

## Case T-29/92

### Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others

v

### Commission of the European Communities

(Competition — Non-existence of measures —  
Decisions of associations of undertakings — Complex rules —  
Infringement — Effect on trade between States — Exemption — Fines)

Judgment of the Court of First Instance (First Chamber), 21 February 1995 ..... II - 295

### Summary of the Judgment

1. *Acts of the institutions — Inalterability — Alleged infringement — Recourse by the Community judicature to measures of inquiry — Conditions*
2. *Competition — Agreements, decisions and concerted practices — Undermining of competition — Concertation between undertakings as to how to respond to an invitation to tender — Exchange of information*  
(EEC Treaty, Art. 85(1))

3. *Competition — Agreements, decisions and concerted practices — Undermining of competition — Joint determination by the undertakings participating in a tendering procedure of the calculation costs to be incorporated in their respective tenders*  
(EEC Treaty, Art. 85(1))
4. *Competition — Agreements, decisions and concerted practices — Undermining of competition — System of rules operating within a trade organization, intended to assure protection in a tendering procedure for the undertaking which, after concertation between the competitors, is found to have submitted the lowest tender*  
(EEC Treaty, Art. 85(1))
5. *Competition — Agreements, decisions and concerted practices — Undermining of competition — System of rules operating within a trade organization, which, in tendering procedures, places the participating undertakings in a more advantageous position than the others*  
(EEC Treaty, Art. 85(1))
6. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Criteria — Agreement covering the entire territory of a Member State*  
(EEC Treaty, Art. 85(1))
7. *Competition — Agreements, decisions and concerted practices — Prohibition — Effect on trade between Member States — Potential effect — Appreciable effect*  
(EEC Treaty, Art. 85(1))
8. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Commission's obligation to take account of the specific characteristics of the field of activity of the applicant undertakings*  
(EEC Treaty, Art. 85(3))
9. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Undertaking's obligation to prove that its application is well founded*  
(EEC Treaty, Art. 85(3))
10. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision rejecting an application for exemption under the competition rules*  
(EEC Treaty, Art. 190)
11. *Actions for annulment — Commission decision based on Article 85(3) of the Treaty — Complex economic evaluation — Review by the Court — Limits*  
(EEC Treaty, Arts 85(3) and 173)

12. *Community law — Principles — Principle of subsidiarity — Not one of the general legal principles applicable before the entry into force of Article 3b of the EC Treaty (EC Treaty, Art. 3b)*
13. *Competition — Fines — Prohibition of the imposition of fines for action taken under a notified agreement — Agreement enjoying an exemption from notification and not notified — Inapplicable (Council Regulation No 17, Arts 4(2) and 15(5)(a))*
14. *Competition — Community rules — Infringements — Committed intentionally — Meaning (Council Regulation No 17, Art. 15)*
15. *Competition — Fines — Amount — Determination — Turnover taken into account — Turnover of all the undertakings making up an association of undertakings — Permissible (Council Regulation No 17, Art. 15(2))*

1. Only where a measure is challenged on the basis of serious and convincing evidence of breach of the principle of inalterability of Community measures can the Court accede to a request that it order production of a decision, in the language or languages in which it is binding, authenticated by the signatures of the President and the Executive Secretary, in order to verify that the texts notified conform exactly with the text adopted by the college of Commissioners.

has decided to adopt or contemplates adopting on the market and being capable of leading to the fixing of certain conditions for the transaction, practical cooperation between contractors is deliberately substituted for the risks of competition and an infringement of Article 85(1) of the Treaty is thereby committed.

2. Where there is concertation by undertakings regarding the manner in which they intend responding to an invitation to tender, involving the exchange of information regarding, *inter alia*, the costs of the product concerned, its specific characteristics and a breakdown of the price tenders, having in particular the object and effect of revealing to his competitors the course of conduct which each contractor

3. The joint fixing of the price increases which all the undertakings participating in a tendering procedure will include in their price tenders, and which will be received by the successful undertaking but passed on to a trade organization entrusted with sharing them among all the undertakings that submitted tenders, making it possible to ensure that the contract awarder bears, on a flat-rate basis, the calculation costs incurred by all the participants in the tendering procedure, is caught by the prohibitions laid down in Article 85(1)(a) of the

Treaty. First, it constitutes fixing of part of the price and, secondly, it restricts competition between undertakings as regards their calculation costs and, lastly, it leads to a general increase in prices.

4. The prohibitions laid down by Article 85(1) of the Treaty apply to a system of rules operating within a trade organization which, in relation to contracts in tendering procedures, makes it possible, through agreements between the undertakings concerned, after comparison of the prices that they intend proposing, to designate the undertaking offering the lowest price, which will enjoy protection against the risk of submission by its competitors of price tenders adjusted downwards, and will be the only one authorized to negotiate the content of its tender with the contract awardee.

Even if such protection is in fact accorded to the undertaking submitting the best tender from the tenderers' point of view, it is for the party awarding the contract to reach its own conclusion, which may involve subjective preferences on matters such as the reputation of the contractor, his availability and his proximity.

5. A system of rules operating within a trade organization which, as between the undertakings interested in a tendering procedure, organizes the exchange of information and excludes certain forms of

competition is caught by the prohibitions contained in Article 85(1) of the Treaty, since its very existence undermines the freedom of contractors to join or not join it, inasmuch as non-membership deprives them of certain advantages afforded by the system and brings them into competition, not with a number of contractors acting independently from each other, but with a number of contractors which have common interests and information and therefore behave in the same way.

6. An agreement which extends over the whole territory of one of the Member States has, by its very nature, the effect of reinforcing compartmentalization of national markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about.

7. For restrictive arrangements to be prohibited by Article 85(1) of the Treaty, it is not necessary for them appreciably to affect trade between Member States but merely to be capable of having that effect. Since a potential effect is sufficient, future development of trade may be taken into account in assessing the effect of the restrictive arrangements on trade between Member States, whether or not it was foreseeable. As regards the appreciable nature of that effect, the more limited the trade the greater is the likelihood that it will be affected by the restrictive arrangements.

8. It is for the Commission, exercising its power under Article 85(3) of the Treaty, to grant exemption from the prohibitions contained in Article 85(1) and to take account of the particular nature of different branches of the economy and the problems peculiar to them.
9. It is for undertakings seeking an exemption under Article 85(3) to establish, on the basis of documentary evidence, that an exemption is justified.
10. In applying the competition rules, all that is incumbent upon the Commission, by virtue of its obligation to state reasons, is to mention the matters of fact and of law and the considerations which prompted it to take a decision rejecting an application for exemption, and the applicants may not require it to discuss all the matters of fact and law raised by them in the administrative procedure.
11. The review carried out by the Community judicature of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article 85(3) of the Treaty in relation to each of the four conditions laid down therein must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.
12. The principle of subsidiarity did not, before the entry into force of the Treaty on European Union, constitute a general principle of law by reference to which the legality of Community acts should be reviewed. No measure adopted before the entry into force of the second paragraph of Article 3b of the EC Treaty may be reviewed by reference to that provision, since the latter would thereby be endowed with retroactive effect.
13. The prohibition of imposing fines laid down in Article 15(5)(a) of Regulation No 17 applies only in relation to agreements which have actually been notified and not to agreements of which notification is unnecessary by virtue of Article 4(2)(1) of that regulation. Consequently, even if an agreement is covered by Article 4(2) of Council Regulation No 17, the Commission is entitled to impose fines on the undertakings which applied it, since the agreement had not been notified.

14. In order for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for the undertaking to have been aware that it was transgressing the prohibition laid down by those provisions; it is sufficient that it could not have been unaware that the conduct concerned had the object or effect of restricting competition in the Common Market.

15. The general term 'infringement' used in Article 15(2) of Regulation No 17 covers, without distinction, agreements, concerted practices and decisions of associations of undertakings and its use indicates that the upper limits for fines laid down in that provision apply in the same way to agreements and concerted practices as to decisions of associations of undertakings. It follows that the upper limit of 10% of

the turnover must be calculated by reference to the turnover achieved by each of the undertakings that are parties to the agreements and concerted practices concerned or by all the members of the associations of undertakings, at least where the internal rules of the association empower it to bind its members. The correctness of this analysis is confirmed by the fact that, in determining the amount of the fines, account may be taken *inter alia* of such influence as the undertaking may have been able to exercise in the market, in particular by reason of its size and economic power, of which its turnover may give an indication. The influence which an association of undertakings may have had on the market depends not on its own 'turnover', which reveals neither its size nor its economic power, but rather on the turnover of its members, which gives an indication of its size and economic power.