JUDGMENT OF THE COURT (First Chamber)
21 September 2006 *

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In Case C-113/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 26 February 2004,

Technische Unie BV, established in Amstelveen (Netherlands), represented by P. Bos and C. Hubert, advocaten,

appellant,

the other parties to the proceedings being:

Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied, established in The Hague (Netherlands), represented by E. Pijnacker Hordijk, advocaat,

applicant at first instance,

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

defendant at first instance,

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

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

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

interveners at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann (Rapporteur), N. Colneric, E. Juhász and E. Levits, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2005,

gives the following

Judgment

1 By its appeal, Technische Unie BV ('TU') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761 ('the judgment under appeal') or, at least, to have that judgment set aside in so far as it concerns Case T-6/00, whereby the Court of First Instance dismissed its action for 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 Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie) (OJ 2000 L 39, p. 1; 'the contested decision').

Facts

2 On 18 March 1991, CEF Holdings Ltd, a wholesaler of electrotechnical fittings established in the United Kingdom, and its subsidiary CEF City Electrical Factors BV, which was formed for the purpose of establishing CEF Holdings Ltd on the Netherlands market (both companies being hereinafter referred to as 'CEF'), lodged a complaint with the Commission concerning the problems in obtaining supplies which they had encountered in the Netherlands.

3 That complaint was directed against three associations of undertakings active on the Netherlands electrotechnical market. These were, in addition to the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (Netherlands Federation for Wholesale Trade in Electrotechnical Products; 'the FEG'), the Nederlandse Vereniging van Alleenvertegenwoordigers op Elektrotechnish Gebied (Netherlands Association of Exclusive Representatives in the Electrotechnical Sector; 'NAVEG') and the Unie van de Elektrotechnische Ondernemers (Union of Electrotechnical Undertakings; 'UNETO').

4 In its complaint, CEF accused those three associations and their members of having concluded reciprocal collective exclusive dealing arrangements at all levels of the distribution chain for electrotechnical fittings in the Netherlands, which made it virtually impossible for a wholesale distributor of electrotechnical fittings which was

not a member of the FEG to enter the Netherlands market. Thus, manufacturers and their agents or importers delivered electrotechnical fittings only to members of the FEG and installers obtained supplies only from those members.

5 Subsequently, in 1991 and 1992, CEF widened the scope of its complaint so as to cover agreements between the FEG and its members concerning prices and price reductions, agreements designed to prevent CEF from participating in certain projects and vertical price-fixing agreements between certain manufacturers of electrotechnical fittings and the wholesaler members of the FEG.

6 On 16 September 1991, the Commission sent a warning letter to the FEG and its members, together with a number of requests to the FEG for information; it also carried out inspections concerning the alleged collusion by the members of the FEG. Then, on 3 July 1996, it communicated its objections to the FEG and to seven of its members, including TU. A hearing took place on 19 November 1997 and was attended by all the addressees of the statement of objections and by CEF.

7 On 26 October 1999, the Commission adopted the contested decision, in which it was found that:

— the FEG had infringed Article 81(1) EC by implementing, on the basis of an agreement concluded with NAVEG, and also on the basis of concerted practices with suppliers not represented in NAVEG, a collective exclusive dealing arrangement intended to prevent supplies to undertakings not belonging to the FEG (Article 1 of the contested decision);

— the FEG had infringed Article 81(1) EC by directly and indirectly restricting the freedom of its members to determine their selling prices independently, on the basis of the binding decisions on fixed prices and publications, by distributing to its members price guidelines for gross and net prices and by providing a forum for its members to discuss prices and discounts (Article 2 of the contested decision);

— TU had infringed Article 81(1) EC by taking an active part in the infringements referred to in Articles 1 and 2 of the contested decision (Article 3 of that decision).

8 Fines of EUR 4.4 million and EUR 2.15 million, respectively, were imposed on the FEG and on TU for the infringements referred to in the preceding paragraph (Article 5 of the contested decision).

9 Owing to the considerable duration of the procedure (102 months), however, the Commission decided on its own initiative to reduce the amount of the fines by EUR 100 000. In that regard, the contested decision states:

'(152) ... The Commission acknowledges that the duration of the proceedings in the present case, which started in 1991, is considerable. There are various reasons for this, some of which can be attributed to the Commission itself and some to the parties. In so far as the Commission is to blame in this respect, it acknowledges its responsibility.

(153) For these reasons, the Commission is reducing the amount of the fine [from EUR 4.5 million] to EUR 4.4 million for the FEG and [from EUR 2.25 million to] EUR 2.15 million for TU.'

The action before the Court of First Instance and the judgment under appeal

10 By application lodged at the Court of First Instance on 14 January 2000 (Case T-6/00), TU brought an action for, primarily, annulment of the contested decision; in the alternative, annulment of Article 5(2) thereof; and, further in the alternative, a reduction to EUR 1 000 in the fine imposed on it.

11 By application lodged at the Court of First Instance on the same date (Case T-5/00), the FEG brought an action having the same object as TU's action.

12 By order of the President of the First Chamber of the Court of First Instance of 16 October 2000, CEF was granted leave to intervene in the proceedings in support of the form of order sought by the Commission.

13 The actions brought by the FEG and by TU, which were joined for the purposes of the oral procedure and the judgment, were dismissed by the judgment under appeal. The FEG and TU were ordered to bear their own costs and to pay the costs incurred by the Commission and by the interveners at first instance in each of the cases which they had brought.

Forms of order sought by the parties before the Court of Justice

14 In its appeal, TU claims that the Court should:

— set aside the judgment under appeal and itself give judgment on the application for annulment of the contested decision; in the alternative, set aside the judgment under appeal and refer the case back to the Court of First Instance;

— annul the contested decision in whole or in part in so far as it relates to TU or, adjudicating afresh, order a substantial reduction in the fine imposed on TU;

— order the Commission to pay the costs of the proceedings, including those relating to the proceedings before the Court of First Instance.

15 The Commission contends that the Court should:

— dismiss the appeal in its entirety as inadmissible or, at least, as unfounded;

— order TU to pay the costs.

Pleas in law put forward in the appeal

16 In support of its appeal, TU puts forward five pleas in law, alleging:

— infringement of Community law and/or of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), or, at least, that the reasoning on which the judgment under appeal is based is incomprehensible in that the Court of First Instance held that the fact that a reasonable time was exceeded did not justify the annulment of the contested decision or a further reduction in the fine;

— breach of the obligation to state reasons, in that the judgment under appeal is vitiated by an internal contradiction owing to the ambiguity characterising the importance which the Court of First Instance attributed to the date of notification of the warning letter;

— an error of law or incomprehensible reasoning in the judgment under appeal in so far as the Court of First Instance held that the Commission was entitled to hold TU responsible for the infringements referred to in Articles 1 and 2 of the contested decision;

— an error of law or incomprehensible reasoning in the judgment under appeal in that the Court of First Instance considered each of the infringements referred to in Articles 1 and 2 of the contested decision to be continuous infringements committed during the periods envisaged and in that, in addition, it took the same periods as those relating to the infringements into account when calculating the duration of the infringement referred to in Article 3 of the contested decision;

— an error of law in that, in spite of the incorrect appraisal of the duration of the infringements and failure to have regard to the 'reasonable time' principle, the Court of First Instance failed to award a further reduction in the amount of the fine or, at least, failed to state sufficiently the reasons for that appraisal.

The appeal

First plea in law, alleging breach of the 'reasonable time' principle

Arguments of the parties

17 In the context of its first plea, TU criticises the Court of First Instance for having infringed Community law and/or the ECHR or, at least, for having stated the grounds of the judgment under appeal in an incomprehensible manner, in that it held that the fact that a reasonable time was exceeded could not justify annulment of the contested decision or a further reduction in the amount of the fine imposed on TU. This plea consists of three parts.

— First part of the first plea, relating to the distinction between the two phases of the administrative procedure

18 TU criticises the Court of First Instance for having held, at paragraphs 78 and 79 of the judgment under appeal, that the prolongation of the phase of the administrative procedure preceding notification of the statement of objections was not capable of adversely affecting the rights of the defence, since in a procedure relating to

Community competition policy the persons concerned are not the subject of any formal accusation until they receive the statement of objections. The Court of First Instance thus wrongly ignored 57 months of the administrative procedure when appraising the reasonableness of the time.

19 TU claims that, in order to determine whether the 'reasonable time' principle was observed, it is necessary to consider the total duration of the procedure as well as the various stages of that procedure. It maintains that, by drawing a distinction between the two phases of the procedure and taking the view that the phase preceding notification of the statement of objections was 'irrelevant' for the purpose of appraising the reasonableness of the time, the Court of First Instance acted in a manner incompatible with Community law.

20 Furthermore, in TU's submission, the Court of First Instance disregarded the case-law of the European Court of Human Rights when it observed, at paragraphs 79 and 80 of the judgment under appeal, that the official date of receipt of the statement of objections must be considered to be the time from which the persons concerned are the subject of a formal accusation and the date of initiation of the procedure under Article 3 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) and that, in criminal matters as in the present case, the reasonable time referred to in Article 6(1) of the ECHR begins to run as from that time.

21 TU contends that, in the specific circumstances of the present case, the 'time of the formal accusation' coincides not with receipt of the statement of objections but with receipt of the warning letter or indeed with the first request for information.

22 The Commission claims that the first part of the first plea put forward by TU rests on a misreading of the judgment under appeal. It submits that at paragraph 77 of that judgment the Court of First Instance found that the duration of the first phase

of the administrative procedure had been unreasonably excessive; it therefore took account of the first phase of that procedure in appraising the reasonableness or unreasonableness of the period which elapsed between the first acts in that procedure and the adoption of the contested decision.

23 The Commission contends that the Court of First Instance, in considering that both the first phase and the second phase of the administrative procedure had taken an excessive time and in then examining whether the fact that a reasonable time had been exceeded had adversely affected TU's rights of defence, proceeded in accordance with the case-law of the Court of Justice to the effect that the unreasonableness of the various phases of the investigation does not automatically entail a breach of the 'reasonable time' principle. It is also necessary that the undertakings concerned demonstrate that that unreasonable period adversely affected the rights of the defence (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, paragraphs 173 to 178).

24 In the present case, the Commission submits that TU has not adduced convincing evidence of its assertion that the excessive duration of the administrative procedure affected the rights of the defence.

25 The Commission also maintains that it follows from paragraphs 87 to 92 of the judgment under appeal that, when examining the question as to whether the unreasonable length of the administrative procedure which it established had affected TU's rights of defence, the Court of First Instance applied its analysis to both the first and the second phases of the administrative procedure.

26 In the alternative, the Commission observes that the question whether it is the date of notification of the statement of objections or the date of receipt of the warning letter that must be taken into consideration for the purposes of the 'charge' against

TU, within the meaning of Article 6 of the ECHR, is irrelevant, since a mere reading of paragraphs 76 to 85 of the judgment under appeal clearly shows that the Court of First Instance examined the question of observance of the 'reasonable time' principle by reference to both the first phase of the administrative procedure, which began when TU received the warning letter, and the second phase of that procedure.

27 The Commission therefore proposes that the first part of the first plea be rejected as unfounded.

— Second part of the first plea, relating to the excessive duration of the administrative procedure

28 TU claims that the Court of First Instance failed to establish certain shortcomings on the part of the Commission. In particular, the statement of objections was not sent to the FEG and its members until 57 months after the warning letter was sent. Thus, in TU's submission, the Commission left those concerned in a situation of uncertainty for a long time about the action that might be taken against them.

29 The length of the administrative procedure ought to have led the Court of First Instance to accept prima facie a breach of the 'reasonable time' principle. Independently of whether TU's rights of defence were ignored, the fact that that period was exceeded in such a serious manner ought to have allowed the Court of First Instance to find that the contested decision ought not to have been adopted as such, as no interested party is supposed to be in a situation of uncertainty for such a long period.

30 The Commission observes that it is settled case-law that the unreasonable length of the administrative procedure can give rise to annulment of the Commission's decision only if the undertakings concerned demonstrate that the fact that a reasonable time was exceeded affected the rights of the defence. That question was determined by the Court of First Instance at paragraphs 87 to 93 of the judgment under appeal, following which it concluded that there was no proof that TU's interests had been adversely affected.

31 The Commission claims that the assertion that the Court of First Instance failed to establish a number of breaches of the 'reasonable time' principle seeks to challenge a finding of fact made by that Court and is therefore manifestly inadmissible.

— Third part of the first plea, relating to the breach of the rights of the defence

32 TU maintains that the Court of First Instance made an error of law or, at least, stated the reasons for the judgment under appeal in an incomprehensible manner in that it declared that TU's rights of defence had not been affected by the unreasonable length of the administrative procedure (paragraph 79 of the judgment under appeal, read in conjunction with paragraphs 93 and 94 thereof).

33 It further claims that the rights of the defence were affected during the phase preceding receipt of the statement of objections. It lays particular emphasis on the unfavourable consequences which it experienced in terms of gathering evidence, owing to the length of the procedure.

34 TU contends that it was deprived of the possibility to carry out a gainful search for evidence. Because too long a period had elapsed, it was increasingly difficult to gather the exculpatory evidence demanded of it, although it acted in accordance with the general duty of care attaching to any undertaking, as the Court of First Instance stated at paragraph 87 of the judgment under appeal.

35 The Commission contends, primarily, that the third part of the first plea seeks to call into question the finding of fact made by the Court of First Instance at paragraphs 87 to 93 of the judgment under appeal and is therefore manifestly inadmissible.

36 In the alternative, the Commission criticises TU's argument that the excessive duration of the investigation did not allow it to seek evidence in an appropriate manner. In that regard, the Commission observes that those arguments were raised by TU before the Court of First Instance, which rejected them at paragraphs 87 and 88 of the judgment under appeal. The conclusions reached by the Court of First Instance on those points are not in any way refuted by TU.

37 CEF also claims, in its response to the communication of the appeal, that TU's first plea rests on a misreading of the judgment under appeal. In the context of the appraisal of the reasonable time, the Court of First Instance was correct to examine the period beginning on the date of the request for information, that is to say, 25 July 1991.

38 As regards the reasonable time and the breach of the rights of the defence, CEF refers to paragraph 49 of the judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417) and maintains that the Court of First Instance did not apply an incorrect legal notion when it took the view that, although the first phase of the administrative procedure was excessively long, there was no breach of the 'reasonable time' principle in the absence of evidence of a breach of the rights of the defence.

39 In any event, CEF maintains that in the present case it is a question of findings of fact made by the Court of First Instance, which cannot be reviewed by the Court of Justice. The first plea must therefore be rejected as inadmissible or, in any event, as unfounded.

Findings of the Court

40 Compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature.

41 The Court must ascertain whether the Court of First Instance made an error of law in rejecting the arguments alleging a breach of that principle by the Commission.

42 Contrary to TU's allegation, the Court of First Instance drew a distinction, for the purposes of the application of the 'reasonable time' principle, between the two phases of the administrative procedure, namely the investigation phase preceding the statement of objections and the phase corresponding to the remainder of the administrative procedure (see paragraph 78 of the judgment under appeal).

43 That approach is perfectly consistent with the case-law of the Court of Justice. Thus, at paragraphs 181 to 183 of the judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, the Court held, in particular, that the administrative procedure may involve an examination in two successive stages, each corresponding

to its own internal logic. The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission, exercising the powers conferred on it by the Community legislature, takes measures which imply an accusation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow. The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must enable the Commission to reach a final decision on the infringement concerned.

44 After drawing a distinction between the two phases of the administrative procedure, the Court of First Instance went on to consider whether the duration of each stage was excessive.

45 As regards the first phase, the Court of First Instance found, at paragraph 77 of the judgment under appeal, that the Commission had 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. The Court of First Instance accepted that such a duration is excessive and derives from inaction attributable to the Commission.

46 As regards the second phase of the administrative procedure, the Court of First Instance observed, at paragraph 85 of the judgment under appeal, that approximately 23 months had elapsed between the hearing of the parties and the adoption of the contested decision, that that period was considerable and that responsibility for it could not be attributed to TU and to the FEG. The Court of First Instance concluded that the Commission had exceeded the period which in the normal course would be necessary for the adoption of the contested decision.

47 As a finding that the duration of the procedure was excessive and that responsibility for that duration could not be attributed to TU or to the FEG was not in itself a sufficient ground on which to conclude that there had been a breach of the

'reasonable time' principle, the Court of First Instance evaluated the impact of such a duration on TU's rights of defence. The premiss for such an approach may be seen at paragraph 74 of the judgment under appeal, where the Court of First Instance held that the fact that a reasonable time is exceeded can constitute a ground for annulment only in the case of a decision finding infringements, where it has been proved that breach of that principle has adversely affected the rights of defence of the undertakings concerned. Save in that specific case, failure to comply with the obligation to adopt a decision within a reasonable time cannot affect the validity of the administrative procedure under Regulation No 17.

48 It is perfectly lawful to make use of that criterion for the purpose of finding that there has been a breach of the 'reasonable time' principle. At paragraph 49 of the judgment in *Baustahlgewebe* v *Commission*, the Court of Justice held, when evaluating the duration of the proceedings before the Court of First Instance, that an indication that the length of the proceedings affected their outcome may result in the judgment under appeal being set aside. The same approach is to be found in the reasoning followed by the Court of First Instance where it considered that the excessive duration of the procedure before the Commission must entail the annulment of the contested decision if TU's rights of defence have been compromised, in which case there is necessarily a possible effect on the outcome of the procedure.

49 Consequently, the Court must evaluate the Court of First Instance's analysis of the alleged breach, in that context, of TU's rights of defence.

50 It follows from the judgment under appeal that that analysis is limited to an evaluation of the effect on the exercise of TU's rights of defence of the second phase of the administrative procedure. In particular, at paragraph 93 of the judgment under appeal, the Court of First Instance concluded that the excessively protracted nature of the administrative procedure after the hearing had not affected TU's and the FEG's rights of defence.

51 As regards the investigation phase preceding notification of the statement of objections, the Court of First Instance observed at paragraph 79 of the judgment under appeal that the prolongation of that stage of the procedure alone was not in itself capable of adversely affecting the rights of the defence, since TU and the FEG were not the subject of a formal accusation until they received the statement of objections.

52 That conclusion is correct in so far as the Court of First Instance considered that it was only after notification of the statement of objections that TU and the FEG were officially informed of the infringements of which the Commission accused them after carrying out its own investigations. The notion underpinning the Court of First Instance's reasoning is that it is only during the second phase of the administrative procedure that the undertakings concerned are able to rely in full on the rights of the defence, which they are unable to do during the phase preceding notification of the statement of objections because the Commission has not yet formulated the accusations relating to the alleged infringements found by it.

53 However, the finding made by the Court of First Instance at paragraph 79 of the judgment under appeal ignores the possibility that the excessive duration of the investigation stage might have an effect on TU's exercise of its rights of defence during the second phase of the administrative procedure, that is to say, after notification of the statement of objections.

54 The excessive duration of the first phase of the administrative procedure may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence where they are relied on in the second phase of the procedure. In effect, as the Advocate General observes at point 123 of her Opinion, the more time that elapses between a measure of investigation such as, in the present case, the sending of the warning letter and the notification of the statement of objections, the more unlikely it becomes that exculpatory evidence relating to the infringements set out in the statement of

objections can be obtained, owing, in particular, to the changes that may have come about in the composition of the managing boards of the undertakings concerned and to the movements affecting their other staff. In its analysis of the 'reasonable time' principle, the Court of First Instance did not have sufficient regard to that aspect of observance of the principle.

55 As respect for the rights of the defence, a principle whose fundamental nature has been emphasised on many occasions in the case-law of the Court (see, in particular, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7), is of crucial importance in procedures such as that followed in the present case, it is essential to prevent those rights from being irremediably compromised on account of the excessive duration of the investigation phase and to ensure that the duration of that phase does not impede the establishment of evidence designed to refute the existence of conduct susceptible of rendering the undertakings concerned liable. For that reason, examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights are fully effective, that is to say, the second phase of the administrative procedure. The assessment of the source of any undermining of the effectiveness of the rights of the defence must extend to the entire procedure and be carried out by reference to its total duration.

56 Thus, the Court of First Instance made an error of law in that, in the judgment under appeal, it confined the scope of its examination of the alleged breach of the rights of the defence owing to the excessive duration of the administrative procedure solely to the second phase of that procedure. It failed to consider whether the excessive duration, imputable to the Commission, of the entire administrative procedure, including the phase preceding notification of the statement of objections, might affect the ability of the FEG and TU to defend themselves in future and whether, in particular, TU had established that fact conclusively.

57 It follows that TU's first plea in law must be upheld in so far as it is based on an error of law in the application of the 'reasonable time' principle. Consequently, the judgment under appeal must be set aside in part, in so far as it determined that the prolongation of the first phase of the administrative procedure was not in itself capable of adversely affecting TU's rights of defence.

58 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

59 In the present case, as the question of the alleged breach of the rights of the defence, examined from the aspect of the excessive duration of the administrative procedure, was argued at first instance and as TU thus had the opportunity to state its case on that point, the Court is in a position to give judgment on the merits.

60 In its action before the Court of First Instance, TU maintains that the excessive duration of the administrative procedure had an impact on the exercise of its rights of defence and, accordingly, on the outcome of the procedure initiated against it. It claims that its defence was thus already impeded at the time when it received the statement of objections.

61 The Court must therefore ascertain whether TU has demonstrated to the requisite legal standard that at the time of notification of the statement of objections, that is to say, on 3 July 1996, it experienced difficulties in defending itself which were the consequence of the excessive duration of the administrative procedure.

62 In the first place, TU observes that the infringements that the Commission found in the contested decision are mainly based on records of discussions between representatives of the FEG, NAVEG and TU. In a number of cases, however, the TU employees who then participated in those discussions have long ceased to work for TU. Thus, the participants in the regional assemblies of the FEG, Mr Van Hulten, Mr de Beun, Mr Romein and Mr Van Wingen, left TU several years ago, either

because they retired or because they became ill. Mr Coppoolse, who is referred to at recitals 65 and 69 in the preamble to the contested decision as President of the FEG, where he represented TU, has not worked for TU since 1989 and has not even worked for Schotman, TU's parent company, since 1 June 1992.

63 TU maintains that, in the absence of those persons, it cannot reasonably be required to reconstitute the precise context of the discussions held at the time in order to defend itself against the accusations formulated by the Commission in the statement of objections.

64 In that regard, it must be observed that in its action before the Court of First Instance TU failed to specify the date on which those persons left TU and the circumstances which would be capable of establishing that on 3 July 1996 it was no longer possible to obtain information from them. TU's arguments concerning the reasons why it would have been crucial to contact those persons in order to exercise its rights of defence are also imprecise. TU does not indicate the specific objections found by the Commission in the contested decision that might have been refuted by virtue of the intervention of those persons.

65 In the second place, TU refers to 11 records of meetings on which the Commission relied in order to establish the existence of a collective exclusive dealing arrangement. Of the persons present at a number of those meetings, three, Mr Vos (present at a meeting between TU and the undertaking Holec), Mr Van der Kaay (present at the FEG's 'Zuid-Nederland' regional assembly of 14 February 1990) and Mr Van Nieuwenhof (present at the same regional assembly of 28 May 1991), are no longer available to TU.

66 TU maintains that even if it were in a position to seek the help of the persons concerned, it would none the less be impossible to reconstitute discussions five to eight years after they took place.

67 In that regard, it must be borne in mind that the statement of objections was notified to TU on 3 July 1996. However, TU does not indicate the date on which the three persons concerned left the company or the reason why the fact that they can no longer be called upon is capable of compromising its defence against the Commission's objections.

68 Furthermore, it is common ground that, at least as concerns the FEG's regional assembly for the 'Zuid-Nederland' region of 14 February 1990, TU was represented not only by Mr Van der Kaay but also by other company representatives whom TU does not claim to be unavailable.

69 It follows from all of the foregoing that TU has not succeeded in establishing, on the basis of convincing evidence, that the failure to respect its rights of defence could result from the excessive duration of the administrative procedure preceding notification of the statement of objections and that on the date on which the statement of objections was notified TU's opportunities to defend itself effectively were thereby already compromised.

70 TU's arguments are not such as to establish the reality of a breach of the rights of the defence, which must be examined by reference to the specific circumstances of each individual case.

71 Thus, the plea put forward by TU in support of its action before the Court of First Instance and alleging breach of the 'reasonable time' principle is unfounded and, accordingly, must be rejected.

72 Consequently, TU's action before the Court of First Instance, in so far as it is based on that plea, must itself be rejected.

Second plea, alleging failure to consider the exculpatory evidence post-dating the warning letter

Arguments of the parties

73 TU maintains that there is an internal inconsistency in the grounds of the judgment under appeal and, consequently, a failure to state the reasons on which the judgment is based, owing to the ambiguity which characterises the importance which the Court of First Instance attributed to the date of notification of the warning letter.

74 On the one hand, the Court of First Instance considered, at paragraph 79 of the judgment under appeal, that notification of the statement of objections marked the date from which TU was made the subject of a formal accusation. It follows from that consideration that TU was not required to defend itself before that date, since no formal accusation had yet been formulated against it. Consequently, the Court of First Instance did not take the period preceding notification of the statement of objections into account for the purpose of determining whether the Commission had observed the 'reasonable time' principle before adopting the contested decision.

75 On the other hand, it follows from paragraphs 196 and 208 of the judgment under appeal that the Court of First Instance considered that TU was in fact subject to an accusation as from the time when it received the warning letter or, at least, from the time of receiving the first request for information. Thus, the Court of First Instance, without giving any explanation, disregarded the exculpatory evidence corresponding to the period following receipt of the warning letter.

76 In TU's submission, the judgment under appeal is vitiated by a serious failure to state adequate reasons and the Court of First Instance breached TU's rights of defence.

77 The Commission contends that the second plea put forward by TU in support of its appeal rests on two incorrect premisses.

78 In the first place, the Court of First Instance took into consideration the period preceding notification of the statement of objections when assessing the reasonableness of the period which elapsed between the first acts of the administrative procedure and the adoption of the contested decision.

79 In the second place, the Commission claims that the Court of First Instance examined the documents and arguments submitted by TU and found that they did not have the probative value which TU sought to ascribe to them. In the Commission's submission, the Court of First Instance, in its assessment, also attached importance to the fact that the documents on which TU relies were drawn up only after all the persons concerned had been informed that the Commission had initiated an administrative procedure.

80 The Commission contends that this plea seeks to bring before the Court the factual assessment made by the Court of First Instance of the probative value of the documents in the file and must therefore be rejected as inadmissible.

Findings of the Court

— Preliminary observations

81 It is appropriate to bear in mind the limits of the Court's powers of review in an appeal.

82 It is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and to review the legal conclusions it has drawn from them (see, in particular, *Baustahlgewebe* v *Commission*, paragraph 23, and Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51).

83 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance has accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (*Baustahlgewebe* v *Commission*, paragraph 24, and *General Motors* v *Commission*, paragraph 52).

84 Furthermore, it must be borne in mind that the question whether the grounds of a judgment of the Court of First Instance are contradictory or insufficient is a question of law which is amenable, as such, to judicial review on appeal (Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53, and Case C-446/00 P *Cubero Vermurie* v *Commission* [2001] ECR I-10315, paragraph 20).

85 As regards the obligation to state reasons, it is settled case-law that the Court of First Instance is not thereby required to provide an account that follows exhaustively and point by point all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court

with sufficient material for it to exercise its power of review (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 372).

— Examination of the second plea

86 In so far as, by its second plea, TU seeks to demonstrate that the reasoning in the judgment under appeal concerning the rejection of the probative value of certain evidence is insufficient, and indeed contradictory, the plea is admissible.

87 In their actions before the Court of First Instance, TU and the FEG challenged the evidence accepted by the Commission in the contested decision as examples of the implementation of a gentlemen's agreement between NAVEG and the FEG concerning supplies to members of the FEG ('the gentlemen's agreement'). In that context, reference was made, in particular, to two letters from Spaanderman Licht, a member undertaking of NAVEG.

88 At paragraphs 196 and 208 of the judgment under appeal, the Court of First Instance examined the probative value of those letters.

89 As regards, in particular, the letter of 14 August 1991, the Court of First Instance, at paragraph 196, assessed its probative value by weighing up the terms of the letter against the context in which it had been drawn up. First, it observed that the letter had been sent to NAVEG in response to a question put by NAVEG two days earlier.

It was therefore NAVEG that took the initiative to question Spaanderman Licht as to the latter's motives for not supplying CEF. Second, the Court of First Instance stated that that letter post-dated the requests for information sent by the Commission to the FEG and TU on 25 July 1991 and therefore carried no conviction.

90 As regards the letter sent to CEF by Spaanderman Licht on 22 May 1991, the Court of First Instance found that Spaanderman Licht had confined itself to saying that it did not wish to extend its retailer network. The Court of First Instance observed, however, that that letter had been written when the Commission investigation was already under way.

91 Thus, it follows from paragraphs 196 and 208 of the judgment under appeal that the Court of First Instance provided sufficient reasons for its finding that the letters lacked conviction and for rejecting them as exculpatory evidence.

92 As regards what TU alleges to be the contradiction in the grounds of the judgment under appeal, it must be observed that, as the Advocate General states at point 27 of her Opinion, in the absence of any logical connection between the assessment of the reasonableness of the duration of the administrative procedure and the assessment of the probative value of the documents submitted to the Court of First Instance as evidence, the judgment contains no contradiction.

93 Furthermore, the probative value, which it is for the Court of First Instance alone to assess, of the documents submitted to it as evidence does not necessarily depend on the stage of the administrative procedure during which they were drawn up. As the Advocate General observes at point 28 of her Opinion, that probative value must be evaluated in the light of all the circumstances of the case. It follows from paragraphs 196 and 208 of the judgment under appeal that the fact that the Commission had already begun its investigation is not the only determining factor on which the Court of First Instance rejected, inter alia, Spaanderman Licht's letters of 22 May and 14 August 1991 as incapable of calling into question the evidence adduced by the Commission concerning the implementation of the gentlemen's agreement.

Accordingly, paragraphs 196 and 208 cannot be interpreted as meaning that no probative value can by nature be attributed to a document drawn up when the Commission's investigation is already under way.

94 In the light of the foregoing, the second plea put forward in support of the appeal must be rejected as unfounded.

Third plea, relating to TU's participation in the infringements established by the Commission

95 TU criticises the Court of First Instance for having made an error of law or, at least, for having stated the reasons for the judgment under appeal in an incomprehensible manner in that it held, at paragraphs 367 and 379 of the judgment, that the Commission was right to hold that the applicant had participated actively in the collective exclusive dealing arrangement and in the FEG's pricing agreements. The third plea consists of three parts.

First part of the third plea, relating to TU's participation in the collective exclusive dealing arrangement

— Arguments of the parties

96 By this part of its third plea, TU claims that the Court of First Instance made an error of law or, at least, stated the reasons for the judgment under appeal in an incomprehensible manner when it considered that TU had taken an active part in the collective exclusive dealing arrangement presented in the form of the gentlemen's agreement.

97 In the first place, the Court of First Instance did not take into account the internal operating rules of the FEG or the Netherlands legislation applicable to associations.

98 TU observes in that regard that it maintained before the Court of First Instance that, as a matter of law, it was unable to influence the decisions of the FEG. Notwithstanding that assertion, the Court of First Instance held, at paragraph 352 of the judgment under appeal, that neither the objections which it had raised in respect of the Commission's argument that TU had an important role in the collective exclusive dealing arrangement nor those based on the FEG's internal operating rules and the Netherlands legislation on associations were relevant.

99 The Court of First Instance's assessment of that point is incomprehensible, since it considered at paragraph 356 of the judgment under appeal that the FEG's internal operating rules were in fact relevant for the purposes of the assessment of TU's role in the conduct of that association's affairs.

100 In that regard, the Commission asserts that that alleged contradiction between paragraphs 352 and 356 of the judgment under appeal rests on a misinterpretation of that judgment.

101 Thus, in the Commission's submission, at paragraph 352 of the judgment under appeal, the Court of First Instance considered that TU could not hide behind the literal provisions of the FEG's internal operating rules or the provisions of the Netherlands legislation governing the law on associations in order to maintain that it had not participated in the infringements concerned. The Commission claims that the Court of First Instance emphasised that it was necessary to take account solely of what had actually happened and not of what was formally possible or authorised.

102 Furthermore, at paragraph 356 of the judgment under appeal, the Court of First Instance considered, relying specifically on an assessment of the actual role which TU played in the FEG's affairs, that TU had in fact participated in the collective exclusive dealing arrangement.

103 In the second place, TU characterises as incomprehensible the reasoning followed by the Court of First Instance at paragraph 353 of the judgment under appeal, where it confirms the criterion applied by the Commission in the contested decision, namely the coincidence of the FEG's and TU's interests. TU maintains that the fact that it is one of the most important member undertakings of the FEG does not demonstrate the existence of a 'natural convergence of interests' between it and the FEG.

104 As the criterion based on a coincidence of interests is not relevant in the present case, the Court of First Instance ought to have ascertained whether there was a common will between TU and the FEG.

105 In that regard, the Commission maintains that the finding of the Court of First Instance relating to the convergence of interests between the FEG and TU is not exclusively based on the fact that TU was one of the largest and principal members of the FEG. It follows from paragraph 356 of the judgment under appeal that the Court of First Instance also took into consideration the fact that for a number of years a representative of TU sat on the board of the FEG and even, for a certain time, occupied the presidency of that body, and that TU was strongly represented on various product committees.

106 The Commission also criticises TU's argument that the Court of First Instance was required to examine the existence of a 'concurrence of wills' between TU and the FEG. It contends that the Court of First Instance ascertained whether TU had participated in the collective exclusive dealing arrangement and concluded that it had, which is sufficient to impute an infringement to it.

107 In the third place, TU refers to the finding made by the Court of First Instance at paragraph 356 of the judgment under appeal that TU is 'one of the largest members of the FEG' and that '[t]hat 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'; TU maintains that such a finding is insufficient to establish whether it 'actively' participated in the infringement referred to in Article 1 of the contested decision.

108 In the present case, the Commission ought to have ascertained whether TU had in any other way manifested its approval of the conduct of 'its' representative on the FEG's board and, accordingly, its approval of the FEG's policy and of the implementation of that policy. The Commission did not do so and the Court of First Instance therefore made a legally incorrect assessment of that point.

109 The Commission claims in that regard that TU manifestly disregards all the evidence which the Court of First Instance analysed at paragraphs 356 to 361 of the judgment under appeal. It observes that the Court of First Instance established at those paragraphs that TU had participated in the gentlemen's agreement, having not only attended the meetings at which that agreement had been discussed without distancing itself from such an agreement but also been directly involved in drawing up and implementing that agreement, as a member of the board of the FEG.

110 It follows that when assessing the imputability to TU of its participation in the collective exclusive dealing arrangement the Court of First Instance applied a correct legal criterion.

— Findings of the Court

111 By this first part of the third plea, TU essentially disputes the legal criteria on which the Court of First Instance relied in order to assess the evidence adduced by the

Commission for the purpose of establishing that TU had participated in the collective exclusive dealing arrangement. As the assessment of the imputability of the infringement to an undertaking constitutes a question of law, the Court must examine whether the Court of First Instance made an error of law when it considered that the Commission had been entitled to take the view that TU had actively participated in such anti-competitive conduct.

112 Furthermore, in the context of this part of the third plea, TU criticises the alleged insufficiency of the reasoning in a number of paragraphs of the judgment under appeal which are devoted to its participation in the collective exclusive dealing arrangement.

113 It follows that the first part of the third plea is admissible.

114 According to the consistent case-law of the Court, it is sufficient for the Commission to demonstrate that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded, without having manifestly opposed them, in order to prove to the requisite legal standard that the undertaking participated in the cartel. Where it is established that an undertaking took part in such meetings, it must put forward indicia of such a kind as to establish that its participation was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 96, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155).

115 It follows from paragraphs 359 to 361 of the judgment under appeal that it is those principles that served as the basis for the Court of First Instance's appraisal concerning the evidence adduced by the Commission in support of its finding that TU had participated in the collective exclusive dealing arrangement. In its examination, the Court of First Instance did not proceed from the premiss that

the fact that an undertaking is affiliated to a trade association automatically implies that the various types of conduct of that association must be imputed to that undertaking. In that regard, it is clear from paragraph 355 of the judgment that the Court of First Instance applied the criterion of personal participation in the implementation of the infringement.

116 The Court of First Instance found, at paragraph 357 of the judgment under appeal, that the Commission had gathered solid indicia of the existence of the gentlemen's agreement. According to the Court of First Instance, the Commission obtained documentary indicia of contacts between the FEG and NAVEG during which the gentlemen's agreement had been 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 during the meetings of those same boards on 28 February 1989 and 25 October 1991 and also a letter from the FEG to NAVEG of 18 November 1991.

117 As regards TU's personal participation in the gentlemen's agreement, the Court of First Instance found, at paragraph 358 of the judgment under appeal, that among the meetings of the boards of the FEG and NAVEG mentioned by the Commission, although TU was neither present nor represented at the meeting of 28 February 1989, the FEG none the less drew up a report on that meeting. The Court of First Instance also observed that TU's presence at other meetings (on 11 March 1986 and 25 October 1991) and its representation on the board of the FEG in 1991 are not contested.

118 At paragraph 360 of the judgment under appeal, the Court of First Instance concluded that in the absence of evidence that it had distanced itself from what was discussed at those meetings 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.

119 It follows that the Court of First Instance did not make an error of law when appraising TU's participation in the collective exclusive dealing arrangement.

120 The Court must also examine the arguments whereby TU contends that certain paragraphs of the judgment under appeal relating to its participation in the collective exclusive dealing arrangement are insufficiently reasoned.

121 In the first place, as regards TU's argument relating to the alleged contradiction between paragraphs 352 and 356 of the judgment under appeal, it follows from a careful reading of those paragraphs that they are not vitiated by any contradiction.

122 Thus, it follows from paragraph 350 of the judgment under appeal that the Court of First Instance examined the objections whereby TU refuted the evidence of its active participation in the infringements, and did so in order to resolve the question whether the Commission had established to the requisite legal standard that TU had participated in the infringements referred to in Articles 1 and 2 of the contested decision.

123 As regards TU's participation in the collective exclusive dealing arrangement, the Court of First Instance, at paragraph 352 of the judgment under appeal, rejected the argument that TU was unable to exert any influence on the FEG's decisions. The Court of First Instance found that TU's arguments relating to internal rules of the FEG and the Netherlands legislation on the law of associations were not relevant. The Court of First Instance observed that it was important to determine whether or not TU had participated in the gentlemen's agreement and not whether the statutes of the FEG or the relevant legislation allowed it to do so.

124 That reasoning is correctly based on the need to demonstrate whether TU did in fact participate in the gentlemen's agreement and not merely whether it was possible for it to do so.

125 And it is precisely by employing such reasoning that the Court of First Instance considered, when examining the question whether TU had in fact participated in the collective exclusive dealing arrangement, that the fact that certain of the management and employees of TU had sat on the board of the FEG was relevant and, at paragraph 356 of the judgment under appeal, referred to the statutes of the FEG in order to point out that the board was responsible for the general management of the association.

126 The judgment under appeal is therefore not vitiated by any contradiction in the reasoning in that regard.

127 In the second place, as regards the criticism of paragraph 353 of the judgment under appeal, it must be pointed out that the Court of First Instance's finding that the interests of the FEG and TU were convergent is not exclusively based on the fact that TU was one of the largest member undertakings of the FEG. It is clear from paragraph 356 of the judgment that the Court of First Instance also took into consideration the fact that for several years a representative of TU had sat on the board of that association, that that representative had for a time been President of the board and that TU was strongly represented in the various product committees.

128 As regards the alleged need for the Court of First Instance to examine the existence of a common will between TU and the FEG, it must be held that, in so far as the Court of First Instance ascertained whether TU had in fact participated in the gentlemen's agreement and concluded that it had done so, the condition governing the imputation of that infringement to TU is satisfied.

129 In the light of the foregoing, the first part of the third plea must be rejected as unfounded.

Second part of the third plea, relating to TU's participation in the extension of the collective exclusive dealing arrangement

— Arguments of the parties

130 TU maintains that the Court of First Instance made an error of law or, at least, stated the reasons on which the judgment under appeal is based in an incomprehensible manner when appraising whether TU had actively participated in the concerted practices of the FEG or, at least, of the members of that association — and, if so, for how long — the purpose of those practices being to secure the accession to the gentlemen's agreement of undertakings not belonging to NAVEG.

131 It submits that the Court of First Instance failed to take account of the fact that the most recent occasion on which TU had exerted pressure on a manufacturer not belonging to NAVEG not to deliver electrotechnical fittings to undertakings not belonging to the FEG was on 2 July 1991. Thus, TU claims that it is incorrect to assert by implication, as the Court of First Instance did, that TU actively contributed to the infringement referred to in Article 1 of the contested decision after 2 July 1991 or that, at least, the judgment under appeal is insufficiently reasoned on that point. After that date, the Commission established no activity in that sense on the part of TU.

132 In that regard, the Commission claims that TU is seeking to call into question the factual appraisal made by the Court of First Instance in respect of the date of 2 July 1991 and that, according to consistent case-law, a participant in a prohibited agreement is considered to be liable for that agreement until he publicly distances himself from its terms, which TU has never done.

133 Purely in the alternative, the Commission observes that TU disregards the finding made by the Court of First Instance, at paragraph 366 of the judgment under appeal,

that TU exerted pressure on undertakings not belonging to NAVEG, not only individually but also, subsequently, 'in concert with other members of the FEG'. That finding constitutes a further reason for holding TU liable for the infringement throughout the entire period during which it was committed.

— Findings of the Court

134 In so far as the second part of the third plea disputes, in substance, the legal criteria on the basis of which the Court of First Instance examined the evidence adduced by the Commission in order to establish that TU had participated in the extension of the collective exclusive dealing arrangement, this part is admissible.

135 However, it fails to take account of the conclusions which the Court of First Instance reached at paragraphs 365 to 376 of the judgment under appeal.

136 Thus, at paragraph 365 of the judgment, the Court of First Instance found that TU was one of the principal members of the FEG and, as such, had been represented on the board of the FEG continuously between 1985 and 1995, with, however, the exception of 1990. The Court of First Instance further observed that, in that capacity, TU had participated directly in the drawing-up of the FEG's policy and/or had been informed of the discussions between the FEG and NAVEG concerning the collective exclusive dealing arrangement, without ever having sought to publicly distance itself from it.

137 At paragraph 366 of the judgment under appeal, the Court of First Instance further stated that it was apparent to the requisite legal standard from the evidence examined by the Commission at recitals 53 to 70 in the preamble to the contested

decision that TU had played a particularly important role in the concerted practice consisting in extending the collective exclusive dealing arrangement to certain suppliers who did not belong to NAVEG. The Court of First Instance observed that TU, acting both individually and in concert with other members of the FEG, had exerted pressure on those undertakings not to supply wholesalers who were not members of the FEG with which they were in competition.

138 As the fact of having exerted such pressure was established by the Court of First Instance in the form of a final decision on the facts, which is not amenable to review in an appeal and the material accuracy of which is not disputed by TU, it must be concluded that the Court of First Instance did not make an error of law when it considered that the Commission had been correct to find that TU had participated in the extension of the collective exclusive dealing arrangement after 2 July 1991, the Court of First Instance having relied in order to reach such a conclusion on the appraisal of the personal role played by TU in that infringement. Nor can any defect in the reasoning be established in that regard.

139 In those circumstances, the second part of the third plea must be rejected as unfounded.

Third part of the third plea, relating to TU's participation in the pricing infringement

— Arguments of the parties

140 TU claims that the Court of First Instance made an error of law or, at least, stated the reasons for the judgment under appeal in an incomprehensible manner in that it considered that the Commission had been correct to hold it responsible for the infringement referred to in Article 2 of the contested decision as regards the agreements on prices, owing to its active participation in those agreements.

141 TU criticises the assertion of the Court of First Instance, at paragraph 371 of the judgment under appeal, that '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'.

142 TU criticises the Court of First Instance for having considered, by implication, that it had participated in a concerted practice by applying two binding decisions, one on fixed prices and the other on publications. It infers from paragraph 376 of the judgment under appeal that the Court of First Instance considered that the mere fact that TU was a member of the FEG was sufficient to hold it responsible for the infringement.

143 TU claims that the fact of being a member of an association of undertakings which infringes the competition rules does not in itself suffice to impute that infringement to that member. It maintains that there must, in this instance, be an individual activity capable of being proved and from which it may be inferred that the member of the association in question manifested its intention to participate in the infringement in question.

144 By not ascertaining the extent to which TU had actually been involved in the infringement referred to in Article 2 of the contested decision, the Court of First Instance made an error of law or, at least, stated the reasons for the judgment under appeal in an incomprehensible manner on that point.

145 In that regard, the Commission claims that the third part of the third plea rests on a misreading of paragraph 371 of the judgment under appeal.

146 The Commission maintains that the Court of First Instance observed, at paragraph 371 of the judgment under appeal, that Article 3 of the contested decision held TU responsible for the infringements owing, in particular, to its active participation in them. The Commission submits that, at paragraph 349 of the judgment, the Court of First Instance rejected TU's argument that the infringements were imputed to it on the sole ground that it was a member of the FEG. The rejection of that argument was explained at paragraphs 351 to 379 of the judgment, where the Court of First Instance held, on the basis of the available evidence — and not solely on the basis of the fact that TU was a member of the FEG — that the two infringements established in the contested decision could be imputed to TU.

— Findings of the Court

147 As the Advocate General observed at point 51 of her Opinion, the Court of First Instance did not proceed from the premiss that TU ought automatically, as a member of the FEG, to be held responsible for the latter's unlawful conduct.

148 On the contrary, paragraphs 375 to 379 of the judgment under appeal are devoted to the examination, by the Court of First Instance, of TU's personal and active participation in the price-fixing infringement.

149 Consequently, the Court of First Instance cannot be criticised for any error of law. Furthermore, the judgment under appeal is sufficiently reasoned in that regard.

150 It follows from the foregoing that the third part of the third plea must be rejected as unfounded and, accordingly, the third plea must be rejected in its entirety.

Fourth plea, relating to the determination of the duration of the infringements imputed to TU by the Commission

151 By its fourth plea, which consists of three parts, TU maintains that the Court of First Instance made an error of law or, at least, did not provide sufficient reasons for the judgment under appeal as regards the duration of each of the continuous infringements referred to in Articles 1 and 2 of the contested decision. The same periods were wrongly used in order to calculate the duration of the infringement referred to in Article 3 of that decision.

152 TU criticises paragraph 413 of the judgment under appeal, where the Court of First Instance considered 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'.

First part of the fourth plea, relating to the duration of the collective exclusive dealing arrangement

— Arguments of the parties

153 TU maintains that the Court of First Instance was incorrect to hold that the infringement referred to in Article 1 of the contested decision was by nature continuous and that it lasted from 11 March 1986 until 25 February 1994 inclusive. In that regard, TU refers to paragraph 406 of the judgment under appeal, where the Court of First Instance held that the infringements referred to in Articles 1 and 2 of the contested decision were 'by their nature' continuous, on the ground that '[t]he 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'. In TU's submission, the Court of First Instance was wrong to rely on 'indicia' when it had no direct evidence to that effect.

154 Furthermore, TU contends that, at paragraph 408 of the judgment under appeal, the Court of First Instance failed to explain the reason for which the question of a collective exclusive dealing arrangement between the FEG and NAVEG during the period 11 March 1986 to 25 February 1994 might still arise in the absence of evidence of the existence of such an arrangement during certain periods in between those two dates. Thus, the existence of such an infringement does not rest on any evidence:

— during the period between 11 March 1986, the date of the meeting during which the FEG and NAVEG first spoke of 'agreements between the two associations', and 28 February 1989, the date on which the boards of the two associations, for the first time since that meeting, referred to the gentlemen's agreement;

— during the period between 18 November 1991, the date on which the FEG itself corresponded for the last time with NAVEG, and 25 February 1994, the date on which NAVEG emphasised for the last time the existence of a collective exclusive dealing arrangement between the FEG and NAVEG.

155 TU contends that such a circumstance is contrary to the rules governing the taking of evidence. It submits that an infringement may be deemed to continue during a period covering several years if it is shown that during those years the undertakings concerned continued to be inspired by a common will in relation to the object of the infringement and that the infringement in fact continued to exist or, at least, to be implemented.

156 TU maintains that the Court of First Instance therefore applied an incorrect criterion in relation to the evidence.

157 As regards the fourth plea in its entirety, the Commission claims that it is inadmissible in so far as it disputes the finding of fact by the Court of First Instance that the acts and instances of conduct restrictive of competition which were established had a common aim and thus constituted a single infringement.

158 In the alternative, as regards the first part of the fourth plea, the Commission claims that paragraph 406 of the judgment under appeal, which is criticised by TU, clearly states that the characterisation of the practices established in the contested decision as being 'continuous infringements' is not substantiated by reference to the relationship between the various acts restrictive of competition but is based on the nature of the infringements which deal with agreements concluded for an indeterminate period and with acts relating to the implementation or extension of those agreements.

159 As regards TU's argument relating to the duration of the collective exclusive dealing arrangement and to the alleged absence of evidence of its existence during long periods, the Commission refers to paragraphs 90, 406 and 411 of the judgment under appeal, where the Court of First Instance held on a number of occasions that the infringement must be characterised as 'continuous'. In fact, where an agreement is concluded for an indeterminate period, the precise nature of that agreement means that the Commission is not required to demonstrate that it was in existence at any given time.

160 The Commission concludes that, since the infringements concerned were characterised by the Court of First Instance as 'continuous', which amounts to a finding of fact, and since no participant in the collective exclusive dealing arrangement expressly distanced itself from that arrangement, the Court of First Instance was correct to consider that the Commission was not required to adduce further evidence in order to establish the existence of the agreement at any time during the periods referred to by TU.

— Findings of the Court

161 In the context of this first part of the fourth plea, TU maintains, in substance, that the Court of First Instance relied on incorrect legal criteria in order to appraise the evidence adduced by the Commission in support of its finding as to the duration of the collective exclusive dealing arrangement in which it accused TU of having taken part. To that extent, this part of the fourth plea concerns a question of law which the Court may be called upon to review in an appeal and, accordingly, it must be considered admissible.

162 As the existence of the gentlemen's agreement was disputed by the FEG and TU, the Court of First Instance took the view, at paragraph 141 of the judgment under appeal, that it was necessary to consider whether, in the contested decision, the Commission had discharged the burden of proof incumbent on it when it concluded that there was evidence of the existence of that gentlemen's agreement from 11 March 1986. The Court of First Instance stated that that assessment was based on an overall evaluation of all the relevant evidence and indicia.

163 After examining the origin and the implementation of the gentlemen's agreement, the Court of First Instance observed, at paragraph 210 of the judgment under appeal, that, at the end of an overall evaluation, TU and the FEG had not succeeded in calling into question the convincing, objective and consistent nature of the indicia relied on in the contested decision.

164 In the present appeal, TU disputes, in particular, the appropriateness of the reference to the 'indicia' as evidence of the existence and the duration of the collective exclusive dealing arrangement.

165 That argument cannot be accepted. The Court has already held that, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 57).

166 As the Advocate General observes at point 64 of her Opinion, such indicia and coincidences may provide information not just about the mere existence of anti-competitive practices or agreements, but also about the duration of continuous anti-competitive practices or the period of application of anti-competitive agreements.

167 In the light of that case-law, the Court of First Instance did not err in law in basing its appraisal of the existence of a collective exclusive dealing arrangement and its duration on 'an overall evaluation of all the relevant evidence and [indicia]'. The question as to what probative value the Court of First Instance attributed to each item of evidence and each indicium adduced by the Commission, however, is a question of assessment of fact which, as such, is not amenable to review by the Court on appeal.

168 In the context of this first part of the fourth plea, TU also criticises the Court of First Instance for having ignored the absence of evidence of the existence of a collective exclusive dealing arrangement during certain specific periods.

169 It must be pointed out in that regard that, at paragraph 406 of the judgment under appeal, the Court of First Instance held that the Commission had adduced evidence of the existence of a continuous infringement during the period 1986 to 1994. The fact that such evidence was not adduced for certain specific periods does not preclude the infringement from being regarded as having been established during a

more extensive overall period than those periods, provided that such a finding is based on objective and consistent indicia. In the context of such an infringement, extending over a number of years, the fact that the infringement is demonstrated at different periods, which may be separated by more or less long periods, has no impact on the existence of that agreement, provided that the various actions which form part of the infringement pursue a single aim and come within the framework of a single and continuous infringement.

170 At paragraph 342 of the judgment under appeal, the Court of First Instance held that the collective exclusive dealing arrangement and price-fixing practices pursued the same anti-competitive object, which consisted in maintaining prices at a supra-competitive level, first by lessening the competitiveness of undertakings seeking 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 and, second, by partially coordinating their price policy.

171 As the Advocate General observes at point 61 of her Opinion, it follows from that finding of the Court of First Instance that each of the infringements, namely the collective exclusive dealing arrangement and the concerted practices on prices, followed that single objective.

172 It should be further observed that, at paragraph 408 of the judgment under appeal, the Court of First Instance explained in detail the indicia on which the Commission was able to determine the duration of the collective exclusive dealing arrangement. That paragraph is worded as follows:

'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 [indicia] 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 [indicia showing] 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 [indicia] 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 which 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.'

173 As the Court of First Instance's appraisal of the evidence adduced by the Commission of the duration of the collective exclusive dealing arrangement is based on legally correct criteria and as the paragraphs of the judgment under appeal relating to that issue are sufficiently reasoned, the first part of the fourth plea must be rejected as unfounded.

Second part of the fourth plea, relating to the duration of the price-fixing infringement

— Arguments of the parties

174 TU maintains that the Court of First Instance was wrong to hold, at paragraph 406 of the judgment under appeal, that the price-fixing infringement referred to in Article 2 of the contested decision was by nature continuous and that it lasted from 21 December 1988 until 24 April 1994, inclusive.

175 TU criticises, in particular, the fact that the Court of First Instance considered the elements which had led to the finding of the infringement referred to in Article 2 of the contested decision not as constituting independent infringements but as the elements of a single and continuous infringement. TU emphasises that at the same time, the Court of First Instance declared, however, that the duration of those elements differed considerably, being fifteen, nine, four and six years, as may be seen from paragraph 413 of the judgment under appeal.

176 TU submits that a more careful examination of those 'elements' reveals that they are wholly heterogeneous. The Court of First Instance ought to have examined each element separately in the light of the criteria governing the application of Article 81(1) EC and, in particular, by reference to the criterion of the effect on trade between Member States.

177 The Commission contends that this part of the fourth plea is based on a misreading of the judgment under appeal. It claims that the Court of First Instance's finding at paragraph 406 of that judgment, relating to the continuous nature of the price-fixing infringement, is based on the nature of the infringement. In effect, the infringement consists of a number of binding decisions adopted for an indeterminate period and also of numerous acts and instances of conduct which all tended to artificially maintain prices on the market at a high level and to do so for an indeterminate period.

— Findings of the Court

178 An infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. When the different actions form part of an 'overall

plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Aalborg Portland and Others* v *Commission*, paragraph 258).

179 It follows from the judgment under appeal that it is precisely such reasoning that underlies the characterisation by the Court of First Instance of the concerted practices on prices as constituting a single and continuous infringement.

180 In particular, at paragraph 342 of the judgment, the Court of First Instance found that the collective exclusive dealing arrangement and the price-fixing practices pursued the same anti-competitive object, consisting in maintaining prices at a supra-competitive level, first, by lessening the competitiveness of undertakings seeking 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.

181 As the Advocate General observed at point 61 of her Opinion, it also follows from such a finding that each of the infringements in itself, namely the collective exclusive dealing arrangement and the collective practices on price, followed that single objective.

182 Paragraph 406 of the judgment under appeal, read in the light of the finding made by the Court of First Instance at paragraph 342, therefore does not reveal any error of law or any defect in the reasoning of that judgment.

183 It should further be borne in mind that, for the purposes of the application of Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition within the common market (*Aalborg Portland and Others* v *Commission*, paragraph 261).

184 Having established the anti-competitive object of the concerted practices on price fixing, the Court of First Instance was therefore not required to proceed to examine their actual effects on the market.

185 It follows from the foregoing that the second part of the fourth plea must be rejected as unfounded.

Third part of the fourth plea, relating to the duration of the infringements imputed to TU

— Arguments of the parties

186 TU submits that if the first and second parts of the fourth plea must be accepted, the duration of the infringement referred to in Article 3 of the contested decision must a fortiori be reduced as a consequence.

187 The Commission refers to its arguments relating to those parts of the fourth plea and submits that the third part and, together with it, the entire plea must be rejected as inadmissible or at least as unfounded.

— Findings of the Court

188 As the first and second parts of the plea have been rejected, it must be concluded that the third part of the fourth plea cannot succeed.

Fifth plea, relating to the request for a reduction in the amount of the fine

189 TU contends that the Court of First Instance made an error of law in that, notwithstanding the Commission's incorrect appraisal of the duration of the infringements and its failure to observe the 'reasonable time' principle, it refused to award a supplementary reduction in the amount of the fine or, at least, that the judgment under appeal is insufficiently reasoned in that regard. This plea consists of three parts.

First part of the fifth plea, relating to the reduction in the amount of the fine owing to what is alleged to be the incorrect determination of the duration of the infringements imputed to TU

— Arguments of the parties

190 TU contends that, according to Article 15 of Regulation No 17, in fixing the amount of the fine that the Commission imposes on an undertaking in respect of an infringement of Article 81(1) EC, regard is to be had both to the gravity and to the duration of the infringement. It claims that the Commission communication setting out the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, published in the *Official Journal of the European Communities* on 14 January 1998 (OJ 1998 C 9, p. 3), provides that the basic amount of the fine may be reduced where attenuating circumstances warrant such a reduction.

191 TU maintains that the Commission and the Court of First Instance did not take account of those rules when they set the fines and that they thus infringed Community law or, at least, the principle that a decision must state the reasons on which it is based and the principle of proportionality as regards the setting of the fine. The Commission used an incorrect duration of the infringement when determining the amount of the fine and the Court of First Instance failed to state sufficient reasons for its refusal to award a reduction in that amount.

192 TU submits that as the infringements which it is presumed to have committed cannot be considered to constitute a single and continuous infringement, it cannot be maintained that the duration of the infringement in respect of which the fines were imposed covered a period of eight years. Contrary to what was held by the Court at paragraph 258 of the judgment in *Aalborg Portland and Others* v *Commission*, there can be no question in the present case of an 'overall plan'.

193 The Commission contends, primarily, that the fifth plea is manifestly inadmissible. The Court of First Instance considered, at paragraphs 436 to 438 of the judgment under appeal, that in the light of the specific circumstances of the present case a further reduction in the amount of the fine was not justified. Pursuant to the consistent case-law of the Court (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 614), it is not for the Court of Justice to substitute its own assessment for that of the Court of First Instance ruling on the amount of fines.

194 In the alternative, the Commission refers, with reference to the 'overall plan' the existence of which is disputed by TU, to paragraph 342 of the judgment under appeal, where the Court of First Instance held that the two infringements pursued the same anti-competitive object.

195 The Commission therefore submits that the first part of the fifth plea is manifestly unfounded.

— Findings of the Court

196 It must be borne in mind that the Court of First Instance alone has jurisdiction to examine how in each particular case the Commission appraised the gravity of unlawful conduct. In an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 81 EC and Article 15 of Regulation No 17 and, second, to consider whether the Court of First Instance responded to the requisite legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, in particular, *Baustahlgewebe* v *Commission*, paragraph 128).

197 In the present case, it is common ground that TU has adduced no evidence capable of demonstrating that the Court of First Instance failed to take into consideration, in a legally correct manner, all the essential factors to assess the gravity of the conduct complained of in the light of Article 81 EC and Article 15 of Regulation No 17. Nor does TU allege that the Court of First Instance failed to respond to the requisite legal standard to the arguments which it raised with a view to having the fine cancelled or reduced.

198 Furthermore, it is clear that the first part of the fifth plea is directly linked to the arguments raised by TU in support of its fourth plea, alleging that the Court of First Instance made an error of law in that it considered that the evidence adduced by the Commission concerning the duration of the infringements established in the contested decision was convincing. Since those arguments were rejected in the context of the examination of the fourth plea, the first part of the fifth plea must be rejected in consequence.

Second part of the fifth plea, relating to the reduction in the amount of the fine owing to the excessive duration of the administrative procedure

— Arguments of the parties

199 TU claims that the Court of First Instance made an error of law in determining the amount of the fine imposed on it or, at least, failed to state sufficient reasons for the judgment under appeal on that point, when it ought to have reduced that amount owing to the excessive duration of the administrative procedure.

200 TU criticises the Court of First Instance for having held, at paragraphs 77 and 85 of the judgment under appeal, that the Commission was responsible for the breaches of the 'reasonable time' principle and for having none the less asserted, at paragraph 438 of the judgment, that the FEG and TU had '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'. The reasons stated for such an assessment are, in TU's submission, provided in an incomprehensible manner.

201 The Commission contends that the reasons for the judgment under appeal are stated clearly and in detail in respect of the relationship between the duration of the administrative procedure and the further reduction in the amount of the fine imposed on TU. First, the Commission states that the Court of First Instance found,

at paragraphs 87 to 93 of the judgment, that TU's defence was not affected by the fact that the reasonable time was exceeded. Second, the Court of First Instance examined whether the particular circumstances of the case justified a further reduction in the amount of the fine and found, in that regard, as indicated at paragraph 438 of the judgment, that TU had produced no evidence to justify such a reduction.

— Findings of the Court

202 As indicated at recitals 152 and 153 in the preamble to the contested decision, cited at paragraph 9 of this judgment, the Commission, in reducing the amount of the fines, took into account the excessive duration, which is imputable to it, of the administrative procedure.

203 At paragraph 438 of the judgment under appeal, the Court of First Instance asserts 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'.

204 That assertion contains no error of law.

205 Furthermore, the present part of the fifth plea is directly linked to the arguments put forward by TU in support of its first plea, according to which the Court of First Instance made an error of law in that it considered that the fact that a reasonable time had been exceeded did not justify annulment of the contested decision. As the plea alleging breach of the 'reasonable time' principle was not upheld, which follows, first, from the part of the judgment under appeal that was not set aside and, second, from the findings of the Court when it adjudicated on that plea, this part of the fifth plea must be rejected.

Third part of the fifth plea, relating to the determination of the amount of the fine by reference to TU's participation in the infringements referred to in the contested decision

— Arguments of the parties

206 TU claims that the Court of First Instance, in determining the amount of the fine imposed on it, provided insufficient reasons for its finding that the amount of the fine is reasonable by comparison with the amount of the fine imposed on the FEG (paragraphs 431 to 433 of the judgment under appeal).

207 The Commission refers, in that regard, to paragraphs 416 to 438 of the judgment under appeal, where the Court of First Instance examined and rejected, stating its reasons for doing so, all the arguments for a reduction in the amount of the fine.

208 The Commission submits that the third part of the fifth plea is inadmissible and, in any event, unfounded and that the same applies to the fifth plea in its entirety.

209 CEF also claims that the fifth plea is inadmissible, since it is directed against findings of fact made by the Court of First Instance, which are not amenable to review in the context of the present appeal.

— Findings of the Court

210 As regards the allegedly disproportionate nature of the fine, it must be borne in mind that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31, and *Baustahlgewebe* v *Commission*, paragraph 129).

211 It follows that this part of the fifth plea must be declared inadmissible in so far as it seeks a general re-examination of the amount of the fines imposed by the Commission (see *Baustahlgewebe* v *Commission*, paragraph 129).

212 Furthermore, a careful reading of this part of the fifth plea reveals that it is linked to the arguments put forward by TU in support of its third plea, whereby it claimed that the Court of First Instance made an error of law in so far as it considered that the Commission had been entitled to hold TU personally responsible for the infringements referred to in Articles 1 and 2 of the contested decision. As the third plea was rejected, the third part of the fifth plea must in any event be rejected as unfounded.

213 It follows from the foregoing that the fifth plea must be rejected in its entirety, as inadmissible in part and as unfounded in part.

Costs

214 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 118 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. As TU has been unsuccessful, with the exception of the plea alleging breach of the 'reasonable time' principle, which, however, has been rejected by the Court, it must be ordered to pay the costs of these proceedings. As regards the costs of the proceedings at first instance in which the judgment under appeal was given, notwithstanding that that judgment has been set aside in part, they must be paid by TU, in accordance with the procedure laid down in paragraph 3 of the operative part of that judgment.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* solely in so far as the Court of First Instance, in examining the plea alleging breach of the 'reasonable time' principle, omitted to ascertain whether the excessive duration, imputable to the Commission of the European Communities, of the entire administrative procedure, including the phase preceding the notification of the statement of objections, was capable of affecting the future possibilities of Technische Unie BV to defend its interests;**

2. **Dismisses the remainder of the application;**

3. **Dismisses the action brought by Technische Unie BV before the Court of First Instance, in so far as it is based in part on the plea alleging breach of the 'reasonable time' principle;**

4. **Orders Technische Unie BV to pay the costs of these proceedings. The costs relating to the proceedings at first instance which gave rise to the judgment of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* remain payable by Technische Unie BV, in accordance with the procedure laid down in paragraph 3 of the operative part of that judgment.**

[Signatures]