision, recital 66, and note No 81).

272 Third, as far as contacts with Holec are concerned, it is common ground that Holec had entrusted the distribution of some of its products to FEG members. TU nevertheless considers that that was a unilateral decision by Holec, not pursuing an anti-competitive purpose.

273 However, it is clear from recital 57 to the contested decision that, on 2 July 1991, TU and Holec had a meeting, on conclusion of which Holec decided to entrust the distribution of certain of its products only to wholesalers who were FEG members. Admittedly, the conclusion of an exclusive dealing between TU and a supplier might have been legitimate and permitted by the rules then in force. Nevertheless, the fact remains that, in this case, the exclusive dealing relationship did not concern only TU but all FEG members. The commercial advantage of such a relationship is not therefore clear either for TU or Holec, as the Commission emphasises in recital 57 to the contested decision. It seems, on the contrary, that that approach by TU reflected the common interest of FEG members. TU's argument is not therefore convincing.

274 All the foregoing shows, on the basis of objective and consistent information, that TU, alone or in concert with other FEG members, made approaches to the suppliers Draka Polva, ABB, KM and Holec with a view to ensuring that they supplied only FEG members. Such an approach forms part of the efforts by FEG members to impose, in particular through the gentlemen's agreement, a competitive disadvantage on competing wholesalers not belonging to the FEG. Since TU has not provided evidence that the findings and classifications made in that connection in the contested decision are incorrect, its arguments must be rejected.

275 Moreover, in so far as the applicants' arguments can be understood as calling for proof of the actual anti-competitive effects of the collective exclusive dealing arrangement, even though the anti-competitive purpose of the conduct criticised has been established, they cannot be upheld. It is settled case-law that, for the purposes of applying Article 81(1) EC, there is no need to take account of the

concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition in the common market (*Consten and Grundig* v *Commission*, cited above; Case C-77/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 14 and 15, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 122).

C — Conclusion concerning the collective exclusive dealing arrangement

276 The Commission was correct to conclude that the gentlemen's agreement between the FEG and NAVEG and the practices designed to extend the scope of that agreement to suppliers outside NAVEG constituted concerted practices and agreements prohibited under Article 81(1) EC.

277 As the Commission observed in recital 105 to the contested decision, the collective exclusive dealing arrangement restricts the freedom of suppliers to choose for themselves which wholesalers they wish to supply. The collective exclusive dealing arrangement was designed and implemented for the benefit of FEG members, in order to render more disadvantageous the conditions under which their competitors, who are not amongst its members, can obtain supplies of electrotechnical fittings from certain suppliers.

278 Consequently, in the absence of any evidence such as to call in question the correctness of the facts relied on by the Commission or its assessment thereof, or such as to establish that the Commission erred in law by concluding that the collective exclusive dealing arrangement was caught by Article 81(1) EC, the applicants' pleas concerning the existence and illegality of the collective exclusive dealing arrangement must be rejected in their entirety.

D — Concerted practices concerning price fixing (Article 2 of the contested decision)

1. Details of the contested decision

279 According to the contested decision, the FEG and its members supplemented the collective exclusive dealing arrangement by decisions and concerted practices concerning price fixing and the granting of discounts (contested decision, recitals 102 and 111 to 121). It considered that that conduct tended to create artificial price stability, the main purpose of which was to ensure that the margins of FEG members did not come under pressure (contested decision, recital 111).

280 The Commission thus considered that the FEG and TU had infringed Article 81(1) EC by, directly and indirectly, restricting the ability of members of that association to fix their selling prices freely and independently. As evidence of that infringement, the Commission relied on:

— the FEG's binding decisions on fixed prices and publications;

— the fact that the FEG provided its members with a forum to discuss prices and discounts (contested decision, Articles 1 and 2);

— the issuing by the FEG of price recommendations.

281 It considered that the effect of the joint application of those instruments in practice was that there was only limited price competition between FEG members (contested decision, recital 117).

282 According to the contested decision, that evidence proves a single infringement, not three separate infringements.

2. Objections concerning the legal classification of the facts

283 The applicants deny that the conduct referred to by the Commission had any purpose or effect of restricting competition within the meaning of Article 81(1) EC. The Commission considered that the applicants had concluded 'horizontal price agreements', whilst at the same time adopting the classification of 'concerted practices' (see for example recital 111 et seq. to the contested decision). However, the applicants do not contest that dual classification.

284 The concept of a concerted practice within the meaning of Article 81(1) EC refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 26, and *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 63).

285 The criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt in the common market (see *Suiker Unie and*

Others v *Commission*, cited above, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 63, and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 86).

286 Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the purpose or effect of such contacts is to lead to conditions of competition which do not correspond to the normal competition on the market in question, in view of the nature of the products or services supplied, the size and number of the undertakings and the volume of that market (see, to that effect, *Suiker Unie and Others* v *Commission*, cited above, paragraph 174; *Züchner*, cited above, paragraph 14, and *Deere* v *Commission*, cited above, paragraph 87).

287 It follows from the very text of Article 81(1) EC that, as in the case of agreements between undertakings and decisions of associations of undertakings, concerted practices are prohibited, regardless of any effect, where their purpose is anti-competitive. The very concept of concerted practice presupposes joint conduct by participating undertakings. However, it does not necessarily imply that such conduct is to be characterised by acts forming part of the commercial activity of those undertakings in the market. Nor does it imply that such conduct must produce the concrete effect of restricting, prohibiting or distorting competition on the market, provided that it pursues such an objective.

288 In the light of those principles, emphasised by the Court of Justice in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 123 and 124, it is necessary to examine each of the applicants' objections successively.

(a) Binding decisions on prices and publications

289 In Article 2 of the contested decision, the Commission referred to two 'binding decisions' of the FEG, one concerning fixed prices and the other publications. It is common ground that, under the articles of association of the FEG, those decisions are binding on members. Any infringement of those decisions may result in suspension or expulsion from membership (contested decision, recital 72).

290 The applicants claim that those decisions have been a dead letter since their withdrawal on 23 November 1993. Consequently, there is no question of any restriction of competition.

291 It is necessary to verify whether the binding decisions at issue pursue an objective restrictive of competition. If they do, any analysis of the effects of those binding decisions would be superfluous for the purposes of applying Article 81(1) EC.

Binding decision on fixed prices

— Arguments of the parties

292 According to the applicants, the Commission wrongly took the view that the binding decision on fixed prices required wholesalers to pass on to customers price increases imposed by suppliers after the orders were placed (contested decision, recital 73). The binding decision on fixed prices was inspired by the

Prijzenbeschikking goederen en diensten 1983 (Ministerial decision on prices of goods and services 1983) (annex 32 to the application), which was adopted during a period of steep inflation.

293 TU insists that it fixes its prices entirely independently, in accordance with ordinary commercial practice. Although in certain cases it charges fixed prices, it reserves the right to pass on increases of prices applied by its suppliers.

— Findings of the Court

294 The binding decision on fixed prices concerns the impact of changes in suppliers' prices on goods already ordered but not yet delivered. Specifically, it provides that where such a change occurs, goods may be delivered for a period of three months at the prices in force on the date of the order. Thereafter, and for a period of six months, FEG members must pass on the changes, up to a maximum to be determined, except where there is a crisis. That maximum is fixed each half year by the FEG, after consulting UNETO. According to the FEG, it is a system for sharing between wholesalers and fitting contractors the risk associated with price increases which may occur in the course of a long-term contract. For cases of failure to comply with that mechanism, the decision provides for fines to be imposed of up to NLG 10 000 (EUR 4 531). Adopted on 2 November 1984, that binding decision was repealed on 23 November 1993 (contested decision, recitals 73 to 75).

295 It is clear from the foregoing that that decision by an association of undertakings restricts the freedom of its members to fix prices and pursues an objective restrictive of competition within the meaning of Article 81(1) EC.

296 The circumstance, even if proved, that the binding decision was inspired by national rules in force when it was adopted is immaterial. The FEG has not contended that the provisions of the rules at issue had required it to adopt the binding decision on prices and that it did not have any freedom of action in that regard (Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 22, and Case C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851, paragraph 15; Case T-387/94 *Asia Motor France* v *Commission* [1996] ECR II-961, paragraph 61). Moreover, the applicants have not demonstrated that that legislation remained in force throughout the period of the infringement.

297 The applicants' arguments must therefore be rejected.

Binding decision on publications

— Arguments of the parties

298 The applicants submit that the binding decision on publication was confined solely to advertising. They point out that it prohibited publication of prices below the cost price. The only example of its application cited by the Commission was taken from the report on the meeting of the board of the FEG of 9 July 1992. However, first, that document merely mentioned that Schotman was not complying with the decision and, second, asked the secretary of the FEG to list the existing binding decisions and give details of the content of measures of that kind. The FEG adds that, in any event, the binding decision on publications was never implemented vigorously and, in practice, was hardly ever observed, as evidenced by the way in which Schotman, a member of the FEG, was able to infringe it with impunity.

— Findings of the Court

299 The binding decision on publications, which remained in force from 2 August 1978 until it was repealed on 23 November 1993, prohibited FEG members from issuing publications offering electrotechnical fittings at loss-leader or specially reduced prices to undertakings specialising in the installation of such fittings. According to the terms of that decision, FEG members thereby wished not to give rise to, encourage or permit any transactions which might have the effect of causing a sharp drop in prices, market dislocation, loss of profits or unbridled competition between members (see contested decision, recital 76).

300 The purpose of the binding decision on publication is to restrict the individual conduct of FEG members regarding their commercial advertising policy, so as to protect them from the consequences of competition which, essentially, they regard as highly damaging. A decision by an association of undertakings of that kind manifestly pursues an objective of restricting competition within the meaning of Article 81(1) EC. As the Commission submits in its pleadings in Case T-5/00, it is not for the FEG, as a trade association, to substitute itself for the legislature and determine the conditions under which its members may fix the prices of their products, undertake promotional business operations or advertise prices or promotions.

301 Consequently, the applicants' arguments concerning the binding decision on publication must be rejected.

(b) Concertation concerning prices and discounts

Arguments of the parties

302 In its legal assessment, the Commission considered that FEG members regularly engaged in concertation on the prices and discounts to be applied. Such concertation took place in the framework of ordinary meetings of the FEG, meetings of its product committees and regional FEG meetings, over the period from 6 December 1989 to 30 November 1993.

303 The discussions (contested decision, recitals 79 to 84) concerned:

— the establishment of rules for granting discounts and fixing the rate thereof:

— compliance with FEG recommendations on prices and discounts.

304 Whilst the applicants concede that prices and discounts were sometimes discussed, they insist that such discussions occurred only exceptionally and were irrelevant as regards competition law. They complain of the fragmented nature of the evidence relied on by the Commission. They complain that it interpreted certain documents from regional FEG wire and cable committees to show the existence of a national agreement on all electrotechnical fittings.

305 The applicants state that the vast majority of suppliers use recommended gross price-lists for sales to final consumers. According to the applicants, this provides the reference point for calculating prices at each stage in the distribution chain. At each stage, the prices are discounted; wholesalers negotiate with their customers on the level of discounts they will grant them. Among wholesalers, price competition operates in relation to the discounts granted to them by suppliers. The description of this mechanism in recitals 85 to 87 to the contested decision is tendentious, since the Commission appears to suggest that the recommended gross prices took the place of prices fixed between competitors.

306 The alleged concertation on prices and discounts between FEG members remained, in practice, limited to the exchange of information on general market trends. In the contested decision, the Commission confined itself to isolated cases of no great significance and failed to fulfil its obligations regarding burden of proof. There can be no question of any horizontal price fixing agreement, or the slightest object or effect of restricting competition.

307 First, as regards the wire and cable product committee (contested decision, recital 80), the applicants maintain that, although its purpose under the articles of association is to 'endeavour to keep the market calm and maintain prices', this should merely be seen as a choice of rather archaic terminology. In view of the lively competition between wholesalers and the absence of powers of compulsion on the part of the wire and cable product committee, there was no question of horizontal price fixing.

308 The applicants challenge the Commission's interpretation of the statement made by the Chairman of the FEG wire and cable committee; 'this committee must endeavour to keep the market calm and maintain prices. In order to achieve this objective, it is necessary to exchange thoughts with one another regularly' (contested decision, recital 80). The Commission (contested decision, recital 81)

perceives confirmation of that alleged price agreement in the following words: 'After a brief discussion, it was decided that, at the next meeting, all members of the product committee would bring a list of prices charged in the month preceding the next meeting... The wire and cable committee is working on the establishment of rules concerning discounts'.

309 The applicants maintain that, at most, there was merely an intention to fix prices between competitors. Attempts to influence the market or to establish a lawful information system on average business margins and turnovers does not constitute an infringement of Article 81(1) EC. No document proves that the wire and cable product committee actually gave effect to that intention in an agreement. On the contrary, the members of that committee even recognised that the drafting of rules was impossible.

310 Second, as regards the rules for granting discounts and the advertising of exaggerated discounts (contested decision, recitals 81 and 82), the applicants deny their existence. The mere fact of having discussed the discounts offered in the market does not constitute an infringement of the competition rules. Similarly, the statement concerning exaggerated discounts does not constitute an infringement. None of those discussions gave rise to action or agreements.

311 Third, as regards standard discounts of 35% (contested decision, recital 83), the applicants state that the discounts in question are granted on teaching equipment ordered by technical schools. The FEG admits having agreed in principle on a standard discount of 35% for schools. That decision could not have an appreciable effect on the market. The FEG insists on the social purpose and special context of that measure.

312 Fourth, with regard to discounts to final consumers (contested decision, recital 84), the applicants criticise the Commission for interpreting the quotation reproduced in recital 84 to the contested decision as a criticism directed against discounts to final consumers granted by certain FEG members. The FEG considers it unthinkable that any supply should be made without a discount. In reality the FEG merely expressed its discontent regarding supplies made direct to final consumers. In its role as 'conscience' of the wholesale electrotechnical fittings trade, it is natural for the FEG to invite its members not to supply their customers' customers (final users or customers of fitting contractors). Such conduct would be commercially suicidal.

313 Fifth, with regard to PVC tubes and junction, central and built-in boxes (contested decision, recital 85), the applicants state that, unlike other electrotechnical fittings suppliers, the manufacturers of PVC tubes and junction, central and built-in boxes charge recommended net prices. They sought help from the FEG to convert those prices into recommended gross prices. They wished to go over to the system of recommended gross prices for all other types of electrotechnical products. In order to respond to that request, TU made staff and data-processing resources available to the FEG. The FEG says that there is therefore no question of unlawful agreements on prices, but rather a different presentation of manufacturers' recommended prices. Since the conversion took place, those articles are sold in accordance with the system of recommended gross prices, standard discounts and conditions adopted on an individual basis. Accordingly, such an exercise cannot be regarded as a restriction of competition within the meaning of Article 81 EC.

314 In any event, such agreements have no appreciable impact on the market.

315 Sixth, as regards the purpose of the FEG product committees (contested decision,

recital 111), the applicants state that the Commission quoted, in recitals 8 and 111 to the contested decision, from the FEG committee manual:

'In order to obtain an accurate picture of what is taking place in the market... it is of crucial importance to be apprised of turnover and margins. Without knowledge of these, it is impracticable to do anything to influence the market.'

316 The applicants criticise the Commission for failing to mention the context of that quotation, which throws an entirely different light on the passage in question, which is followed immediately by the following phrase:

'In recent years, no committee has taken any action whatsoever to gather these market data.'

Findings of the Court

317 The applicants do not deny that discussions were held on discounts, prices, margins and turnover of FEG members, but contend, in essence, that those discussions were not contrary to Article 81 EC, in so far as, not having been implemented or produced appreciable effects, they have no impact on the market.

318 Those arguments cannot be upheld.

319 It must be remembered, first, that in recital 111 to the contested decision the Commission indicated that, by means of a number of decisions and concerted

practices, the FEG and its members sought to establish 'an artificial price stability serving... to ensure that the margins of the FEG members do not come under pressure'. The Commission referred in particular to the manual sent by the FEG to the product committees, according to which 'in order to obtain an accurate picture of what is taking place in the market... it is of crucial importance to be apprised of turnover and margins' and 'without knowledge of these, it is impracticable to do anything to influence the market'.

320 The applicants state in reply that the FEG sought to establish a lawful system of exchanging information on the turnover and profit margins of its members. It criticises the Commission for distorting that passage by not pointing out that it was immediately followed by the following phrase:

'In recent years, no committee has taken any action whatsoever to gather these market data.'

321 Notwithstanding those objections, it must be stated that the Commission was right to take the view that the purpose of the information exchange system at issue, as described in the FEG instruction manual, is — according to its own terms — to 'influence the market'. Accordingly, the Commission was entitled to regard it as a further indication of the existence of practices designed to limit price competition among FEG members.

322 As regards the wire and cable product committee, it must be borne in mind that its purpose was to 'endeavour to keep the market calm and maintain prices' (contested decision, recital 80). That is manifestly a purpose prohibited by Article 81(1) EC, since it is intended to substitute for undertakings' individual decisions the results of their collusion on prices.

323 As regards the rules concerning the granting of discounts, the contested decision notes in particular that, at a meeting of 6 December 1989, the wire and cable product committee had decided to establish an exchange of information on the prices charged by its members. That exchange was intended to enable the committee to decide whether it was necessary to establish rules for granting discounts. The Commission was therefore right to consider those facts to be indicative of practices whose purpose was to restrict competition within the meaning of Article 81(1) EC.

324 As regards the standard discount for sales of electrotechnical fittings to schools (contested decision, recital 83), it is common ground that the FEG, TU and other members of that association agreed upon a uniform discount rate of 35%. Such concurrent intentions manifestly pursue the aim of restricting the freedom of FEG members to determine commercial policy. As regards the allegedly social purpose of such collusion, it cannot be taken into account for the purposes of Article 81(1) EC.

325 As regards discounts to final consumers (contested decision, recital 84), it is common ground that the FEG called on its members not to supply electrotechnical fittings to their customers' customers. In recital 84 to the contested decision, the Commission observed that, at the FEG regional meeting of 28 May 1991, attended by TU, the FEG expressed opposition to the practices of certain wholesalers who were granting discounts to final consumers. The Commission referred to that incident in order to illustrate the role played by the FEG in monitoring compliance with concerted practices concerning discounts. Contrary to the applicants' contention, such a role on the part of the FEG is not 'natural' but is associated with practices whose purpose is to restrict competition within the meaning of Article 81(1) EC.

326 As regards the issue of price recommendations by the FEG to its members, it is common ground that TU assisted the FEG in connection with the conversion into recommended gross prices of the recommended net prices charged by suppliers of certain plastic products. It is also common ground that the FEG regularly sent its members the most recent price-lists for such products. The applicants have not

contested that, in the case of PVC tubes, the FEG sent its members, following price changes decided on by manufacturers, updated lists of prices, also mentioning the percentage reductions or increases which it recommended its members to apply (contested decision, recital 85). Finally, the applicants have not contested the truth of the Commission's interpretation in recital 87 to the contested decision of the report on the FEG regional meeting of 2 March 1989. It is clear from that document that the FEG, following an increase in the price of plastic tubes, had advised its members to observe the recommended prices.

327 The applicants deny that the conversion work in which TU actively participated pursued an objective restrictive of competition. They consider that action lawful, intended as it was to help the manufacturers of the fittings in question to present their prices in a manner consistent with that of the manufacturers of other electrotechnical fittings.

328 That argument is not convincing. In the light of the foregoing, it must be pointed out that TU and the FEG were able to exercise an influence on price formation through the members of that association, by exchanging and distributing information on prices and discounts for certain plastic electrotechnical fittings. The Commission was therefore entitled to consider those facts to be indicative of the existence of a restriction of competition and to take the following view, expressed in recital 116 to the contested decision:

'By sending the price lists, the FEG sought to ensure that FEG members would react in a uniform fashion to increases or reductions in their suppliers' prices. This reduced the danger that price increases or reductions might be seized upon by individual FEG members in order to secure a competitive advantage over other FEG members by refraining from passing on an increase or reduction to their customers, or by passing it on only in part. Conduct of that sort would have disturbed the calm which the FEG wanted to see on the market, and might have stirred up price competition between FEG members.'

329 The Commission did not therefore make any error in reaching the conclusion that the concertation on prices and discounts pursued an anti-competitive purpose.

(c) Similar price-lists

330 In the contested decision (recitals 88 to 90), the Commission considered that the result of the joint application of the abovementioned instruments was to allow only limited price competition to exist between FEG members. By way of illustration, it drew attention to the considerable similarity between the prices and discounts appearing in the catalogues of the largest FEG members, including TU. It also pointed out that their publications came out at the same time.

Arguments of the parties

331 The applicants consider that those similarities are natural in so far as the prices indicated in the wholesalers' catalogues are those announced by the manufacturers. For the rest, TU considers that those similarities are a matter of chance and draws attention to the numerous differences between the catalogues of the various wholesalers concerned. As regards the publication dates, they are the consequence of the dates of the manufacturers' announcements of prices. The applicants infer from this that the Commission was wrong to consider, on the basis of that evidence, that there was a horizontal price-fixing agreement.

332 Although the Commission referred to the existence of price lists which were identical as between certain competitors, TU emphasises that those findings were not repeated in the operative part of the decision. Reliance on those findings is therefore entirely superfluous.

Findings of the Court

333 The applicants' arguments are based on a misreading of the contested decision. The Commission referred to the similarities observed between the catalogues of the main wholesalers to illustrate the limited degree of competition prevailing in the relevant market. The Commission thus gave an example to show the effect of the practices at issue on the market and not a separate infringement from those referred to in the operative part of the contested decision.

334 It is clear from the foregoing findings concerning the binding decisions on prices and publications and the various forms of concertation on prices and discounts (see above, paragraphs 294 to 297, 299 to 301, and 317 to 329) that the Commission demonstrated, to the requisite legal standard, the way in which the practices at issue restricted competition. It is therefore superfluous to examine their effects on the market.

335 For the sake of completeness, it must be borne in mind that, without entirely denying the similarities observed, TU attributes their origin to the structure and unnatural operation of the relevant market. It is true that the relevant market is highly concentrated: the five largest members of the FEG jointly accounted for 62% of the market and the share of the 10 largest amounts to 80% (contested decision, recital 24). Although such a structure can favour collusion, no definitive conclusion can be drawn as to the lawfulness of the similarities observed.

336 TU minimises the importance of those similarities, contending that each wholesaler offers, alongside its standard conditions, discounts negotiated individually. In recital 117 to the contested decision, the Commission nevertheless drew attention to the effect of those practices on the market: either the wholesalers apply the gross prices and the standard discounts mentioned in the catalogues and thus eliminate price competition between them, or they use those standard conditions as a basis for negotiation and thereby limit such competition. The Commission also drew attention to the knock-on effect of those practices engaged in by the main wholesaler members of the FEG. The smaller members rely on the latter's catalogues to define their own price policy. The applicants' objections are not such as to call in question the merit of those findings.

337 The Commission also observed, without being directly contradicted on this point by TU, that the prices charged by wholesalers in the Netherlands are higher than those charged in the other Member States (contested decision, recital 119). It concluded from this that the practices at issue resulted in the harmonisation of the pricing policy of FEG members and stabilised or increased the prices of the fittings sold. As a result, the price of electrotechnical fittings attains, in the wholesale trade, an artificial level, higher than that at which it would be set in a purely competitive market. The FEG, whilst challenging the assertion that prices are higher in the Netherlands than in neighbouring countries, offered no sound evidence to overturn the latter assertion.

338 It thus appears that, through a series of practices, agreements and decisions, the members of the FEG and that association, which enjoy a preponderant economic power in the relevant market, have sought, collusively, to restrict price competition between them by engaging in concertation on prices and discounts and by adopting, within the FEG, binding decisions on prices and advertising.

339 The Commission has thus demonstrated, to the requisite legal standard, that those practices were contrary to Article 81 EC.

E — The link between the collective exclusive dealing arrangement and the concerted practices in relation to price fixing

1. Arguments of the parties

340 The applicants object to the link established between the two infringements of which they are accused. The structure and functioning of the market are such that wholesalers are not able to exercise economic power enabling them to increase prices artificially. It is wrong to believe, as the Commission did, that the members of the FEG do not compete on prices. As regards the allegedly artificial price level on the Netherlands market, the Commission did not undertake any detailed investigation on that point.

341 TU adds that, with so many manufacturers, wholesalers, fitting contractors, final users and about 70 000 products, it is impossible for a group of economic operators to contrive, through a cartel, to reserve the most important products for themselves and maintain prices at a high level. FEG members are not in a position to maintain an artificially high price level, particularly since suppliers sell about half their products directly, without using the services of wholesalers.

2. Findings of the Court

342 The question of a link between the two infringements is irrelevant. It is of scant importance to ascertain who, within the collective exclusive dealing arrangement or through price-fixing practices, is supporting the other. The two infringements pursue the same anti-competitive purpose, which consists in maintaining prices at supra-competitive levels, first by lessening the competitiveness of undertakings which seek to operate on the wholesale electrotechnical fittings distribution market in the Netherlands and thereby to compete with members of the FEG, without being affiliated to that association of undertakings, and, second, by partially coordinating their price policy.

343 For the rest, the applicants reiterate the argument that the structure and functioning of the market exclude any restriction of competition. Those criticisms have already been rejected. Consequently, the applicants' argument concerning the link between the two infringements must also be rejected.

III — *The attributability of the infringements to TU* (Case T-6/00)

344 TU's argument concerning the attributability of the infringements comprises three parts. In the first part, it contests the validity of the criteria for attributability of the infringements referred to in Article 3 of the contested decision. In the second part, TU alleges that those criteria infringe the principle of equal treatment. In the third part, TU alleges breach of the obligation to give reasons set out in Article 253 EC.

A — Criterion of attributability

1. Arguments of the parties

345 Referring to Article 3 of the contested decision, TU maintains that the infringements committed by the FEG were attributed to it merely because it belonged to that association. TU infers from this that its responsibility cannot be invoked for acts which were not committed by the FEG.

346 Thus, TU objects to the alleged arbitrariness of the criteria for attributability of the infringements of which it is accused. Moreover, it contends that its contacts with suppliers outside NAVEG could not serve as a basis for the finding of an unlawful concerted practice designed to extend the collective exclusive dealing arrangement, since its contacts took place outside the framework of the FEG.

347 Only on a subsidiary basis does TU contest the evidence relied on by the Commission to hold it responsible for the infringements referred to in Articles 1 and 2 of the contested decision.

348 The Commission replies that the premise for that reasoning is incorrect. The contested decision holds the applicant personally responsible for the infringements found in Articles 1 and 2. It is clear from Article 3, and from the grounds of the contested decision, that those infringements were committed by the applicant individually, both by reason of its role within the FEG and by reason of its conduct and personal initiatives. Accordingly, the first part of this plea should be rejected in its entirety.

2. Findings of the Court

349 TU's argument is based on a misreading of the contested decision. According to Article 3 thereof, TU infringed Article 81(1) EC by actively participating in the infringements found in Articles 1 and 2 against the FEG. It is not therefore because of the mere fact of its membership of the FEG that the applicant was declared responsible for the infringements referred to in Articles 1 and 2 of the contested decision, but because of its active participation therein.

350 Contrary to the Commission's contention, that finding is not sufficient to reject the first part of this plea in its entirety. TU also put forward a number of objections challenging the evidence of its active participation in the infringements. It is therefore necessary to examine those objections, in order to decide whether the Commission established to the requisite legal standard that TU participated in the infringements referred to in Article 1 (collective exclusive dealing arrangement) and Article 2 (price fixing) of the contested decision.

B — TU's participation in the infringements concerning the collective exclusive dealing arrangement

1. Participation in the gentlemen's agreement

351 In Recital 69 to the contested decision, the Commission considered that TU had played a key role within the FEG concerning the collective exclusive dealing arrangement. TU takes exception to those findings, which it considers erroneous. It objects that:

— legally, it could not exert any influence on the FEG's decisions;

— its interests do not coincide with those of the FEG;

— it was not present or represented when the details of the collective exclusive dealing arrangement were discussed between the FEG and NAVEG on 28 February 1989.

352 The Court considers, first, that the criticisms based on the internal rules of the FEG and the Netherlands legislation are not relevant. It is important to determine whether or not TU participated in the gentlemen's agreement and not whether the statutes of the FEG or the legislation governing associations in the Netherlands allowed it to do so.

353 Second, it is incorrect to say that the Commission erred in considering that the applicant's interests coincided with those of the FEG. The contested decision confines itself to indicating that those interests 'run more or less in parallel' (contested decision, recital 69), thereby drawing attention to a natural convergence of interests between the FEG and one of its principal members, rather than identicality of interests.

354 Third, the fact that TU was not present or represented at the meeting of 28 February 1989 is not sufficient to call in question its active participation in the gentlemen's agreement.

355 Admittedly, membership of a trade association cannot lead to automatic attribution to the member concerned of responsibility for various kinds of unlawful conduct on the part of the association, without any actual demon-

stration of the personal participation of that member or its support for the unlawful conduct complained of. However, TU cannot contend that its personal conduct cannot be relied on as evidence of its participation in the infringements in question.

356 In this case, that participation is directly linked to TU's role in the conduct of the FEG's affairs. It is common ground that TU is one of the largest members of the FEG. That is why a number of its executives or employees sat on the board of the FEG and took part in the deliberations of the organs of that association between 1985 and 1995. In that regard, it must be borne in mind that the board, comprising five natural persons elected by the general meeting, is in charge of general management of the association (Article 6 of the articles of association of the FEG).

357 The Commission gathered sound evidence of the existence of the gentlemen's agreement, as has been confirmed by the Court in paragraphs 210 to 212 above. In view of the nature of that agreement, the Commission was not in a position to determine the precise date on which it was concluded, contrary to what TU appears to contend. On the other hand, it obtained documentary evidence of contacts between the FEG and NAVEG during which the gentlemen's agreement was referred to. Those documents cover a period starting on 11 March 1986 with a meeting between the boards of NAVEG and the FEG. The Commission also relied on exchanges between those same boards on 28 February 1989 and 25 October 1991 and a letter from the FEG to NAVEG of 18 November 1991 (see contested decision, note 53).

358 Among the meetings of the boards of the FEG and NAVEG mentioned by the Commission, it is common ground that TU was neither present nor represented at that of 28 February 1989. It is not, however, disputed that the FEG drew up a report on that meeting (contested decision, recital 46, and note No 48). The presence of TU at other meetings (11 March 1986 and 25 October 1991) and its representation on the board of the FEG in 1991 are not contested.

359 According to well-established case-law, provided that an undertaking participates, even without taking an active part, in meetings between undertakings for anti-competitive purposes and does not publicly distance itself from the proceedings of those meetings, thereby causing the other participants to think that it subscribes to the result of those meetings and will conform with it, it can be considered as established that it participates in the cartel resulting from those meetings (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 98, and Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 85 and 86).

360 In the absence of evidence of such distancing and, *a fortiori*, by virtue of its participation as a member of the board of the FEG, TU must be regarded as having participated in the gentlemen's agreement.

361 For the sake of completeness, it may be added that TU cannot contend that it was unaware of the content of the discussions held with NAVEG on 28 February 1989.

362 Consequently, TU's arguments must be rejected.

2. Participation in concerted practices

363 TU confines itself to contending that the incidents concerning Draka Polva, ABB, KM and Holec involve companies which were not members of NAVEG. TU maintains that those incidents did not occur within the framework of the FEG, and cannot therefore be linked with the collective exclusive dealing arrangement

at issue. On the basis of the interpretation of the operative part of the contested decision which it advocated earlier, TU considers that no infringement can therefore be attributed to it by reason of those events.

364 The Court considers that that reasoning is based on a mistaken premise, as has already been stated in connection with the examination of TU's main thesis (see paragraph 349 above). Accordingly, those same considerations prompt rejection of those arguments without further examination.

365 In conclusion, it must be held that TU is one of the principal members of the FEG and, as such, was represented on the board of the FEG continuously between 1985 and 1995, with the exception of the year 1990. In that capacity, TU participated directly in the drawing up of the FEG's policy and/or was informed of the discussions between that association and NAVEG concerning the collective exclusive dealing arrangement, without ever having sought to publicly distance itself from it.

366 Moreover, it is sufficiently clear for legal purposes from the evidence examined by the Commission in recitals 53 to 70 to the contested decision that TU played a particularly important role in the concerted practice consisting of extending the collective exclusive dealing arrangement to certain suppliers who did not belong to NAVEG. TU, acting both individually and in concert with other members of the FEG, exerted pressure on those undertakings not to supply wholesalers who were not members of the FEG with which they were in competition.

367 TU has not succeeded in detracting from those findings. Accordingly, the Commission was right to hold that the applicant participated actively in the unlawful collective exclusive dealing arrangement. The Commission has thus established to the requisite legal standard that first infringement is attributable to TU.

C — TU's participation in the infringement relating to price fixing

368 TU considers that the binding decisions on fixed prices and publications are decisions of an association of undertakings within the meaning of Article 81 EC. That legal classification in its view implies that only the FEG can be responsible for them.

369 In the alternative, TU criticises the Commission generally for not having demonstrated its participation in the infringement referred to in Article 2 of the contested decision. TU also puts forward three specific arguments. First, the Commission classified the FEG's issuing of recommended prices as a concerted practice within the meaning of Article 81 EC. That classification is incompatible with the remainder of the contested decision, which refers only to agreements and/or decisions of associations of undertakings. Next, the provision of a forum for concertation on prices by its nature involves only the FEG. Any responsibility on the part of TU is therefore ruled out. Finally, the operative part of the contested decision does not refer to the agreements on discounts to schools or the findings made with regard to uniform price lists.

370 The Court observes that that argument is, to a considerable extent, based on a misreading of the contested decision.

371 First, TU cannot claim that, by its nature, the infringement referred to in Article 2 of the contested decision concerns only the FEG and cannot therefore be imputed to it. As has been pointed out already (see paragraph 349 above), Article 3 of the contested decision states that the applicant infringed Article 81 EC by actively participating in the infringements committed by the FEG.

372 Second, TU's criticisms concerning the legal classification of agreements and/or concerted practices are unfounded. An infringement of Article 81 EC may derive not only from an isolated act but also from a series of acts or, indeed, continuous conduct. TU cannot successfully contest the Commission's assessments on the ground that one or more elements of that series of acts or continuous conduct may also in themselves constitute an infringement of Article 81 EC.

373 In this case, the infringement referred to in Article 2 of the contested decision was unique in character. Imputed to the FEG, it consisted in restricting directly or indirectly the power of the members of that association to fix their selling prices freely and independently. The elements making up that infringement are the binding decisions of the FEG on prices and publications, the issuing of recommendations on prices and discounts and the provision of a forum for concertation on prices and discounts.

374 Article 2 of the contested decision must, moreover, be read in the light of the grounds of that decision. It is undisputed, in this case, that the binding decisions on prices and publications are decisions of an association of undertakings within the meaning of Article 81(1) EC (contested decision, recital 95). As regards concertation on prices and discounts and the issuing by the FEG of recommended prices, the Commission classified them as concerted practices (contested decision, recital 102). The Commission found that there was regular concertation between the members of the FEG on prices and rebates between 6 December 1989 and 30 November 1993 (contested decision, recital 115). In particular, it took into consideration the factual elements relating to the fixing of discounts for schools, described in recital 83 to the contested decision. The Commission also relied upon the similarities found to exist between the price catalogues of several wholesalers, including the applicant, to demonstrate that the binding decisions and concertation on prices and discounts jointly had the effect of allowing only limited competition between the members of the FEG (contested decision, recital 117).

375 It remains to be determined whether the Commission produced, to the requisite legal standard, evidence of TU's active participation in the infringement concerning price fixing.

376 As regards TU's participation in the binding decisions on prices and publications, it has been established that those decisions pursued an unlawful purpose. In view of the rules in the FEG's statutes, those unlawful decisions constitute a faithful expression of the common will of its members and are sufficient to attribute to TU responsibility for their adoption (see Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125 and Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405).

377 For the rest, the role of TU within the FEG has already been described (see paragraphs 356 and 365 to 367 above). Thus, the Commission was right to consider, in recital 93 to the contested decision, that '[f]or many years, TU was represented on the FEG board and therefore knew about or indeed actively participated in the abovementioned FEG policy'.

378 Moreover, it is common ground that the TU forwarded to the FEG information on prices on the basis of which the FEG itself informed its members of changes in gross and net prices of certain products. As the Commission stated:

'Specifically, this meant that TU, on behalf of the whole sector, converted the information supplied by the manufacturer about amended net prices into uniform gross prices and then passed on this information to the FEG... TU was the only one at the time to have the necessary computer capacity to perform these calculations' (contested decision, recital 93).

379 Consequently, the Commission validly attributed to TU the infringement concerning price fixing referred to in Article 2 of the contested decision, by reason of its active participation therein.

D — Breach of the principle of equal treatment

1. Arguments of the parties

380 The Commission, it is claimed, did not prove the particular role of TU as compared with other members of the FEG. Such treatment is discriminatory (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28).

381 Whereas six other members of the FEG received the statement of objections, the Commission took the view, in recital 31 to the contested decision, that it was not in a position to establish with sufficient certainty the responsibility of each of them. Nevertheless, TU considers that its situation is exactly the same as that of all the other FEG members who:

— sat on the board or products committees of the FEG;

— were present at FEG meetings;

— made material contributions at those meetings;

— have interests parallel with those of the FEG.

2. Findings of the Court

382 The fact that the Commission did not find an infringement on the part of other FEG members does not constitute a breach of the principle of equal treatment. The fact that a trader who was in a position similar to that of an applicant was not found by the Commission to have committed any infringement cannot in any event constitute a ground for setting aside the finding of an infringement by that applicant, provided it was properly established (*Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 146).

383 Accordingly, TU's argument alleging breach of the principle of equal treatment must be rejected.

E — Lack or inadequacy of the statement of reasons

1. Arguments of the parties

384 TU maintains that the Commission did not fulfil its obligation to state reasons under Article 253 EC. It did not clearly describe the conduct on the basis of which it held TU individually responsible for the infringements committed by the FEG. TU considers that the Commission was required to give reasons for its decision in particularly detailed form since the fine is considerable and, in proportionate terms, exceeds that imposed on the FEG.

2. Findings of the Court

385 According to settled case-law the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to carry out its review (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86).

386 TU's argument alleging breach of the obligation to state reasons is unfounded. In recitals 67 to 70 to the contested decision, in a section entitled 'FEG and its largest member, TU, as central players', the Commission set out the evidence on which it relied for its finding that TU had participated in the collective exclusive dealing arrangement. With regard to the price-fixing agreements, the Commission, in a section entitled 'Role of the FEG and its largest member, TU', explained its appraisal of TU's conduct. The reasons given for the contested decision are in conformity with Article 253 EC. They enabled TU to exercise its rights of defence and the Court to carry out its review of legality.

IV — *The attributability of the infringements to the FEG (Case T-5/00)*

A — Arguments of the parties

387 As regards the infringement referred to in Article 1 of the contested decision, the FEG objects to the attribution to it of the extension of the gentlemen's agreement to suppliers not belonging to NAVEG. It states that the indications of the concerted practices by which that extension was put into effect relate only to its members.

388 The Commission replies, from the legal standpoint, that, where an association concludes an unlawful agreement in favour of its members and, thereafter, the members seek, through concerted practices, to attract third parties to that agreement, the association also bears responsibility for such practices. It cannot escape its responsibility by stating that it did not participate in or have knowledge of that concerted practice. An association could escape such responsibility only if it brought the unlawful arrangement to an end and publicly distanced itself from each of its members.

389 The Commission adds, from the factual standpoint, that the circumstances of the case enable certain conduct by which FEG members endeavoured to bring third parties into the collective exclusive dealing arrangement to be imputed to the FEG.

B — Findings of the Court

390 The FEG argues that it should not have to bear responsibility for concerted practices put into effect by its members. This case is different from the cases concerning the attributability to the members of an association of an infringement committed by the latter (see, for example, *CB and Europay* v *Commission*, cited above).

391 In this case, three factors allow the inference that the concerted practices regarding extension of the gentlemen's agreement are attributable to the FEG. In the first place, the gentlemen's agreement and the subsequent attempts to extend its scope to suppliers not belonging to NAVEG are the two components of the

infringement referred to in Article 1 of the contested decision. Next, the persons involved in the concerted practices at issue held management posts within the FEG. In that connection, it is clear that TU and/or its parent company Schotman, and also the companies Schiefelbusch, Brinkman & Germeraad and Wolff, were, during the period of the infringement, represented on the board of the FEG and participated directly in the approaches made to suppliers who were not members of NAVEG.

392 Finally, the FEG members who thus participated in the concerted practices at issue acted for the benefit of all the members of that association. In that connection, it must be emphasised that the approaches to KM were initially envisaged by 26 FEG members acting in concert. By endeavouring to persuade KM to stop supplying CEF, the 11 FEG members forming part of the 'delegation' which visited KM on 27 June 1991 (contested decision, recital 65) acted, in concert, in the joint interest pursued by that association. That interest consisted in securing, for all FEG members, advantages similar to those which could accrue to them from the collective exclusive dealing arrangement agreed upon between the FEG and NAVEG. It must also be added, as was emphasised earlier during examination of the materiality of the facts relating to extension of the gentlemen's agreement, that the approach made to KM, thus being in the joint interest of the members of the FEG, could not fail to appear to the latter to be backed by the FEG.

393 Since the actions at issue pursued the same object, shared the same beneficiaries and were implemented by the members and certain executives of that association, it must be considered that the Commission was right to conclude that the responsibility for the approaches thus made by FEG members to suppliers not belonging to NAVEG could also be attributed to the FEG. Consequently, the FEG's arguments must be rejected as unfounded.

The claims that the fines should be amended or reduced

394 In putting forward their arguments, the applicants have raised several objections relating to determination of the amount of the fine. Those objections concern infringement of the conditions laid down by Article 15(2) of Regulation No 17 for the imposition of fines. TU also maintains that the Commission infringed the principle of equal treatment by imposing a fine on it and contends that the reasons given in the contested decision on this point are inadequate.

I — *Article 15(2) of Regulation No 17*

A — The intentional nature of the infringements

395 Essentially, the applicants contest the finding as to the intentional nature of the infringement concerning price fixing. TU maintains that the Commission was required to prove that it knew or should have known that its participation in the conversion of net prices into gross prices for certain products could be linked to a concerted practice.

396 The Court points out, in that connection, that it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally. It is sufficient that it could not have been unaware that the object of the conduct complained of was the restriction of competition (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 41, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 50).

397 In this case, the infringements for which the fines were imposed relate to agreements on the direct or indirect fixing of prices and the fact of placing wholesalers not belonging to the FEG at a competitive disadvantage resulting from the setting up of the collective exclusive dealing arrangement. In view of the intrinsic seriousness of the infringements, the applicants could not have been unaware of the fact that their participation in such agreements, explicitly referred to in Article 81(1)(a) and (d) EC, was liable to distort or restrict competition within the Community. It follows that the Commission was right, after giving an adequate statement of reasons, to conclude in recital 135 to the contested decision that the infringements in question were intentional.

398 It must also be observed in this context that the anti-competitive nature of those practices was acknowledged in a note of 30 August 1993 sent to the members of the board of the FEG in which the Secretary of that association stated, with regard to the new Netherlands competition legislation:

'As far as the FEG is concerned, this means that, in my view, the establishment of recommended prices for junction, switching and built-in boxes is prohibited, and possibly the binding decision on fixed prices, the binding decision on publications and the rules on costs of cutting' (contested decision recital 91).

399 In those circumstances, the applicants cannot maintain that they had no knowledge of the unlawful character of the various elements of the infringement referred to in Article 2 of the contested decision.

B — Seriousness of the infringements

400 With the exception of its arguments intended to prove the lack of an appreciable effect on the market, TU has not contested the seriousness of the infringements. The FEG, for its part, repeats the argument that the conduct in question could have had only a negligible impact on the market.

401 That argument must fail. The Commission's findings highlighted the existence of a collective exclusive dealing arrangement and of price-fixing agreements. In view of the characteristics of the relevant market, in which FEG members hold a 96% market share, the Commission properly emphasised that the collective exclusive dealing arrangement, linked with a restrictive admission policy, was intended to:

— hinder access to the market by foreign competitors;

— restrict the freedom of manufacturers of electrotechnical fittings to choose the wholesalers to whom they entrust the distribution of their products;

— strengthen price agreements.

402 Agreements of that nature substitute coordination of a price-fixing policy between competitors for the operation of competition protected by the Treaty. They therefore involve serious infringements of Article 81 EC.

C — Duration of the infringements

1. Case T-6/00

403 TU puts forward two arguments concerning the duration of the infringements.

404 First, it considers that the incidents involving Draka Polva, ABB, KM and Holec concerning extension of the collective exclusive dealing arrangement relate to a period from July 1990 to July 1991. It is therefore appropriate in their view to reduce to one year, rather than the eight years indicated in the contested decision, the duration of the infringement regarding the collective exclusive dealing arrangement.

405 Second, TU maintains that the Commission has not demonstrated the existence of an uninterrupted price-fixing infringement between 21 December 1988 and 24 April 1994. Those are the dates taken by the Commission for the period in which the FEG sent its members recommendations for the prices of plastic materials (contested decision, recital 146). Although raised succinctly in connection with the objections relating to imputation of the infringement (reply, paragraph 108), it would seem that this point can be examined in the context of the claims concerning the fine.

406 First, the Court considers that those criticisms are based on a reading of the contested decision which leaves out of account the unique character of each of the infringements in question. The incidents concerning extension of the collective exclusive dealing arrangement and the sending out of price recommendations by the FEG do not constitute independent infringements; they are components of the infringements referred to in Articles 1 and 2 of the contested decision. By their nature, those infringements are of a continuous nature. The fact that the Commission did not produce proof of the pressure exerted by TU on suppliers in

implementation of the collective exclusive dealing arrangement for a period longer than that from July 1990 to July 1991 cannot therefore detract from the proof of the existence of the infringement between 11 March 1986 and 25 February 1994. Similarly, the fact that the sending out of price recommendations by the FEG was noted only between 21 December 1988 and 24 April 1994 does not detract from the determination of the duration of the infringement as constituting a longer period, since it is based on objective and consistent information.

407 It is therefore necessary to examine the elements on the basis of which the Commission determined the respective durations of the infringements. In that connection, it can but be observed that TU has not put forward specific arguments to undermine the Commission's appraisals. Its observations are very general and hardly go beyond the utterance of a complaint. At most, they amount to contesting the probative value of the documents relied on to determine the existence and attributability of the infringement. However, those documents have already been examined in detail in the earlier assessments in this judgment.

408 As regards the infringement referred to in Article 1 of the contested decision, the Commission was not able to determine precisely the date on which the collective exclusive dealing arrangement was entered into. Nevertheless, it produced evidence of the existence of the arrangement as from the meeting of 11 March 1986, at which the boards of the FEG and NAVEG referred to the gentlemen's agreement. The Commission also relied on certain items of evidence post-dating that meeting on the basis of which it considered that the gentlemen's agreement was continuing to be applied by NAVEG members (see contested decision, recitals 47 to 49). The Commission also referred to certain evidence indicating that NAVEG members had followed the recommendations of their association, in implementation of the gentlemen's agreement (contested decision, recitals 50 to 52). The last of those pieces of evidence is the account of an internal meeting of the Hemmink company of 25 February 1994, at which that NAVEG member stated that it had refused to supply a wholesaler not belonging to the FEG. As regards the pressure brought to bear, particularly by TU, on manufacturers not belonging to NAVEG not to supply wholesalers who were not members of the FEG, it is also common ground that this took place over a period of 12 months as from July 1990.

409 As regards the infringement involving price fixing, it is common ground that the binding decisions on publications and prices adopted in 1978 and 1984 remained in force until they were withdrawn in 1993. Concertation on prices occurred between 6 December 1989 and 30 November 1993 (see report of the board of the FEG at which the question of the standard discount of 35% for schools was considered, as indicated in recital 83 to the contested decision).

410 It follows that TU's arguments concerning the duration of the infringements must be rejected.

2. Case T-5/00

411 The FEG considers that the duration of the infringement referred to in Article 1 of the contested decision should be limited to the period from 28 February 1989 to 23 August 1991. Those dates are those of the only admissible documents to which the Commission referred in the contested decision. For the reasons set out above regarding TU, that argument must be rejected: the Commission produced evidence of the existence of a continuous infringement over the period from 1986 to 1994.

412 As regards the infringement referred to in Article 2 of the contested decision, the FEG contends that the binding decisions were not applied before their withdrawal on 23 November 1993. Moreover, the Commission found no evidence of concertation on prices after 1991. According to the FEG, the duration of the infringement should be reduced in the light of those facts. That argument must fail. First, the effectiveness of the implementation of the binding decisions has no impact on determination of the duration of the infringement. Second, the Commission relied on as evidence of continuing concertation on prices after 1991 the terms of the report of the FEG of 30 November 1993 concerning discounts to schools.

3. Conclusion

413 The Commission was right to consider that the durations of the component parts of the infringements referred to in Articles 1 and 2 of the contested decision were eight, fifteen, nine, four and six years and, consequently, to classify those periods as medium-to-long in the light of its decision-making practice (contested decision, recital 147).

D — Mitigating circumstances

414 According to TU, the role of 'follower' which it played in the infringements committed by the FEG constitutes a mitigating circumstance which the Commission should have taken into account, in accordance with the guidelines for calculating the amount of fines imposed under Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, hereinafter 'the guidelines').

415 The Court finds that that argument is based on the mistaken premise that TU played only an ancillary role or that of 'follower' in relation to the infringements committed by the FEG. As has been observed already, TU's responsibility derives from its active participation in the unlawful agreements put into effect within the framework of the FEG. Consequently, that argument must be rejected.

E — Revision of the amounts

1. Arguments of the parties

416 The interveners consider that the amount of the fine is modest. Because of the seriousness of the infringements, the Commission should have imposed a heavier fine on TU. Consequently, the interveners ask the Court to double the amount of the fine in the exercise of its unlimited jurisdiction.

417 The applicants reply that such a request is inadmissible. According to the combined provisions of Article 37 of the Statute of the Court of Justice and Articles 116(3) and 115(2) of the Rules of Procedure, an intervener must accept the case at its existing state of advancement. Since the Commission did not claim that the amount of the fine should be increased, the claims of the interveners are inadmissible.

2. Findings of the Court

418 Interveners must, under Article 116(3) of the Rules of Procedure, accept the case as they find it at the time of their intervention, and, under the fourth paragraph of Article 37 of the Statute of the Court of Justice, their application to intervene must be limited to supporting the form of order sought by one of the parties. In this case, since the Commission did not contend that the amount of the fine should be increased, the interveners have no standing to do so. Consequently, the interveners' claims for an increase in the amount of the fines must be rejected as inadmissible.

II — *Statement of reasons*

A — Arguments of the parties

419 TU maintains, first, that the reasons given for the contested decision do not allow it to ascertain for what conduct a fine was imposed on it by reason of the infringements committed by the FEG. It follows from the previous findings concerning the existence and attributability of the infringements that this objection is unfounded.

420 TU then contends that the contested decision did not give certain information which was essential for evaluation of the amount of the fine, such as the reference year and the amount of the turnover used as a point of reference.

B — Findings of the Court

421 The second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'. The essential procedural requirement represented by the obligation to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons (Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 44).

422 The scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order of the Court of Justice of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54).

423 In this case, recitals 130 to 153 to the contested decision set out the criteria used by the Commission to calculate the fines, in particular the intentional nature of the infringements (recitals 131 to 135), their seriousness (recitals 136 to 144) and their duration (recitals 145 to 149).

424 The method followed by the Commission is entirely clear from a reading of the decision. In view of the seriousness of the infringements, the Commission, pursuant to the guidelines, adopted the minimum of EUR 1 million, plus 25%, as the basic amount of the fine. The duration of the infringements was classified as medium-to-long, since the average duration of the component elements thereof is eight years. Consequently, the Commission increased by 80% the basic amount of the fine and thus arrived at the sum of EUR 2.25 million.

425 Those details are in conformity with the requirements for statements of reasons in relation to the conditions laid down in Article 15(2) of Regulation No 17.

426 For the sake of completeness, it should be observed that TU did not contend that the fine exceeded the maximum amount which could be imposed on it, having regard to its turnover, under Article 15(2) of Regulation No 17.

427 Since the statement of the reasons on which the contested decision is based is adequate, this plea must be rejected.

III — *The principle of equal treatment*

428 It must be borne in mind that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (*Sermide*, cited above, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

429 In this case, TU claims to be the victim of discrimination as compared with the other members of the FEG which sat on the board during the period of the infringement. Even though their situation was comparable to its own, those FEG members did not have fines imposed upon them.

430 It must be borne in mind, however, that where an undertaking has acted in breach of Article 81(1) EC, it cannot escape being penalised altogether on the ground that other traders have not been fined, even where, as in this case, those traders' circumstances are not the subject of proceedings before the Court (*Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 197). TU's argument must therefore be rejected.

431 TU also alleges discrimination by comparison with the FEG as regards the fine. Whereas its turnover amounts to less than one-third of that of the FEG, the Commission imposed on it a proportionally higher fine. It considers that the fine

imposed on the FEG represents 0.23% of the turnover (1994) of its members, that of the applicant not being taken into account. The fine imposed on TU, however, represents 0.47% of its turnover (1993).

432 The Court considers that those comparisons are not sufficient for it to be inferred that the principle of equal treatment has been infringed. Contrary to TU's contention, the Commission is not required, when determining the amount of fines having regard to the seriousness and duration of the infringement in question, to make certain, where fines are imposed on several undertakings or associations of undertakings implicated in one and the same infringement, that the final amounts of the fines resulting from its calculation for the undertakings concerned are exactly proportional to their respective turnovers.

433 In this case, the Commission imposed a fine on the FEG and on TU by reason of their individual participation in each of two infringements, after describing their respective roles in those infringements and the gravity and duration thereof.

434 Consequently, TU's arguments alleging breach of the principle of equal treatment must be rejected.

IV — *The excessive duration of the administrative procedure*

435 The applicants claim that the failure to observe the requirement of a reasonable time-limit should lead to a reduction of the fine.

436 As explained earlier (see paragraph 85 above), the Commission is responsible for the excessive duration of the procedure. Although that finding has no consequence regarding the legality of the contested decision, the fact remains that, in the exercise of the unlimited jurisdiction enjoyed by the Court under Article 229 EC and Article 17 of Regulation No 17, the Court may consider whether a reduction of the fine imposed is justified.

437 The Commission considers that it took due account of all the consequences of the 'considerable' delay in completing the administrative procedure by reducing the amount of the fine by EUR 100 000 on its own initiative. The applicant contends that that fact does not mean that the Court cannot make a further reduction.

438 The Court finds that the Commission reduced the fine on its own initiative. The possibility of granting such a reduction falls within the scope of the Commission's powers. The applicants have produced no evidence to show why the Court, in the exercise of its unlimited jurisdiction, should consider granting a further reduction of the amount of the fine. Consequently, there is no reason to grant the applicants' request in that regard.

Conclusion

439 It is clear from all the foregoing considerations that the applications in Cases T-5/00 and T-6/00 must be dismissed.

Costs

440 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.

441 In Case T-5/00, the FEG states that the interveners made no express application regarding the costs of their intervention, and should therefore bear those costs.

442 It is apparent that, in Cases T-5/00 and T-6/00, the interveners described the form of order sought by them, particularly as regards the question of costs, by referring to the terms used by the Commission, the party which they supported. The form of order sought by the interveners must therefore be construed as likewise seeking an order for costs against the applicants.

443 In this case, since the applicants have been unsuccessful, they must be ordered to pay the costs incurred by the Commission and by the interveners, including those relating to the application for interim measures in Case T-5/00 R, in accordance with the application made by those parties to that effect.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. **Dismisses the applications;**

2. **Orders the applicant in Case T-5/00 to bear its own costs and to pay those of the Commission and of the interveners, including those relating to the application for interim measures in Case T-5/00 R;**

3. **Orders the applicant in Case T-6/00 to bear its own costs and to pay those of the Commission and of the interveners.**

Vesterdorf Forwood Legal

Delivered in open court in Luxembourg on 16 December 2003.

H. Jung B. Vesterdorf

Registrar President

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