ORDER OF THE COURT
25 March 1996 *

In Case C-137/95 P,

Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others, represented by L. H. van Lennep, of The Hague Bar, and E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of L. Frieden, 62 Avenue Guillaume,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities of 21 February 1995 in Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, assisted by P. Glazener, of the Amsterdam Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers),

* Language of the case: Dutch.

G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann (Rapporteur), H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: M. B. Elmer,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 27 April 1992, the Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (hereinafter 'SPO') and 28 others brought an appeal against the judgment delivered by the Court of First Instance on 21 February 1995 in Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, in so far as it dismissed their application for a declaration that Commission Decision 92/204/EEC of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and 32.571 — Building and Construction Industry in the Netherlands (OJ 1992 L 92, p. 1) was non-existent or, alternatively, for a declaration that it was void.

2 SPO is a coordinating organization set up in 1963 by a number of Netherlands associations of building undertakings, the present membership of which now comprises the 28 other appellants. Since 1952, the latter had adopted rules to regulate competition in connection with calls for tenders issued in certain regions or sectors of the construction industry. After the SPO was set up, those regional and sectoral rules were progressively standardized under its control between 1973 and 1979 (paragraphs 1, 2 and 4 of the contested judgment).

3 Under its statutes, SPO's object is 'to promote and administer orderly competition, to prevent improper conduct in price tendering and to promote the formation of economically justified prices'. To that end, it drew up rules and regulations providing for 'institutionalized regulation of prices and competition' and is empowered to impose penalties on contractors affiliated to its member organizations if they breach their obligations under those rules. Implementation of the rules is entrusted to eight executive offices, whose operations are controlled by the SPO. The member associations of the SPO at present have a membership of more than 4 000 building undertakings established in the Netherlands (paragraph 2 of the judgment).

4 On 3 June 1980, the general meeting of SPO adopted a 'Code of Honour' which was made binding on all the contractors belonging to its member associations and provided for a uniform system of penalties for infringements of the rules standardized between 1973 and 1979 and certain material provisions necessary for the application of those rules. The Code of Honour entered into force on 1 October 1980 (paragraph 5 of the judgment).

5 On 16 August 1985, the Commission sent to the SPO a request for information concerning the participation of foreign undertakings in the SPO (paragraph 6 of the judgment).

6 By Ministerial Decree of 2 June 1986, the Netherlands authorities adopted uniform rules on tendering, laying down the rules for the award of public contracts (paragraph 7 of the judgment).

7 In the same year, the SPO adopted two sets of price-regulating rules (hereinafter 'the UPR'), one of which concerns invitations to tender under the restricted procedure and the other invitations to tender under the open procedure. Those rules were themselves supplemented by four regulations and three annexes and entered into force on 1 April 1987 (paragraph 8 of the judgment).

8 It is apparent in particular from paragraphs 90 and 125 of the judgment of the Court of First Instance that the UPR are essentially intended to ensure that the undertakings rather than the contract awarders designate the 'entitled undertaking', which will be the only one entitled to contact the contract awarder to negotiate the content and price of its tender and to fix the price increases to be borne by the contract awarder, comprising essentially compensation for calculation costs and contributions to the running costs of trade organizations, including the SPO. The UPR also provide that such increases are to cover all the calculation costs of all the interested undertakings taking part in the meeting and are to be added to the amount of the tender which the entitled undertaking will make to the contract awarder; in other words they are, according to the appellants, charged to the works in relation to which those costs were incurred. Finally, tenderers may withdraw their proposed price tenders after comparing them with those of other tenderers.

9 On 15 June 1987, the Commission carried out investigations at the SPO's premises. Thereafter, on 13 January 1988, the SPO notified the UPR to the Commission, supplementing that notification on 13 July 1989 after amending the UPR. In November 1989, the Commission decided to initiate a procedure against the SPO and on 5 December 1989 it sent it a statement of objections. After a hearing on 12 June 1990, the Commission adopted a decision unfavourable to the applicants on 5 February 1992 under Article 85 of the EEC Treaty (paragraphs 10 to 23 of the contested judgment).

10 In that decision, the Commission found that the statutes of the SPO of 10 December 1963, as subsequently amended, the two sets of UPR rules of 9 October 1986 and the regulations and annexes forming part of them, the previous and similar UPR rules which they replaced and the Code of Honour, except for Article 10 thereof, constituted infringements of Article 85(1) of the Treaty. It also rejected the application for an exemption under Article 85(3) of the Treaty and imposed on the appellants fines totalling ECU 22 498 000 (paragraphs 22, 23 and 25 of the judgment).

11 On 13 April 1992, the SPO and its 28 members brought an action before the Court of First Instance for a declaration that the Commission decision was non-existent or, in the alternative, for the annulment of the decision.

12 By judgment of 21 February 1995, the Court of First Instance dismissed the application, thus confirming the Commission's decision.

13 On 27 April 1995, the SPO and its 28 members brought the present appeal against that judgment.

The pleas in law of the parties

14 In support of their appeal for annulment of the judgment of 21 February 1995, the appellants put forward two pleas in law, one relating to the application for exemption under Article 85(3) of the EC Treaty and the other to determination of the amount of the fines.

15 The appellants thus do not challenge the part of the judgment of the Court of First Instance which finds that infringements of Article 85(1) of the Treaty were committed.

16 In their first plea, the appellants allege that the Court of First Instance, in reviewing the Commission's appraisal of their application for exemption, infringed Articles 85(3) and 190 of the EEC Treaty, Article 9(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty

(OJ, English Special Edition 1959-1962, p. 87), or in any event the general principles of Community law requiring reasons to be given for decisions, and failed to observe the rights of the defence.

17 Article 85(3) provides:

'The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings;

— any decision or category of decisions by associations of undertakings;

— any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress' (first condition) 'while allowing consumers a fair share of the resulting benefit' (second condition), 'and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives' (third condition);

'(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question' (fourth condition).

18 In the first part of the first plea, the appellants claim that, to enable it to review the Commission's appraisal of the second and third conditions for exemption and the statement of reasons therefor, the Court of First Instance should have determined the 'benefits' at issue by first examining the first condition for exemption to which that concept relates before going on to examine the other conditions.

19 In the second part of the first plea in law, the appellants claim that the Court of First Instance applied a number of inappropriate legal criteria when reviewing the Commission's appraisal of the second condition for exemption.

20 First, they submit that it carried out its review by reference to the concept of competition rather than to that of benefits as defined in the first condition for exemption under Article 85(3), first by deciding that the rules designed to counter what the appellants refer to as ruinous competition could not, 'in principle', be exempted because they necessarily lead to restriction of competition and, secondly, by indicating, *inter alia* in paragraph 294 of the contested judgment, that the appellants 'necessarily restrict competition and therefore deprive consumers of its benefits'.

21 Secondly, they claim, it took the view, in paragraph 292, that, in examining the second condition for exemption, a macroeconomic analysis was unnecessary; and it failed to take account of the position and role of the Netherlands authorities whilst the rules were applicable.

22 Thirdly, they say, it expressed the view, in paragraph 295, that the benefits should accrue to all users without distinction, and it also failed to take account of the fact that it was apparent from its own findings at the end of paragraph 296 that contract awarders other than those whose situation it considered obtained benefits from the application of the rules.

23 In the third part of the first plea, concerning the third condition for exemption, the appellants claim that the Court of First Instance, in considering that the process for designating the entitled undertaking was unilateral, substituted its own view of the rules in question for that of the Commission, in breach of the exclusive competence vested in the latter by Article 9(1) of Regulation No 17. They also allege that the Court of First Instance disregarded a number of arguments they put forward.

24 In their second plea, the appellants, albeit without going into detail, criticize the Court of First Instance for infringing Articles 85 and 190 of the EC Treaty, Article 4(2) and 15(2) of Regulation No 17 or the general principles of Community law concerning the statement of reasons on which a decision is based, legal certainty, legal protection and proportionality, in reviewing the Commission's evaluation of the gravity of the infringements that it had found. The plea as a whole concerns the obligation whereby, according to the applicants, the Commission and the Court of First Instance must take account of the extent to which the infringement was intentional ('intentionally or negligently') when evaluating its gravity, gravity being one of the two criteria for determining the amount of the fine provided for in the second subparagraph of Article 15(2) of Regulation No 17.

25 In the first part of the second plea, the appellants criticize the Court of First Instance for failing to verify in each case, when carrying out its review, whether the infringement had been committed 'intentionally or negligently', a condition laid down in the first subparagraph of Article 15(2).

26 In the second part, they criticize it for failing to annul the Commission decision, which made it impossible for it to examine the application of the criteria at issue since, in point 140, it 'failed to decide whether there was any intention or fault' as regards the infringements dating back to at least 1 October 1980, even though it did so in relation to the other infringements.

27 In the third part of the plea they maintain, essentially, that any application of Article 4(2) of Regulation No 17, which grants exemption from the requirement of notification for certain agreements, is a factor that the Court of First Instance must without fail take into account in determining the amount of the fine. In their view, that factor implies, as a matter of principle, that the infringements could only have been committed negligently and not intentionally as the Court of First Instance had, they maintain, decided.

28 In its reply, the Commission contends that the appeal should be dismissed as unfounded.

29 With respect to the first part of the plea, it submits that, in view of the cumulative nature of the conditions for exemption, the Court of First Instance cannot be criticized for failure to examine the first exemption condition. Nor can it be criticized, having regard to the second and third exemption conditions, for adopting for the purposes of its review the definition of 'benefit' put forward by the appellants themselves.

30 As regards the second part of the first plea, it contends that the various charges made by the appellants are based on a misreading of the judgment of the Court of First Instance or concern assessments of fact which are outside the purview of the Court of Justice in appeals.

31 With respect to the third part of the first plea, it contends that the matter to be examined, namely the unilateral nature of the procedure for designation of the entitled undertaking, formed part of the proceedings since it appears in various parts of the Commission decision and, moreover, there is no rule preventing the Community judicature, when reviewing the legality of acts of the institutions, from taking account of arguments which are not contained as such in the act in question but nevertheless confirm that it is correct. It considers that the many other arguments put forward in connection with this plea should be rejected.

32 As regards the second plea, the Commission submits, first, that the Court of First Instance enjoys unlimited jurisdiction in reviewing decisions which impose fines. Then, with respect to the various parts of the plea, it considers that the appellants have, first of all, misinterpreted the first and second subparagraphs of Article 15(2) of Regulation No 17, between which a distinction must be drawn, and have then misread point 140 of the Commission decision, which contains the criticized wording, namely 'intentionally or, at the very least, negligently', concerning the fulfilment or otherwise of the condition for the imposition of fines contained in the first subparagraph of Article 15(2), which does not distinguish between the two cases. Finally, it submits that the appellants are wrong to claim that their rules are covered by Article 4(2) of Regulation No 17, a claim which, moreover was rejected both by the Commission decision and by the Court of First Instance; furthermore, that article is not required to be taken into account in imposing the fine or determining its amount.

Findings of the Court

33 Pursuant to Article 119 of its Rules of Procedure, the Court may, where an appeal is clearly inadmissible or clearly unfounded, by reasoned order dismiss it at any time.

The first plea

The first part

34 As regards the plea as to the failure by the Court of First Instance to examine the first exemption condition when carrying out its review of the Commission's appraisal of the second and third exemption conditions, it must be pointed out, first, that the Court of First Instance referred, in paragraphs 267 and 286, to the

cumulative nature of the four exemption conditions and indicated that 'non-fulfilment of only one of those conditions will render it necessary to confirm the decision rejecting the application for exemption made by the applicants'.

35 Secondly, it must be held that the Court of First Instance, which referred in paragraph 288 of the contested judgment to the limited nature of its review of the Commission's assessments relating to the grant of an exemption under Article 85(3), first described, having regard to the arguments of the parties, the benefit considered by the appellants to derive from their rules (paragraphs 268 to 271 regarding the second condition and paragraph 301 regarding the third), before examining those arguments individually, in particular in paragraphs 293, 295, 296 and 298 and in paragraph 310 et seq.

36 Since the second exemption condition concerns the sharing out of the benefit and not its existence, the Court of First Instance was entitled to adopt, as it did, the definition of benefit adopted by the appellants, an approach which did not adversely affect them in any way.

37 It follows that the first part of the first plea must be rejected as manifestly unfounded.

The second part

38 The objection that the Court of First Instance applied a number of inappropriate criteria in reviewing the Commission's assessment of the second exemption condition, concerning the sharing of the benefit, is manifestly unfounded.

39 The first argument is entirely based on a manifestly incorrect reading of the judgment. A reading of the contested passage (end of paragraph 294) in context is sufficient to demonstrate this. In that part of the judgment, the Court of First Instance merely carried out a check, as is appropriate in relation to the grant of exemptions, to establish whether the Commission committed a manifest error of assessment (paragraph 288). Adjudicating in relation to the examination of the second exemption condition (fair sharing of the benefit considered to derive from the contested rules), it simply found that the benefit considered to derive from 'action to counteract what they regard as ruinous competition' (beginning of the contested passage) does not extend to consumers. In adjudicating as it did, the Court of First Instance did not in any way confuse Article 85(1) (existence of restrictions of competition) and Article 85(3) (exemption conditions).

40 The appellants' second argument relates to paragraph 292 and is also based on a manifestly incorrect reading of the judgment. It is clear merely from a reading of the judgment that the Court of First Instance did not, as the appellants imply, exclude as a matter of principle macroeconomic analyses from the assessment of cartels in relation to the second exemption condition in Article 85(3).

41 After mentioning, in paragraphs 288 and 289 of the judgment, its limited powers of review in relation to exemptions for restrictive arrangements, in that Article 9 of Regulation No 17 conferred exclusive powers on the Commission, the Court of First Instance considered, in paragraphs 290 and 291, whether the Commission was right not to have accepted the macroeconomic benefits relied on by the appellants, before going on to conclude, in paragraph 292, that the Commission, by weighing the appellants' macroeconomic analysis against its own microeconomic analysis, did not commit a manifest error of assessment.

42 Moreover, the attitude of the national authorities during the period of application of the rules constitutes a matter of fact which the Court of First Instance, applying Community law, was not required to take into account in its assessment in relation to the second exemption condition.

43 As to the third argument, its first part is also based on a manifestly incorrect reading of paragraph 295 of the contested judgment. The Court of First Instance did not there admit, as the appellants assert, that the advantages identified should benefit all users without distinction but merely noted the limits of the advantages claimed by the appellants, on the basis of findings of fact — which, as such, fall outside the purview of the Court of Justice in an appeal.

44 In the second part of that argument, the appellants criticize the Court of First Instance for failing to take into consideration the fact that, in the absence of the rules, the calculation costs which contract awarders who seek tenders from a large number of undertakings cause the latter to incur are incorporated by the latter in their general costs and are thus passed on to other contract awarders and that, by preventing this, the rules, in their view, are beneficial to contract awarders other than those considered by the Court of First Instance.

45 However, it is clear from the beginning of paragraph 296 that the Court of First Instance expressly examined the question of exactly who received the benefit which those other contract awarders were said to obtain, and in doing so weighed the benefit against the disadvantages associated with it and the limited way in which it was shared.

46 Accordingly, the second part of the first plea must be rejected in its entirety as manifestly unfounded.

The third part

47 It must be borne in mind, without any detailed consideration of the appellants' arguments being necessary, that it is settled case-law that the Court of Justice will reject outright complaints directed against grounds given in a judgment of the Court of First Instance merely for the sake of completeness, since the latter cannot

provide any basis for its annulment (see, in particular, Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraph 25, and Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991).

48 In this case, it must be noted that in paragraph 267 of the judgment, in examining the conditions for the grant of an exemption, the Court of First Instance rightly stated: 'It must first be borne in mind that the four conditions for granting an exemption under Article 85(3) of the Treaty are cumulative ... and that therefore non-fulfilment of only one of those conditions will render it necessary to confirm the decision rejecting the application for exemption' (see also paragraph 286) and that, furthermore, after reaching the conclusion, in paragraph 300, that the second exemption condition was not fulfilled, it stated, in paragraph 310 of the contested judgment, that its finding that the third exemption condition likewise had not been fulfilled was made 'unnecessarily'.

49 Since it is apparent from paragraphs 35 and 44 of this order that the Court of First Instance did not infringe Community law by concluding that the second exemption condition was not fulfilled, the third part of the first plea fails and therefore manifestly provides no basis for the appeal.

The second plea in law

The first two parts

50 This plea concerns determination of the amount of the fine under the second subparagraph of Article 15(2) of Regulation No 17.

51 In the first part, the appellants rely on the erroneous premise that the gravity of the infringements committed — one of the prescribed criteria — should without fail have been considered in relation to the condition in the first subparagraph of that provision, according to which infringements must have been committed intentionally or negligently.

52 In the second part, they also submit, likewise incorrectly, that the Court of First Instance should have annulled the Commission decision which, by not distinguishing in paragraph 140 thereof between infringements committed intentionally and those committed negligently, made it impossible for it to carry out its review.

53 However, it must be pointed out at the outset that it is apparent from the clear and precise terms of Article 15(2) that it deals with two distinct matters. First, it lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions); these include the condition concerning the intentional or negligent nature of the infringement (first subparagraph). Secondly, it governs determination of the amount of the fine, which depends on the gravity and duration of the infringement (second subparagraph). That clear distinction underlies all the case-law of the Court on that provision.

54 With regard to the first part, it must be observed next that the second subparagraph of Article 15(2) does not require (or indeed allow) any reference to the initial conditions in the first subparagraph, or indeed to the case-law of the Court of Justice on determination of the amount of the fines. It is apparent from that case-law 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.

55 Furthermore, it must be observed that, as the Commission emphasizes, infringements committed negligently are not, from the point of view of competition, less serious than those committed intentionally.

56 With regard to the second part, it need merely be observed that paragraph 140 of the Commission decision does relate to the conditions for the imposition of fines and that the first subparagraph of Article 15(2), like the case-law of the Court of Justice, draws no distinction between the two cases in which fines may be imposed, which are given as alternatives to each other.

57 In those circumstances, the Court of First Instance was not required to verify, in order to determine the gravity of the infringement, whether it had been committed intentionally or negligently, still less to distinguish between the two cases. The first two parts of the second plea in law must therefore be rejected as manifestly unfounded.

The third part

58 As regards the appellants' claim that it is necessary, in assessing the gravity of an infringement, to take account of the possible application of Article 4(2) of Regulation No 17, it need merely be pointed out that, for the purposes of determining the amount of the fine, nothing in the text of the second subparagraph of Article 15(2) of Regulation No 17 or of Article 4(2) thereof or in the case-law of the Court of Justice requires the Commission or the Court of First Instance to take account of any such application. It must also be pointed out, as the Court of First Instance rightly indicated, that in such circumstances the parties are always entitled to notify their agreements to the Commission in order to obtain immunity from a fine.

59 The third part of the second plea must therefore also be dismissed.

60 Accordingly, pursuant to Article 119 of the Rules of Procedure, the appeal must be dismissed as clearly unfounded.

Costs

61 Under Article 69(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. Since the appellants have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the appellants, jointly and severally, to pay the costs.

Luxembourg, 25 March 1996.

R. Grass — Registrar

G. C. Rodríguez-Iglesias — President