JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
21 February 1995 *

In Case T-29/92,

Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid, an association governed by Netherlands law, established in Amersfoort, Netherlands,

Amsterdamse Aannemers Vereniging, an association governed by Netherlands law, established in Amsterdam, Netherlands,

Algemene Aannemersvereniging voor Waterbouwkundige Werken, an association governed by Netherlands law, established in Utrecht, Netherlands,

Aannemersvereniging van Boorondernemers en Buizenleggers, an association governed by Netherlands law, established in Soest, Netherlands,

Aannemersvereniging Velsen, Beverwijk en Omstreken, an association governed by Netherlands law, established in Velsen, Netherlands,

Aannemers Vereniging Haarlem-Bollenstreek, an association governed by Netherlands law, established in Heemstede, Netherlands,

Aannemersvereniging Veluwe en Zuidelijke Ijsselmeerpolders, an association governed by Netherlands law, established in Apeldoorn, Netherlands,

* Language of the case: Dutch.

Combinatie van Aannemers in het Noorden, an association governed by Netherlands law, established in Leeuwarden, Netherlands,

Vereniging Centrale Prijsregeling Kabelwerken, an association governed by Netherlands law, established in Leeuwarden, Netherlands,

Delftse Aannemers Vereniging, an association governed by Netherlands law, established in Rotterdam, Netherlands,

Economisch Nationaal Verbond van Aannemers van Sloopwerken, an association governed by Netherlands law, established in Utrecht, Netherlands,

Aannemersvereniging 'Gouda en Omstreken', an association governed by Netherlands law, established in Rotterdam, Netherlands,

Gelderse Aannemers Vereniging inzake Aanbestedingen, an association governed by Netherlands law, established in Arnhem, Netherlands,

Gooise Aannemers Vereniging, an association governed by Netherlands law, established in Huizen, Netherlands,

's-Gravenhaagse Aannemers Vereniging, an association governed by Netherlands law, established in The Hague, Netherlands,

Leidse Aannemersvereniging, an association governed by Netherlands law, established in Leiden, Netherlands,

Vereniging Markeer Aannemers Combinatie, an association governed by Netherlands law, established in Tilburg, Netherlands,

Nederlandse Aannemers- en Patroonsbond voor de Bouwbedrijven, an association governed by Netherlands law, established in Dordrecht, Netherlands,

Noordhollandse Aannemers Vereniging voor Waterbouwkundige Werken, an association governed by Netherlands law, established in Amsterdam, Netherlands,

Oostnederlandse-Vereniging-Aanbestedings-Regeling, an association governed by Netherlands law, established in Delden, Netherlands,

Provinciale Vereniging van Bouwbedrijven in Groningen en Drenthe, an association governed by Netherlands law, established in Groningen, Netherlands,

Rotterdamse Aannemersvereniging, an association governed by Netherlands law, established in Rotterdam, Netherlands,

Aannemersvereniging 'de Rijnstreek', an association governed by Netherlands law, established in Rotterdam, Netherlands,

Stichting Aanbestedingsregeling van de Samenwerkende Bouwbedrijven in Friesland, a foundation governed by Netherlands law, established in Leeuwarden, Netherlands,

Samenwerkende Prijsregelend Vereniging Nijmegen en Omstreken, an association governed by Netherlands law, established in Nijmegen, Netherlands,

Samenwerkende Patroons Verenigingen in de Boouwbedrijven Noord-Holland-Noord, an association governed by Netherlands law, established in Alkmaar, Netherlands,

Utrechtse Aannemers Vereniging, an association governed by Netherlands law, established in Utrecht, Netherlands,

Vereniging Wegenbouw Aannemers Combinatie Nederland, an association governed by Netherlands law, established in Zeist, Netherlands, and

Zuid Nederlandse Aannemers Vereniging, an association governed by Netherlands law, established in Heeze, Netherlands,

represented by Louis H. van Lennep, of the Hague Bar, and Erik H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Luc Frieden, 6, Avenue Guillaume,

applicants,

v

Commission of the European Communities, represented by Berend J. Drijber, of the Commission's Legal Service, acting as Agent, assisted by P. Glazener, of the Rotterdam Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 92/204/EEC of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and 32.571 — Building and Construction Industry in the Netherlands (OJ 1992 L 92, p. 1) is non-existent or, alternatively, for a declaration that it is void,

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

composed of: R. Schintgen, President of the Chamber, H. Kirschner, B. Vesterdorf, K. Lenaerts and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 11 July 1994

gives the following

Judgment

The facts

1 As from 1952, a number of associations of contractors came into being in the Netherlands building market, grouped according to sector or region. They drew up rules for their members with a view to organizing competition.

2 In 1963, those associations set up the Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (hereinafter 'the SPO') whose object, according to Article 3 of its statutes, is 'to promote and administer orderly

competition, to prevent improper conduct in price tendering and to promote the formation of economically justified prices'. To that end, the SPO draws up rules and regulations (hereinafter 'the rules' or 'the rules and regulations') providing for 'institutionalized regulation of prices and competition' and is empowered to impose penalties on contractors affiliated to its member organizations if they breach their obligations under those rules. Implementation of the rules is entrusted to eight executive offices, whose operations are controlled by the SPO. The member associations of the SPO at present number 28 and their total membership exceeds 4 000 building undertakings established in the Netherlands.

3 In 1969, most of the sectoral or regional associations acceded to the SPO.

4 In the period from 1973 to 1979, the various associations undertook standardization of their rules (hereinafter 'the previous rules').

5 On 3 June 1980, the Erecode voor Ondernemers in het Bouwbedrijf (Code of honour for contractors in the building industry, hereinafter 'Code of Honour') was adopted by the General Assembly of the SPO and made binding on all the contractors belonging to the member associations of the SPO. The Code of Honour provides for a uniform system of penalties for infringements of the rules standardized between 1973 and 1979 and certain material provisions necessary for the application of those rules. The Code of Honour entered into force on 1 October 1980.

6 On 16 August 1985 the Commission sent to the SPO under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-62, p. 87, hereinafter 'Regulation No 17') a request for information concerning the participation of foreign undertakings in the SPO.

7 By Ministerial Decree of 2 June 1986, the Netherlands authorities adopted the Uniform Aanbestedingsreglement (uniform rules on tendering, hereinafter 'the UAR') laying down the rules for the award of public contracts, which entered into force on 1 November 1986.

8 On 9 October 1986, the General Assembly of the SPO adopted two Uniforme Prijsregelende Reglementen (Uniform Price-Regulating Rules, hereinafter 'UPR rules') laying down the procedural framework for competition between contractors tendering for building works. The first set of UPR rules concerns invitations to tender under the restricted procedure (hereinafter 'the UPRR rules') and the second set concerns invitations to tender under the open procedure (hereinafter 'the UPRO rules'). The two sets of rules have the same structure and contain precise and detailed provisions concerning the obligations incumbent on undertakings belonging to the SPO and the operating conditions thereof. The UPR rules are themselves supplemented by four regulations and three annexes. All those rules and regulations entered into force on 1 April 1987.

9 By Royal Decree of 29 December 1986 the Netherlands Government declared those rules non-binding, with the exception of those which fulfilled certain conditions. That decree entered into force on 1 April 1987. The UPR rules fulfilled the conditions laid down by the royal decree.

10 On 15 June 1987 the Commission carried out inspections at the SPO under Article 14 of Regulation No 17. In July and November of the same year it did likewise at the Zuid Nederlandse Aannemers Vereniging (hereinafter 'the ZNAV'). The purpose of those inspections was to establish whether the SPO rules were liable to affect trade between Member States.

11 On 13 January 1988 the SPO notified the UPR rules and the Code of Honour to the Commission with a view to obtaining a negative clearance or, in the alternative, an exemption under Article 85(3) of the EEC Treaty (hereinafter 'the Treaty').

12 On 23 June 1988 the UPR rules were amended. The amendment entered into force on 1 July 1988.

13 On 13 July 1989, the SPO supplemented its notification of 13 January 1988.

14 On 26 July 1989 the municipality of Rotterdam (Netherlands) complained to the Commission concerning certain parts of the SPO's rules and regulations.

15 On 7 November 1989 the Commission decided to initiate a procedure against the SPO and sent a statement of objections to it on 5 December 1989.

16 The SPO responded to the statement of objections on 5 April 1990.

17 The administrative hearing provided for by Article 19 of Regulation No 17 was held on 12 June 1990.

18 On 15 March 1991 the SPO entered into discussions with the Commission to examine whether the rules and regulations notified might qualify for an exemption if they were amended. The SPO and the Commission exchanged letters on this matter between 12 April 1991 and 15 January 1992.

19 On 5 February 1992 the Commission adopted the contested decision.

20 On 12 February 1992 a decision dated 5 February 1992 bearing reference number C(92) 66 def. was sent to the applicants. It was notified on 17 February 1992. A passage from that decision was missing and the addresses of various associations of undertakings mentioned in the operative part of the decision were incorrect.

21 On 26 February 1992 a decision dated 5 February 1992 bearing reference number C(92) 66 def. rev. was sent to the applicants (and reached the SPO on 2 March 1992). The text of that decision included the passage missing from the text notified on 17 February 1992 and subsequently added. The errors in the addresses of certain associations of undertakings had also been rectified.

22 In Article 1 of the decision the Commission finds that the statutes of the SPO of 10 December 1963, as subsequently amended, the two sets of UPR rules of 9 October 1986 and the regulations and annexes forming part of them, the previous and similar UPR rules which replaced them and the Code of Honour, except for Article 10 thereof, constituted infringements of Article 85(1) of the Treaty.

23 In Article 2 of its decision, the Commission rejects the application made on 13 January 1988 for an exemption under Article 85(3) of the Treaty in respect of the UPR rules of 9 October 1986 and the Code of Honour.

24 In Article 3(1) and (2) of the decision the Commission requires the SPO and its member organizations to bring to an end immediately the infringements found and to inform the undertakings concerned in writing of the content of the decision and the fact that the infringements have been brought to an end, indicating the practical consequences thereof, such as the freedom of each of such undertakings to withdraw at any time from the said rules and regulations. The SPO and its member organizations were also required to communicate to the Commission, within two months following notification of the decision, the information transmitted to the undertakings in accordance with Article 3(2).

25 In Article 4 of the decision the Commission imposed fines totalling ECU 22 498 000 on the 28 associations concerned.

Procedure

26 By application lodged at the Registry of the Court of First Instance on 13 April 1992 the SPO and 28 member associations of it brought an action under the second paragraph of Article 173 of the Treaty seeking a declaration from the Court that Commission Decision 92/204/EEC of 5 February 1992 relating to a proceeding pursuant to Article 85 of the Treaty (IV/31.572 and IV/31.571 — Building and Construction Industry in the Netherlands OJ 1992 L 92, p. 1) was non-existent or, alternatively, a declaration that it was void.

27 By a separate document received at the Registry of the Court of First Instance on the same day the applicants also applied under Articles 185 and 186 of the Treaty and Article 105(2) of the Rules of Procedure of the Court of First Instance for interim measures suspending the operation of the contested decision.

28 The parties presented oral argument on 18 June 1992.

29 On 16 July 1992, the President of the Court of First Instance made an order, the operative part of which is as follows:

1. Operation of Article 3 of the Commission decision relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/31.571 — Building and Construction Industry in the Netherlands) is suspended in so far as it concerns elements of the contested rules and regulations that are not linked to the existence of a concerted practice and an exchange of information between contractors, to the

granting of preference or the direct passing on to contract awarders of amounts relating to reimbursements for calculation costs and contributions to trade organizations.

2. The applicants shall communicate to the Commission and the Court of First Instance, not later than 1 October 1992, the measures they have taken to make the system function in conformity with this order.

3. For the rest, the application for suspension of operation is dismissed.

4. Costs are reserved.

30 By letter received at the Registry of the Court of First Instance on 14 August 1992 the applicants forwarded to the President of the Court the provisional instructions, applicable since 20 July 1992, which the first applicant had sent to the other applicants in compliance with the order of the President of the Court of First Instance of 16 July 1992.

31 On 27 August 1992 the Netherlands company Dennendael BV sought leave to intervene in support of the defendant pursuant to Article 37 of the Protocol on the Statute (EEC) of the Court of Justice.

32 By order of 12 January 1993 the Court of First Instance granted leave for that company to intervene in support of the defendant.

33 On 21 January 1993 the intervener lodged its statement in intervention.

34 By letter of 17 November 1993 the intervener informed the Court of First Instance that it wished to withdraw its intervention, and the Court took formal note thereof by order of 4 May 1994.

35 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry. However, the Court invited the parties to answer certain questions in writing before the hearing.

36 Following the judgment delivered by the Court of Justice on 15 June 1994 in Case 137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, the Court of First Instance, by order of 27 June 1994, called on the Commission to 'produce the decision adopted by the Commission at its sitting of 5 February 1992 relating to a procedure pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/32.571 — Building and Construction Industry in the Netherlands) authenticated at that time in the language in which it is binding by the signatures of the President and the Executive Secretary pursuant to the first paragraph of Article 12 of the Commission's Rules of Procedure as in force at that time' and to forward that document to the Court of First Instance 'no later than 6 July 1994'.

37 Following that order, by letter of 4 July 1994 the Commission lodged a copy of the Commission decision of 5 February 1992 bearing reference number C(92) 66 def. rev. and the signature of the President of the Commission and of its Secretary General, preceded by the words 'the present decision was adopted by the Commission at its 1092nd meeting held in Brussels on 5 February 1992. It comprises 92 pages plus annexes'. It also lodged certain other documents.

38 The first of those documents is a letter which counsel for one of the applicants sent to the relevant official of the Directorate-General for Competition (DG IV) on 19 February 1992 indicating that in the decision which had been notified to him

something was missing between pages 86 and 87. He asked that official to undertake the necessary checks and take the necessary rectifying measures.

39 The second document is a fax, also dated 19 February 1992, which the official in question sent to an official of the Secretariat General of the Commission, asking him to establish 'whether the version of the decision adopted by the Commission and notified to its addressees conforms perfectly with the draft and, if necessary, to take the action needed to ensure that the addressees of the decision are formally apprised of the full text thereof'.

40 The third document is a letter of 21 February 1992 sent to the relevant official of DG IV by one of the lawyers for the applicants in which he asks the Commission to notify only to SPO the copies of the rectified version of the decision since the addresses of some of its member organizations were incorrect.

41 The fourth document is a letter from the relevant official of DG IV, also dated 21 February 1992, to counsel for the applicants in which he states that, following a telephone conversation with one of them, the Secretary General was considering different methods of (re-)notification with respect to all the organizations to which the decision was addressed (at their rectified addresses, where appropriate).

42 The parties presented oral argument and answered questions put to them by the Court at the hearing on 11 July 1994. During the hearing, a film concerning the rules and regulations at issue in this case was shown at the request of the applicants and their expert was heard.

Forms of order sought

43 The applicants claim that the Court should:

(i) declare that the Commission's measure entitled 'Commission decision of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/32.571 — Building and Construction Industry in the Netherlands)' is non-existent;

(ii) in the alternative, annul the Commission decision of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and IV/32.571 — Building and Construction Industry in the Netherlands);

(iii) take any other measures considered necessary by the Court;

(iv) order the Commission to pay the costs, including those relating to the application for interim measures lodged under Articles 185 and 186 of the EEC Treaty.

The Commission contends that the Court should:

(i) dismiss the applicants' claims;

(ii) order the applicants to pay the costs, including those of the application for interim measures.

Pleas in law and arguments of the parties

44 The applicants seek two orders: primarily, they seek a finding that the contested decision is non-existent or, at least, void for infringement of essential procedural requirements; in the alternative, they seek annulment of that decision.

The principal claim

Arguments of the parties

45 The applicants claim, primarily, that by virtue of the case-law of the Court of First Instance the contested decision is non-existent (judgment in Case T-79/89 and others *BASF and Others* v *Commission* [1992] ECR II-315) for breach of the principle of inalterability of measures and lack of competence — a page having been added thereto without the approval of the college of the Commissioners — and infringement of the rules on languages, since the college of Commissioners did not adopt the decision only in the language in which it was binding. A passage was missing from Decision No C(92) 66 def. of 5 February 1992 which was sent to the applicants on 12 February 1992 and notified to them on 17 February 1992 and the addresses of various associations of undertakings mentioned in the operative part of the decision were incorrect.

46 On 26 February 1992, a decision dated 5 February 1992 bearing reference number C(92) 66 def. rev. was sent to the applicants (and reached the SPO on 2 March 1992). It included the passage missing from the text notified on 17 February 1992 and subsequently added. The errors in the addresses of various associations of undertakings had also been rectified.

47 The applicants also state that the document bearing reference number C(92) 66 def. was first sent to each of the applicants by letter of 12 February 1992 signed by the Secretary General of the Commission and that it had not been notified until about 17 February. The fact that the text of the contested decision was not available on the day after 5 February 1992 confirms, in their view, that the text notified to the applicants was not the same as that which had been submitted to the college of Commissioners. The fact that the revised document was given a new reference (C(92) 66 def. rev.) supports the same conclusion. Moreover, they maintain, the Commission does not deny that document C(92) 66 def. rev. was never submitted as such to the college of Commissioners.

48 Consequently, the applicants call on the Commission to prove, by means of a certified extract from the minutes of the Commission meeting of 5 February 1992, that it in fact met to consider the Dutch version of the contested decision and that it was that text which it adopted.

49 The Commission replies that the applicants have produced no evidence to show that the principle of the inalterability of measures was infringed after the adoption of the decision. In the absence of such evidence, the decision should be regarded as lawful (see the judgment of the Court of First Instance in Case T-10/89 *Hoechst* v *Commission* [1992] ECR II-629, paragraph 375).

50 It contends that the decision was sent to the applicants a second time because a page was missing from the text sent on 12 February 1992 and that, in the case of certain applicants, it had been sent to an address which was no longer correct. The disappearance of one page was attributable to a technical defect in the Commission's internal electronic mail system which arose after adoption of the decision.

51 The Commission also states that the college of Commissioners did have before it, on 5 February 1992, the text of the draft decision in all the Community languages, including Dutch. That draft was adopted at that meeting.

Findings of the Court

52 The Court finds, first, that it follows from paragraph 52 of the judgment of the Court of Justice in Case C-137/92P, *Commission* v *BASF*, cited above, that the gravity of the irregularities complained of by the applicants, which concern the procedure for adoption of the Commission decision, is not so clear that the decision must be regarded as legally non-existent.

53 It follows that the applicants' main claim must be rejected in so far as it seeks a finding that the contested decision is non-existent.

54 However, it is necessary to consider, secondly, whether the irregularities complained of by the applicants might, as they claim in the alternative, be such that the contested decision should be annulled for infringement of the principle of inalterability of measures and of the rules on the use of languages.

55 As regards the inalterability of measures, the Court considers that it is apparent from paragraph 59 of the judgment of the Court in Case C-137/92P that 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.

56 In the present case, the Court considered, on the basis of the information available to it at that time, that the fact that the text of the decision notified on 17 February 1992 did not correspond to the text notified on 26 February 1992 constituted, at first sight, serious and convincing evidence that the changes made to the first text had not been adopted by the college of Commissioners. It was for that reason that, on 27 June 1994, it ordered production of the decision adopted by the Commission at its meeting of 5 February 1992, authenticated at that time, in the language in which it is binding, by the signatures of the President and the Executive Secretary pursuant to the first paragraph of Article 12 of the Commission's Rules of Procedure in force at that time.

57 However, the Court finds that the documents produced by the Commission in response to its order of 27 June 1994 confirm that the difference between the first text notified and the second was attributable to a technical defect in the operation of its electronic mail system which caused the loss of a page and that, consequently, the text notified on 26 February 1992 conformed perfectly with the text adopted by the college of Commissioners at its meeting of 5 February 1992. Indeed, counsel for the applicants informed the Commission on 19 February 1992 that 'in the SPO decision, there is something missing between pages 86 and 87. I should be grateful if you would look into this and take the measures necessary to rectify matters. If it is discovered that an error found its way into the text, I should be grateful if you would send an amendment to all the addressees'. The addressee of that letter, the relevant official of DG IV, sent a memorandum on the same date to the Secretariat General of the Commission asking that the necessary checks be carried out. According to that memorandum, 'I have received from your department the text of the abovementioned decision in the Dutch language. In that document, a passage is missing which was definitely included in the draft submitted to the Commission. May I ask you to check whether the text adopted by the Commission and notified to the addressees of the decision conforms exactly with the draft and, if necessary, to take the action needed to ensure that the addressees are formally apprised of the full text of the decision? Please find enclosed as annex I hereto: the cover page of document C(92) 66 def. [...] pages 86 and 87 of that document. Please find enclosed as annex II hereto: pages 85, 86 and 87 of the draft decision in question (version in the Dutch language, as submitted to the Commission): the passage missing from that document, C(92) 66 def., is clearly indicated'.

58 In view of that information, of which the Commission's interpretation has not been challenged by the applicants, the evidence produced by the applicants can no longer be regarded as serious and convincing.

59 It has thus been established that the text of the decision notified to the applicants on 26 February 1992 is in perfect conformity with the text adopted by the college of Commissioners on 5 February 1992.

60 As regards compliance with the rules on the use of languages, the Court considers that it is clear from the letter sent by the DG IV official to the Secretariat General that the draft decision was submitted to the Commission in its Dutch language version, which is also borne out by the fact that, on 5 February 1992, the operative part of the decision was notified by fax to the applicants in the Dutch language.

61 It follows that there can be no question of any infringement of the rules on the use of languages in this case.

62 The Court also notes that, in response to its order of 27 June 1994, the Commission produced the text of the Commission decision of 5 February 1992 bearing reference number C(92) 66. def. rev. and the signatures of the President of the Commission and its Secretary General preceded by the words 'the present decision was adopted by the Commission at its 1092nd meeting held in Brussels on 5 February 1992. It comprises 92 pages plus annexes'. At the hearing, the applicants objected to the fact that that document does not give the date on which the signatures of the President and the Secretary General were appended. In his covering letter of 4 July 1994 and at the hearing the Agent for the Commission stated that that document was the text of the decision as adopted by the college of Commissioners on 5 February 1992 and as authenticated at that time. In response to a question from the Court, the Agent for the Commission explained that his statement on that point is borne out by the fact that, when the decision was adopted the Commission had

already been alerted to the inferences which the Court might draw from the absence of authentication of its measures since, at that time, the hearing had already been held in Joined Cases T-79/89 and others *BASF and Others* v *Commission*, and the Court had already ordered production of the text of the decision at issue in that case, authenticated by the signatures of the President and the Executive Secretary pursuant to the first paragraph of Article 12 of the Commission's Rules of Procedure in force at that time. The Court notes that the applicants did not object to the explanation given by the Agent for the Commission.

63 On the basis of the aforementioned documents and the information supplied by the Agent for the Commission, the Court finds that the document bearing reference number C(92) 66 def. rev. produced by the Commission is the text of the decision as adopted by the college of Commissioners on 5 February 1992 and as authenticated at that time.

64 It follows that the applicants' main claim must be dismissed.

The alternative claim

65 The applicants base their alternative claim on nine grounds of challenge which may be condensed into five pleas in law. The first plea is that Article 85(1) of the Treaty was infringed by the Commission's having incorrectly defined the relevant market, misapprehended the scope of the rules and regulations at issue and wrongly considered that they appreciably affected trade between Member States. The second plea alleges infringement of Article 85(3) of the Treaty; the Commission (i) failed to take account of the particular characteristics of the building industry in the Netherlands and reversed the burden of proof; (ii) misunderstood the scope of the rules and regulations at issue in relation to the four preconditions for the grant of an exemption, in particular by refusing to take account of the amendments made by the applicants 'in the context of the notification'; and (iii) breached the principles of proportionality and subsidiarity by refusing to grant the requested

exemption. The third plea alleges infringement of Articles 4(2)(1) and 15(2) of Regulation No 17 in that the Commission imposed a fine even though the infringement had not been established or, at least, was covered by immunity, and wrongly considered that the infringement had been committed deliberately or negligently and imposed an excessive fine. The fourth plea alleges infringement of Article 190 of the Treaty in that the Commission did not give an adequate statement of reasons regarding either infringement of Article 85(1) of the Treaty or rejection of the application for an exemption under Article 85(3) of the Treaty. The fifth plea alleges breach of the applicants' rights of defence.

First plea: infringement of Article 85(1) of the Treaty

First limb: incorrect definition of the relevant market

Arguments of the parties

66 The applicants state that the Court of First Instance has held that appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (judgment of the Court of First Instance in Joined Cases T-68/89, 77/89 and 78/89 *SIV and Others* v *Commission* [1992] ECR II-1403). In the present case, they maintain, the Commission failed to define the relevant product market and geographical market.

67 As regards the product market, they state that the eight sectors of the building industry covered by the rules and regulations at issue do not come within a single product market but constitute at least as many — if not more — distinct product markets, in so far as the activities covered by them are not interchangeable from the point of view of either supply or demand.

68 The applicants add that, although they took the view in their notification that the Netherlands building market constitutes a sole and single product market, that was in the context of an application for a negative clearance or exemption for the UPR rules which were introduced in 1987 and were for the first time applicable without distinction to the eight product markets concerned. The context of the contested decision is entirely different since it is directed not only against the 1987 UPR rules but also against the previous rules, which differ for each of the sectors of the building industry. Consequently, the Commission should have drawn a distinction according to the product markets concerned, at least to the extent to which it sought to incriminate the rules applicable before 1 April 1987.

69 As regards the geographical market, they observe that the Commission found in paragraph 23 of the decision that there were various relevant geographical markets within the market to which the rules apply. It thus conceded that the scope of the relevant geographical market may vary according to the sector and the nature of the activities concerned. Since the geographical market for smaller-scale works is more limited, the Commission should have found that all the rules fall outside the scope of Article 85 of the Treaty in so far as they relate to such works since they cannot affect trade between Member States (see below, third limb of the plea).

70 As regards the product market, the Commission replies, first, that the relevant market should not be defined by reference to the substitutability of the products concerned but rather on the basis of the activities actually undertaken by the contractors and the scope of the rules. The UPR rules and the Code of Honour apply without distinction to the various sectors mentioned by the applicants, regardless of the nature, extent or location of the works. That approach is fully in conformity with the views put forward by the applicants in the course of the administrative procedure.

71 The Commission also contends that it is inappropriate to distinguish between the rules prior to 1987 and the UPR rules as regards definition of the relevant product

market since the previous rules applicable to the various sectors were standardized between 1973 and 1979 under the aegis of the SPO.

72 As regards the geographical market, the Commission replies that the regular fluctuations in demand, the breadth of activities of large and medium-sized undertakings and the fact that even some small undertakings submit tenders on occasion for works to be undertaken outside the region where they are established show that there are no distinct geographical markets within the construction market to which the incriminated regulations apply. It also states that the applicants did not at any stage of the administrative procedure refer to the existence of different geographical markets or supply information enabling their extent to be defined.

Findings of the Court

73 The Court considers that it is necessary, at the outset, to determine the scope of the Commission's obligation to define the relevant market before finding an infringement of Articles 85 and 86 of the Treaty.

74 The approach to defining the relevant market differs according to whether Article 85 or Article 86 of the Treaty is to be applied. For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour (judgment of the Court of First Instance in Joined Cases T-68/69, T-77/89 and T-78/89 *SIV and Others* v *Commission*, cited above, paragraph 159), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. For the purposes of applying Article 85, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of

undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the Common Market.

75 That is why, for the purposes of Article 85, the applicants' objections to the definition of the market adopted by the Commission cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing of competition. The merits of this approach are confirmed by the fact that, in their application for negative clearance or an exemption, the applicants dealt with the issue of definition of the market only in the part concerning effects on trade between Member States.

76 It is important to note that, in treating the building market in the Netherlands as a whole as the relevant market, the Commission merely followed the approach adopted by the applicants in their notification of the UPR rules with a view to obtaining a negative clearance or an exemption and in their reply to the statement of objections. In the administrative procedure, the applicants never claimed that the eight sectors of the construction industry constituted separate markets for the purposes of the Community competition rules or that distinct geographical markets existed. On the contrary, they stated in their notification (p. 19, paragraph 2.2.1.) that

«Naar het oordeel van de SPO dient als de relevante produktmarkt vanuit een macro-perspectief te worden aangemerkt de markt voor het aannemen van bouwwerken. Slechts die produktmarkt lijkt vanuit kartelrechtelijk oogpunt relevant. Dit is een omvangrijke markt. Weliswaar is het in beginsel (wellicht) mogelijk binnen deze markt talloze marktsegmenten te onderscheiden naar gelang de aard en de omvang van de aan te nemen bouwwerken, doch het is twijfelachtig of dergelijke segmenten zouden kunnen worden aangemerkt als afzonderlijke produktmarkten in het licht van het Europees mededingingsrecht. Zowel de aanbodzijde als de vraagzijde van de betrokken markt heeft een dermate diverse samenstelling, dat het in beginsel onmogelijk lijkt bepaalde submarkten te isoleren, waarop bepaalde

categorieën aanbesteders en aannemers bij uitsluiting opereren. Eennoodgedwongen-kunstmatige indeling van de bouwmarkt in submarkten is bovendien niet dienstig voor de beoordeling van de onderhavige mededingingsregelingen, aangezien enerzijds de Erecode van toepassing is op bouwwerken van alle categorieën, terwijl het UPR betrekking heeft op alle werken van de categorieën, genoemd onder nr. 2.1.1.».

['According to the SPO, the relevant product market from the macroeconomic point of view is the construction market. Only that product market appears relevant from the point of view of competition law. It is an extensive market. Whilst it may be possible, in principle, to identify within that market innumerable market segments reflecting the nature and size of the constructions to be erected, it is nevertheless doubtful that such segments could be described as separate product markets for the purpose of European competition law. Both supply and demand are so diversified in that market that it would appear, in principle, impossible to isolate submarkets in which only certain categories of contract awarders and contractors operate. A necessarily artificial division of the construction market into submarkets would, moreover, be unhelpful in assessing the competition rules in question, since, first, the Code of Honour applies to all building work and, secondly, the UPR rules cover all works in the categories mentioned in paragraph 2.1.1.' (that is to say, all those to which the Commission claims that the UPR rules apply).

77 The Commission properly adopted that definition of the market, since the rules introduced in 1987 apply without distinction to all the eight sectors concerned. In their reply, moreover, the applicants subscribed to that approach regarding the assessment of the UPR rules introduced in 1987.

78 However, they maintain their criticism of the definition of the market as regards the previous rules, asserting that the view adopted by them in the administrative procedure was dictated by the fact that their application for a negative clearance or

exemption related to the rules introduced in 1987 whereas the decision also incriminates the previous rules, which were different for each sector.

79 In that connection, it is important to note that, whilst it is true that the considerations set out in the notification related only to the rules introduced in 1987, the statement of objections was directed also against the previous rules. Consequently, the applicants' reply to that statement [see pages 23 to 71 and in particular Title 3: 'De relevante markt: de bouwmarkt in Nederland' ('The relevant market: the building market in the Netherlands')], in which they maintained the same view regarding definition of the market, also related to the previous rules.

80 It follows that, in the administrative procedure, the applicants did not consider that a different approach was called for regarding definition of the market in the case of the previous rules.

81 Similarly, the Court considers that the Commission was also right to adopt that definition of the market in relation to the previous rules as well. First, the applicants have not been able to indicate any substantial differences between the previous rules and the rules introduced in 1987 or as between the various sets of previous rules themselves. It must be concluded that the various sets of previous rules applied in the same way to each of the sectors and each of the geographical areas covered by them. Furthermore, the applicants stated at the hearing that all building products were covered throughout the Netherlands by the various sets of previous rules, being covered either by regional rules covering several products, or by rules specific to certain products but extending throughout the territory of the Netherlands.

82 It follows that the Commission was right to adopt the Netherlands building market as the relevant market as regards both the previous rules and the rules introduced in 1987 in order to consider whether they affected trade between the Member States or undermined competition.

83 This limb of the plea must therefore be rejected in so far as it does not overlap with the other two limbs of the plea and must be considered with the latter in all other respects.

Second limb: misapprehension of the content and scope of the contested rules

I — Overview

Arguments of the parties

84 According to the applicants, it is essential to keep in mind the end purpose of the contested rules when considering their compatibility with Community competition law: to prevent haggling by setting up a binding system under which contractors compete on only one occasion and to improve the transactional structure of the market by attributing to each construction project awarded the design costs to which it gave rise.

85 They claim that the Commission misapplied Article 85(1) of the Treaty by taking the view that the rules seriously infringed that provision. That misapplication derived from the Commission's purely theoretical and abstract approach to the manner in which competition must be upheld by that provision, a view which is *a priori* inimical to any regulation of the market.

86 The Commission replies that, for the purposes of Article 85(1) of the Treaty, all that is important is to establish that there is a restriction of competition — not whether or not a restriction of competition is acceptable. In answering that question, the Commission analysed the economic and legal context of the infringement. It therefore focused its appraisal on the building market and not on a 'standardized market operating ideally'. It nevertheless refused to concede that restrictive agreements are inevitable in the building market and considers that undistorted competition provides a specific means of attaining the objectives of the Treaty.

Findings of the Court

87 The Court notes that, according to the decision, the system established by the rules introduced in 1987 may be described as follows. Those rules seek to establish a procedure to be observed by the applicants' members where they intend submitting a price tender for a particular project. According to the applicants, that procedure has a twofold purpose: to combat the haggling in which contracting authorities tend to engage and correct imbalances between supply and demand resulting from a lack of openness on the supply side of the market and the high transaction costs incurred in respect of tenders.

88 To that end, the applicants established physical and human infrastructures in order to apply the procedure introduced by the rules. That procedure, which differs somewhat according to whether invitations to tender are open or restricted or whether or not they are simultaneous, comprises several stages between notification to the appropriate SPO office of the intention to submit a price tender for a particular project and conclusion of the contract between the contract awarder and the successful tenderer.

89 Those stages may be summarized as follows: any contractor who is a member of the applicants must notify the relevant SPO office if he intends submitting a price

tender for a particular project, so that that office can apply the rules (decision, paragraph 24).

90 If there are several notifications, the office summons the notifying undertakings to a meeting. They must attend, failing which they are penalized. At the meeting, chaired by an official from the office, certain decisions will be taken either by a majority or unanimously (decision, paragraph 25). The first decision is whether to designate an entitled undertaking, which will be one of the contractors participating in the meeting, who will alone be entitled to have dealings with the contract awarder in order to negotiate the content and price of his tender (decision, paragraphs 26 and 39 to 41). If it is decided that an entitled undertaking will be designated, the meeting goes on to determine the data on the basis of which the various price tenders will be compared. Thus, according to the applicants, the meeting decides whether the invitations for price tenders are or can be rendered comparable and, according to the Commission, whether the price tenders of the various contractors are or can be rendered comparable (decision, paragraph 27). If the answer is affirmative, an entitled undertaking may be designated by the meeting. Before designating the entitled undertaking, the meeting decides on which basis price increases will be defined. Those increases, to be borne by the client, are essentially of two kinds: reimbursements for calculation costs and contributions to the operating costs of the trade organizations, including SPO and its offices (decision, paragraphs 31 to 33). Once that decision has been taken, each contractor indicates his tender figure (referred to as a blank figure) and hands it to the chairman (decision, paragraph 28). That figure does not yet include the price increases. At that time, a contractor may ask the meeting to grant him preference, that is to say to designate him as an entitled undertaking provided that he submits a price tender equal to the lowest blank figure (decision, paragraph 30). The chairman then examines the figures and may disclose them to the participants if the meeting so decides (decision, paragraph 28). After examining the others' figures, each contractor may decide to withdraw his tender, subject to the loss of certain rights (decision, paragraph 29). In principle, the contractor who submitted the lowest blank figure is designated as the entitled undertaking (decision, paragraph 39). Each contractor thereupon adds to his blank figure price increases calculated on the basis previously determined by the meeting. Those increases are the same for each contractor and are intended in particular to cover all the calculation costs of all the participants in the meeting. They will be borne by the client if the latter awards the contract to one of the members of the SPO (decision, paragraphs 31 to 33). The successful tenderer to which they are paid will have to transfer them to the office, which will for the most part repay them to the contractors in respect of calculation costs and to

the trade organizations in respect of the contributions payable to them (decision, paragraphs 42 to 46). Finally, the differences between the tender prices of the various contractors may be increased or decreased by the meeting (decision, paragraph 38).

91 If the office receives only one notification for a contract, the latter will be regarded as a private contract and only the notifying undertaking will have the status of entitled undertaking, which means that any member undertakings of the applicants consulted subsequently will be able to submit a tender only with its consent or, in the event of a dispute, that of an arbitration committee (decision, paragraphs 41, 52 and 53). However, it is possible that between the notification from the first contractor and award of the contract to him, the client may consult other contractors who are members of the applicants and whose notifications are received after the contract is awarded. In such cases, the successful tenderer is required to pay the office an amount equal to 3% of the price in respect of price increases (decision, paragraph 60).

92 There are also rules laying down a procedure applicable to tenders by subcontractors which essentially incorporate the provisions applicable to other price tenders, adjusting them to the specific requirements of subcontracting (decision, paragraphs 55 to 59).

93 The Court notes that the decision raises essentially four types of objections against the rules drawn up by the applicants. The first concerns the fact that they establish concertation between contractors involving the exchange of information on the cost components of the contract, the characteristics of the tenders and the prices proposed by each contractor. The second group of objections is directed against the fact that, during such concertation, parts of prices are fixed, the prices proposed are sometimes changed and partial prices are also fixed. The third group of objections relates to the fact that following such concertation, one of the contractors — the entitled undertaking — enjoys protection from the other participants in the concertation since the latter lose the right to negotiate their tender with the client.

The entitled undertaking also enjoys protection from the other members of the applicants in that, if they are subsequently approached, they will be able to submit a tender only with its consent or that of a committee of contractors, and only then if that tender is lower by a specified percentage than that of the entitled undertaking. The fourth group of objections concerns the fact that the rules confer on the members of the applicants advantages in their competition with third parties.

94 The applicants look at those groups of objections from various angles: they either draw attention to the beneficial effects which the rules have on competition and therefore for consumers, or they challenge the factual basis of the objections, or else they reject the legal characterization of the facts as constituting an infringement of Article 85(1) of the Treaty.

95 The Court finds, first, that the Commission was right to consider the applicants' rules as forming a single whole from which the various components cannot be artifically isolated.

96 The beneficial effects of the rules described by the applicants cannot be taken into consideration for the purposes of Article 85(1) of the Treaty but are pertienent only to the application of the criteria laid down by Article 85(3) of the Treaty. It follows that those various arguments must be examined in the context of the second plea in law.

97 Accordingly, as far as the present plea in law is concerned, it is appropriate only to examine the applicants' arguments concerning the correctness of the facts and the assessment of them under Article 85(1) of the Treaty. The Court will therefore consider in turn the arguments relating to concertation between contractors intending to submit a price tender, concerted fixing of prices or parts of prices, limitation of contractors' freedom to negotiate, and the conduct of the SPO towards non-member contractors.

II — Concertation between contractors intending to submit a price tender

Arguments of the parties

(1) The obligation to notify the intention to submit a price tender (decision, paragraphs 24 and 79)

98 The applicants, which do not challenge the description of this aspect of the regulations contained in paragraph 24 of the decision, claim that the obligation to notify, and the notification itself, do not, as such, have any significance in competition law. They consider, in particular, that the third subparagraph of paragraph 79 of the decision is misconceived in that it criticizes the fact that the office may, on request, disclose to a notifying undertaking the number of undertakings which have lodged a notification.

99 The Commission replies that the obligation to notify must not be examined *per se* but as an integral part of the rules. It adds that the information obtained from the notifications enables the notifying undertakings to anticipate the intensity of competition and therefore, indirectly, the foreseeable level of the final tender.

(2) The meetings held in accordance with the UPR rules (decision, paragraphs 25 to 58 and 80 to 92).

(a) Agreement on the principle of designating an entitled undertaking (decision, paragraphs 26 and 80).

100 The applicants contest the statement in paragraph 80 of the decision that the number of cases in which the meeting decides to forgo designation of an entitled

undertaking is small and contend that their research shows that an entitled undertaking is appointed only in 39% of cases.

101 The Commission replies that paragraph 80 refers to the number of cases in which the meeting forgoes designation of an entitled undertaking *a priori*, that is to say before ruling on the comparability of the information concerning the tendering procedure, and not to the number of cases in which, without waiving designation in advance, the meeting does not designate an entitled undertaking, in most cases because it has found that the information relating to the tendering procedure is not comparable.

(b) Comparison of the cost elements of the contract (decision, paragraphs 27 and 81).

102 The applicants maintain that the decision misstates the nature of the information exchanged at the meeting. That information relates solely to particulars provided by the client awarding the contract. It is necessary to exchange such information to check that the invitations to which the participants in the meeting are responding are comparable and thereby to ensure that there is no comparison of blank figures relating to different invitations to tender. As a result, that exchange of information enhances competition, to the greater satisfaction of contract awarders.

103 They also claim that the information must cover certain tendering conditions where the latter are unreasonable, in order to ensure that the contract awarders do not make contractors bear unforeseeable risks. Without such concertation, contractors would individually be confronted with the following dilemma: either to accept unreasonable conditions — and therefore experience problems in carrying out the works — or to make their price tender subject to other conditions — and therefore leave the way open for a competitor to be chosen. Thus, concertation regarding performance times is possible only if the time-limits set by the contract awarder are unrealistic.

104 The applicants add that the exchange of information prompts contractors to formulate price tenders calculated within narrower limits because the risks are more foreseeable, and ultimately the contract awarders benefit from this.

105 They consider that the criticism of the exchange of information concerning the contract awarder's requirements is not only incorrect as regards the context of such information but also displays confusion between tendering arrangements and an oligopolistic situation, as a result of which the Commission regards any exchange of information concerning a tendering procedure as contrary to the Treaty.

106 In short, the applicants criticize the Commission for considering that any exchange of information between competitors which is liable to reduce uncertainties in an entirely opaque market in itself constitutes a restriction of competition.

107 The Commission replies that the applicants have given a false impression of the content of the information exchanged. It is impossible to check whether the tenders called for are comparable or may be rendered comparable without knowing how the participants in the meeting intend to react to the invitation to tender. Exchange of information thus relates to particular aspects of the works known only to one or other of the participants, who is thus deprived of a competitive advantage. As a result, competition is not enhanced but curtailed. The Commission has produced a number of reports of contractors' meetings in support of its statements.

108 It adds that it is not for contractors to decide together whether certain conditions in invitations to tender, such as completion times or the dimension of foundations, are unreasonable, still less to lay down their own conditions in concertation where they consider it appropriate to do so.

109 The Commission states that the exchange of information occurring at the meeting is just as damaging to competition as that which takes place between competitors in an oligopolistic market.

(c) Handing over of blank figures (decision, paragraphs 28 and 82)

110 The applicants maintain that the handing over of unalterable blank figures to the chairman of the office does not restrict competition but merely brings forward the time at which competition takes place. Delivery of tender prices to the contract awarder is replaced by delivery of blank figures to the independent chairman of the SPO office concerned. The fact that the blank figures may not be altered after they have been delivered ensures that competition is not distorted but is merely brought forward in order to avoid the practice of successive bargaining.

111 For the Commission, it is not the delivery of unalterable blank figures itself which constitutes an infringement but rather the fact that they have been fixed on the basis of information exchanged at the meeting. It adds that the delivery of blank figures forms an integral part of a procedure which substitutes practical cooperation between contractors for the risks of competition, and must be regarded as such.

(d) Possibility of withdrawal after comparison of prices (decision, paragraphs 29, 83 and 84)

112 The applicants maintain that the possibility of withdrawing after prices have been compared not only involves no restriction of competition but in fact reinforces competition in that it enables contractors to calculate their tenders within narrower limits, since they know that, if they make an error which might lead to economically unjustified prices, they will be able to withdraw their tender. That possibility is, moreover, used only where one of the contractors who handed in a blank figure made an error in calculating his tender.

113 They also state that the comparison of prices carried out after the blank figures have been handed in cannot have an anti-competitive effect since the blank figures can no longer be changed. Moreover, the information obtained from that comparison, such as the price variance between the tender of the entitled undertaking and those of its competitors, cannot be exploited by the entitled undertaking in its negotiations with the contract awarder since the blank figures are definitive.

114 The Commission replies that even if — and that is not the case — withdrawal is resorted to only in the event of an error leading to an economically unjustified price, it is not for contractors unilaterally to judge whether a price is economically justified and deprive the contract awarder of an advantageous price tender, particularly where those competing contractors make that judgment after exchanging price information.

115 It adds that the entitled undertaking may use the information available to it regarding the prices quoted by other tenderers in its negotiations with the contract awarder since the difference between its price and those of the others represents the margin within which it is protected, the latter being unable to tender a lower price (see below, in relation to protection of the entitled undertaking). In that context, the comparison of prices also restricts competition.

Findings of the Court

116 The Court finds that the concertation starts with the obligation of the applicants' members to notify the relevant SPO office of their intention to submit a price tender. The Court agrees with the Commission that the fact that the relevant office can disclose to those notifying undertakings which so request the number of undertakings which have lodged a notification may be liable to restrict competition since the notifying undertakings are thereby enabled to anticipate the intensity of competition between them and to modify their conduct accordingly, as well as to obtain information not yet available at that stage to undertakings which are not SPO members.

17 The concertation between contractors objected to in the decision starts only if the meeting does not from beginning waive designation of an entitled undertaking. Otherwise, the participants exchange information. There is thus concertation, even if it leads to the conclusion that the price tenders are not and cannot be rendered comparable, so that an entitled undertaking cannot be designated. In response to the applicants' statement that an entitled undertaking is designated in only 39% of cases, it must be observed, first, that at least in such cases the concertation between contractors condemned in the decision can operate fully and, secondly, that in the other cases the applicants have neither claimed nor proved that the meeting decides from the beginning not to designate an entitled undertaking, thereby rendering any further concertation pointless. The applicants have not therefore succeeded in rebutting the statement contained in paragraph 80 of the decision that 'the number of cases in which the meeting of firms decides to forgo such designation, thus allowing undistorted competition to operate, is small'. That statement relates to the number of cases in which the meeting decides from the start to forgo designation of an entitled undertaking, whereas the applicants' statement relates to the number of cases in which it has not been possible to designate an entitled undertaking, either because such designation has been decided against from the start or because the price tenders were not comparable and could not be rendered comparable.

18 Where the meeting does not forgo designation of an entitled undertaking from the start, it is in the participants' interest to decide on the basis of what technical and economic data they will compare prices, since an entitled undertaking can be designated only on the basis of comparable price tenders. In that connection, the parties differ as to the nature of the information exchanged in order to assess the comparability of price tenders: the applicants maintain that such information relates exclusively to the contract awarder's invitation to tender and is exchanged solely in order to establish whether all the participants are relying on the same data. They concede, however, that the information exchanged may also concern the stance which should be taken regarding certain conditions imposed by the contract awarder where those conditions are unreasonable. The Commission contends that the exchange of information goes much further and relates to the manner in which the various contractors intend responding to the invitation to tender.

19 The Court finds, first, that concertation by contractors regarding the manner in which they intend responding to an invitation to tender is incompatible with

Article 85(1) of the Treaty, even where the invitation sets unreasonable conditions. It is for each contractor to determine independently what he regards as reasonable or unreasonable and to conduct himself accordingly.

120 It must next be observed that, contrary to the applicants' assertions, the information exchanged does not relate solely to the invitation to tender. It is apparent from Articles 1(b) and 6.2 of the UPRO rules and 6.3 of the UPRR rules, read in conjunction, that that information concerns matters other than the invitation to tender. Indeed, Articles 6.2 and 6.3 of the UPR rules provide:

'Before the forms containing the PEs (proposed evaluations for execution of the works) are completed, the meeting shall determine, on the basis of the *information relating to the invitation to tender* supplied by the contract awarding party *and all other information relevant to a comparative and objective examination of prices*, the data which must be relied on in entering the PE on the form provided for that purpose. It shall also determine, in accordance with the provisions of the present article, the figures and details to be mentioned in the note containing the PE.',

whilst Article 1(b) provides that the 'information relating to the invitation to tender' are to contain

'all documents, including the specifications, drawings, invitation to tender, the form for recording the intention to bid, all similar documents and all instructions or notifications relevant to submission of the tender'.

This shows that, the 'other information relevant to a comparative and objective examination of prices' includes items which do not appear in the information relating to the invitation to tender. Furthermore, the reports of certain meetings of contractors clearly show that at such meetings they discuss the manner in which they intend formulating their tenders, comparing the characteristics of the works which they intend proposing and therefore matters taken into account in the

determination of prices. Thus, at a meeting of 14 March 1988, the participants concluded that the tenders were not comparable because one of the contractors had proposed a round silo and the other a square silo (annex 1 to the rejoinder). Apart from the fact that the contractors compare the technical characteristics of the tenders which they propose submitting, they sometimes compare the various components of each of the price tenders. Thus, the report of meeting 040388 concerning a project at Tilburg (Netherlands) shows that one of the contractors participating in the meeting 'wil blanken maar geen inzicht geven in samenstelling prijsaanbieding. Prijsvergelijking daarom niet mogelijk. VH stapt kwaad op. Verliest rechten' ['wishes to submit a blank figure but refuses to disclose the composition of his price tender. Comparison of prices is therefore impossible. VH leaves in great anger. Forfeits his rights'] . The statement that 'comparison of prices is therefore impossible' indicates that what the applicants call an examination of the comparability of the data relating to a tendering procedure in fact presupposes that the participants in the meeting are prepared to disclose the breakdown of their price tenders to each other.

121 It follows that the Commission has sufficiently established that, at the meetings held by them under their rules, the contractors exchange information relating in particular to the costs of the product concerned, its specific characteristics and a breakdown of the price tenders, although that is information which an independent operator would keep strictly secret as confidential business information (judgment of the Court of First Instance in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 217).

122 It should also be noted that at those meetings the participants exchange price information. Articles 6.4 and 7 of the UPR rules allow disclosure of blank figures to all those present at the meeting. Whilst it is true, as pointed out by the applicants, that in principle such exchange of information occurs at a time when those figures can no longer be altered (but see below, paragraph 157), the applicants cannot justify this by stating that the rules merely change the moment at which competition takes place from the time of submission of tenders to the awarding party to the time of delivery of the blank figures to the chairman of the office and that, consequently, the exchange of information on prices occurs after competition has already taken place. As the applicants indicated at the hearing, the delivery of blank figures does not end competition because negotiations remain possible between the client and

the entitled undertaking and between the client and undertakings which did not attend the meeting. However, in the context of such negotiations, the entitled undertaking will possess information relating in particular to the specific characteristics of the product and the price at which the participants in the meeting are authorized to submit a tender or are not prepared to submit a tender where they have withdrawn under Article 10 of the UPR rules, thus depriving the client of an advantageous tender of which he might have been able to secure the performance by court order if it had been submitted to him without any concertation between the contractors.

123 It follows that the Commission was right to consider in its decision (paragraph 81) that such concertation between contractors, having in particular the object and effect of revealing to his competitors the course of conduct which each contractor has decided to adopt or contemplates adopting on the market (judgment of the Court of Justice in Case 40/73 *Suiker Unie* v *Commission* [1975] ECR 1663, paragraphs 173 and 174; see also the judgment of the Court of First Instance in the judgment of the Court of First Instance of 17 December 1991, cited above, paragraph 260) and may lead to the fixing of certain conditions for the transaction, means that practical cooperation between contractors is deliberately substituted for the risks of competition (judgment in Case 40/73, cited above, paragraph 191), and therefore constitutes an infringement of Article 85(1) of the Treaty.

III — The concerted fixing of prices or parts of prices

Arguments of the parties

(1) Price increases in cases of simultaneous tenders (decision, paragraphs 31 to 34, 42 to 46, 86, 87 and 96).

124 The applicants maintain, first, that the system of reimbursement of calculation costs has no adverse effect on competition between contractors since when they deliver

their blank figures, each of them is in a position to anticipate the amount of the reimbursement which he will receive, because the latter is, in principle, based on the average of the blank figures presented by the undertakings and that average may be anticipated because the blank figures submitted do not differ greatly. The reimbursement could also be anticipated if it were calculated on another basis. In the context of the UPRR rules, each tenderer can do this by applying the reimbursement tables in force (for smaller-scale works), anticipating the tender put in by each contractor whose reimbursement constitutes a percentage (where a blank figure is not given), or by assuming that he himself will bid lowest (where the amount of the reimbursement is fixed by the person who gave the lowest blank figure). The applicants add that the fact that, in the context of the UPRO rules, reimbursements are paid over annually through the calculation fund does not preclude anticipation of the amount of the payments, since each contractor can anticipate the number of points which he may earn if he bids lowest and the value of such points, which hardly varies from one year to the next. Finally, reliance on the value of supplies provided or works done by the contract awarding party or by third parties, for calculation of the reimbursement, likewise does not preclude anticipation of the amounts payable, since that value is known or can be estimated approximately.

125 The applicants state, secondly, that the system of reimbursing calculation costs has the purpose and effect of improving the transactional structure of the market by allowing the transaction costs arising from each project to be allocated to that project.

126 The Commission replies, first, that the system of reimbursing calculation costs is detrimental to competition for the reasons set out in the decision. Contrary to the applicants' assertions, the amount to be reimbursed cannot be anticipated with such precision that the system is neutralized because it depends in all cases on factors which cannot be known with sufficient certainty when the blank figures are handed in. Consequently, all contractors tend simply to include the payments in respect of calculation expenses in their price tender without adjusting the tender. That is why the Netherlands authorities describe the reimbursements as 'increases'. In any event, even if the payments are regularly anticipated, the system nevertheless

continues to constitute direct fixing of part of selling prices within the meaning of Article 85(1) of the Treaty.

127 Secondly, the Commission rejects the view that the system of reimbursing calculation costs enhances the efficiency of the market by limiting transaction costs because contract awarders have no right to obtain disclosure of the reimbursements in respect of calculation expenses applied to them.

(2) Price increases in respect of private contracts (decision, paragraphs 60, 61 and 100)

128 The applicants contest paragraph 61 of the decision, according to which the rules give rise to a general increase of 3% in the prices of private contracts because, if the contract awarder contacts other contractors after receiving the tender from the first tenderer and nevertheless awards the contract to the latter after receiving the tenders asked for subsequently, the first tenderer is required to pay a sum equal to a maximum of 3% of the contract value in respect of the price increases provided for by the rules.

129 They maintain that the Commission has confused an obligation to transfer 3% of the price to the SPO office with the obligation to take that 3% into account in the price tender. Moreover, 3% is a maximum figure which is rarely applied. The Commission also failed to take account of the fact that if contractors exercise their right to waive *a priori* the rights deriving from the status of entitled undertaking, the 3% does not have to be paid in any circumstances and if the contract awarder actually intends concluding the contract with the first contractor consulted and negotiates on an open-budget or team basis, he will be able to establish whether a provision for risk is included in the price and have it cancelled if he awards the contract without approaching other contractors.

130 The applicants also claim that there are two ways for the contractor first approached to make provision for risk in his price tender without the contract price thereby being increased if it is concluded on a private basis. First, he could reserve the right to increase his price tender by a maximum of 3% in the event of the client seeking other tenders subsequently. Secondly, he could, when submitting his tender, inform the contract awarder that it contains a risk provision which could be removed if the contract awarder did not seek other tenders subsequently. In most cases, they maintain, the contractor does not include any risk provision.

131 They state, finally, that the keen competition between contractors and the position of strength on the demand side means, beyond doubt, that the 3% would ultimately be refunded to contract awarders in the event that the risk was provided against but did not subsequently materialize.

132 The Commission replies, first, that it established that contractors are regularly called on to make payments to the office under the 3% rule.

133 It doubts whether contractors have recourse to the possibilities described by the applicants, so as to take account of the risk deriving from the 3% rule, because contractors may, without exposing themselves to any risk, merely include in their price tender a provision covering that 3%.

134 According to the Commission, a contractor who includes such a provision in his tender suffers no competitive disadvantage because the other contractors approached subsequently must do the same, unless outsiders have been invited to bid, which occurs fairly infrequently.

135 What is important, it concludes, is that in the absence of the 3% rule contractors would not have to account in their price tenders for the risk of ultimately having to pay the 3%.

(3) Increases in subcontract prices (decision, paragraphs 55 to 59 and the third subparagraph of paragraph 100)

136 The applicants state that the fact that the main contractor can be made to bear only the tendering costs incurred by the subcontractors who have submitted a price tender to him — to the exclusion therefore of the costs incurred by the subcontractors who have submitted price tenders to other main contractors — in no way conflicts with the general philosophy underlying the rules on tendering costs, in that it results in the allocation to each contract-awarding party of the transaction costs arising in connection with the latter's invitation to tender. A main contractor cannot be answerable for tendering costs for which he is in no way responsible. Moreover, this system of specific allocation makes it possible to ensure that subcontractors who, in connection with the same contract, have submitted tenders to several main contractors cannot receive double, or even triple, reimbursements.

137 They claim, finally, that the Commission has no grounds for saying that the rules on subcontracting lead to a systematic increase of 3% in price tenders in cases where the main contractor seeks to negotiate a price privately. They refer in that connection to their submissions regarding private contracts.

138 The Commission contends that the system established by the rules on subcontracting is incompatible with the general philosophy of the system of reimbursing tendering costs as described by the applicants. Where subcontracting is resorted to, not all the tendering costs arising in connection with a project are attributed to it since the subcontractors of a main contractor who are unsuccessful receive no

reimbursement and are therefore forced to include their tendering costs in their general costs. Consequently, in subsequent tendering procedures, the client has to bear not only the payments in respect of calculation costs but also the general costs arising from non-reimbursement of tendering costs incurred in respect of previous contracts.

139 The Commission adds that the system does in fact lead to an increase of 3% in price tenders, as in the case of private contracts.

Findings of the Court

140 First of all, the Court must again point out that the applicants' arguments concerning improvement of the transactional structure of the market are irrelevant in the context of a plea in law relating to infringement of Article 85(1) of the Treaty: those arguments will be considered in connection with the plea concerning infringement of Article 85(3) of the Treaty.

141 The rules provide for two types of price increases to be added uniformly to the price tenders of the various contractors taking part in the meeting, which will therefore be borne by the party awarding the contract. They are, first, the reimbursement of calculation expenses (decision, paragraphs 32, 33, 86 and 87) and, secondly, the contributions to the operating costs of the trade organizations (decision, paragraphs 34 to 37).

142 The applicants' objections relate essentially to the way in which the Commission analysed the former. The price tenders of the various contractors are increased by the same amount, which is deemed to represent the sum of the calculation costs incurred by all the contractors taking part in the meeting. Those price increases are

calculated by reference to the scales for the various sectors annexed to the UPR rules. Those scales, which fix the maximum reimbursements, are applied to the average of the blank figures or the estimated value of the project, as the case may be (for further details, see paragraphs 32 and 33 of the decision, which are not objected to by the applicants). The result of that system is that the contract awarder bears, at a standard rate, all the calculation costs to which his invitation to tender has given rise, including therefore the costs of unsuccessful tenderers. Its aim is to induce contract awarders to consider the benefits and disadvantages of inviting a greater or lesser number of contractors to tender. Those price increases, which are included in the price tender, are received by the successful tenderer, which must repay the bulk of them to the office, which then shares them amongst the various contractors and itself. That repayment occurs contract by contract in the case of the UPRR rules and by calendar year in the case of the UPRO rules. Moreover, this price-increase system has its counterpart in the case of private contracts and subcontract arrangements. In such cases, the contractor approached must forearm himself against the risk that the party awarding the contract or the main contractor may approach other contractors and the risk of having in such circumstances to repay a sum representing 3% of the contract to the office in order to cover the calculation costs of the contractors who are approached subsequently but who are unsuccessful (for further details, see paragraphs 55 to 59 of the decision).

143 The applicants, without challenging the decision's description of the price-increase system, maintain that it does not restrict competition since contractors participating in a tendering procedure can anticipate the amount of the reimbursement which they will receive in respect of their calculation costs. Thus, because of its flat-rate basis, the system is neutral for competition purposes since, knowing that they will receive a reimbursement exceeding the costs incurred, contractors who carry out their calculations most efficiently can reduce their price tender correspondingly. The Commission replies that the possibilities of anticipating the amounts involved are insufficient to neutralize the system and that, in any event, the joint fixing of such reimbursement constitutes fixing of part of the price.

144 The Court notes that the decision essentially criticizes the system of price increases in three respects. It involves, first, fixing of part of the price; secondly, a non-

competition clause regarding calculation costs (decision, third subparagraph of paragraph 86); and, thirdly, the system leads to an increase in price levels for contract awarders which invite a large number of contractors to tender and in respect of private contracts and subcontracts (decision, paragraphs 57, 87 and 100).

145 First, it must be pointed out that the applicants have advanced no argument to show that the joint fixing of price increases uniformly applied to the price tenders of the various contractors does not constitute fixing of a part of the price within the meaning of Article 85(1)(a) of the Treaty. The applicants' arguments concerning the possibility of anticipating the amount of price increases are entirely irrelevant in that respect and relate solely to the question whether the price-increase system has the effect of eliminating competition between contractors regarding their calculation costs, which is a separate issue.

146 It follows that the Commission was right to consider that the joint fixing of price increases constitutes fixing of a part of the price prohibited by Article 85(1)(a) of the Treaty.

147 Secondly, as regards the question whether such fixing of a part of the price results in the elimination of competition between contractors in relation to calculation costs, thereby favouring the least efficient contractors in that respect at the expense of the most efficient, it is ncessary to consider whether, as the applicants claim, the contractors are in a position to anticipate correctly the amount of the reimbursement they will receive in respect of calculation costs and, if so, whether, because of its flat-rate basis, the system is entirely neutral in so far as each contractor can reduce his price tender by an amount equal to the difference between the calculation costs actually incurred and the reimbursement due.

148 On that point it suffices to observe that there is no absolute certainty of being able correctly to anticipate the amount of the reimbursement. Indeed, it is impossible to

anticipate the amount with absolute accuracy since the price tender must be calculated at a time when certain parameters essential for such a forecast are still unknown (average of the blank figures, estimated value of the works, lowest price tender).

149 Under the UPRO rules, even minimally accurate forecasts are impossible by reason of the system of paying over compensation annually and the difficulty of predicting the number of points and the value thereof.

150 The case in which the best forecast seems possible is where, under the UPRR rules, the meeting leaves to the contractor who submitted the lowest blank figure the task of defining the price increases. In such cases, each contractor presumes that he will be the lowest bidder and will be able to determine the reimbursement himself. However, in such circumstances, the contractor will have to take account of the risk that he may not be the lowest bidder and that he may have to include in his price tender the amount determined by the lowest bidder, which might exceed or fall short of his own figure for calculation costs. Whilst it is true that each contractor could adjust his blank figure according to the amount of the reimbursement which he himself would determine, the fact remains that, for him to be able correctly to incorporate in his blank figure the amount of the reimbursement finally fixed, he must know the intentions in that regard of all his competitors, each of whom might be the lowest bidder and might therefore be prompted to determine the amount of the reimbursement on the basis of his own calculation costs. However, contractors cannot obtain such information, it being a matter of business secrecy for each of them.

151 A further consequence of this system may be to deprive the contract awarder of the benefit of a given contractor's greater efficiency regarding calculation costs. Thus, where contractor A, who calculates his costs very efficiently, proposes to fix the amount of compensation at 12 in the event of his being the lowest bidder with his blank figure of 105, whereas contractor B, who is less efficient, proposes to fix them as 20 in the event of his being the lowest bidder with his blank figure of 100, the following situation is liable to arise: B, proving to be the lowest bidder, decides

to fix the reimbursement of 20. Consequently, his price bid to the client will be 120, whereas A's tender will be 125. If competition had operated freely, A would have tendered 117 and B 120. The client thus has B rather than A as the lowest bidder as regards the definitive tender, and at a higher price than he would have obtained following undistorted competition. If A had known that B would fix the amount of the reimbursement at 20, he could have lowered his blank figure from 105 to 97, knowing that his total would still be the 117 which he needed, and would thus become the lowest bidder. However, A could only know the amount at which B would fix his reimbursement after unlawful concertation with B, a result which certainly does not indicate that the system is objectively transparent and allows perfect forecasting of the amount of the reimbursement, as claimed by the applicants.

152 It follows that, in all cases, competition between contractors regarding their calculation costs is restricted by the system of reimbursements for calculation costs and that the client is thus deprived of the benefits of such competition.

153 Thirdly, it is necessary to consider whether the system of reimbursing calculation costs, like the system of contributions to the operating costs of trade organizations, leads to a general increase in prices. In that respect, a distinction must be drawn between three areas: that of simultaneous tenders, that of private contracts and that of subcontracts.

154 As regards the first area, it is indisputable that the system involves a price increase for contract awarders who address their invitation to tender to a large number of contractors since they will have to bear the calculation costs of each of them. Similarly, this system deprives contract awarders of more advantageous tenders than the one from the entitled undertaking whenever the greater efficiency of a contractor regarding calculation costs more than compensates for his lesser efficiency in other spheres and that contractor, unaware of the extent of his greater efficiency, has been unable to pass it on entirely to his blank figure (see above, paragraph 151).

Finally, the contribution to the operating costs of the trade organization also leads to a price increase.

155 In the second and third areas, it is common ground that contractors tendering for a private contract or a subcontract are exposed to the risk of having to pay the SPO office a sum representing 3% of the contract price if either the party awarding the contract or the main contractor approaches others with a view to awarding the contract in question. Whilst it is true, as the applicants observe, that it is open to the awarding party or the main contractor to seek to persuade those contractors not to provide against that risk and not to incorporate it in the price, it must nevertheless be concluded that the system, as such, encourages contractors to pass that risk on to their contract awarders and forces the latter to undertake negotiations if they wish to avoid this. It follows that in this area too this system may result in a price increase.

156 It follows from the foregoing that the Commission was right to consider that the price-increase system constitutes fixing of part of the price, restricts competition between contractors regarding calculation costs and leads to an increase of prices which, in the case of the UPR rules, is larger if a contract awarder wishes to obtain competitive bids from a larger number of contractors.

157 The Court also observes that the applicants do not deny that, after the price increases have been added to the blank figures, the tender prices of contractors other than the entitled undertaking may be reduced provided that they do not affect the sequential order of the blank figures, so that the differences between the price tenders forwarded to the party which is to award the contract do not appear excessive. Nor do they deny that price tenders may be increased where preference has been granted in order to place the entitled undertaking in a privileged position or that partial prices or unitary prices may be fixed in order to ensure that the contract awarder does not award part-contracts for the works.

158 Such price manipulations undeniably constitute concerted price fixing within the meaning of Article 85(1)(a) of the Treaty since, as the applicants have repeatedly stated, it remains possible for the contract awarder to award the contract to a contractor other than the lowest bidder.

IV — Limitation of contractors' and contract awarders' freedom of negotiation

Arguments of the parties

(1) Preference (decision, paragraphs 30 and 85)

159 The applicants maintain that the preference system does not lead to marketing sharing since each tendering procedure must be regarded as an *ad hoc* market in which the identity of the tenderers is determined by the contract awarder. The contractors cannot share the works amongst themselves since none of them has any guarantee that he will ultimately be in competition with the contractor to which preference has been accorded and therefore be able to receive compensation from the latter.

160 They also state that, in principle, the unanimous agreement of all the participants in the meeting is required for preference to be granted. The granting of preference is thus rare (0.3% of cases in 1988).

161 Finally, the applicants draw attention to the fact that the beneficiary of the preference is required to submit a tender equivalent to the lowest tender, which increases the risks for him, those risks being commensurate with his interest in securing the contract for the project.

162 The Commission replies that the interest which a contractor has in a project must be reflected by the price which he bids and not by the obtaining of a right of preference from his competitors.

163 It states that the granting of preference to one of the tenderers constitutes sharing of the relevant market, since it is the competitors who decide amongst themselves who will be protected against competition from the others.

(2) Protection of the entitled undertaking (decision, paragraphs 39 to 41, 52 to 54 and 93 to 95).

164 The applicants, who do not object to the decision's theoretical description of the operation of the system, state that the decision takes no account of the objective of the system, which is the prevention of successive bargaining or 'playing-off', and incorrectly analyses the system's practical effects on competition.

165 As regards the prevention of successive bargaining, which occurs where a contract awarder plays off tenders which he has obtained simultaneously or successively from several contractors against each other in order to obtain a price reduction, the applicants state that protection against playing-off is desired by all those active in the market and is essential to combat the risk that economically unjustified prices might emerge where the demand side is stronger than the supply side, to prevent the effectiveness of the transactional structure of the market from being adversely affected by expectations of affecting the first price tenders and to prevent the objectiveness of tendering procedures from being impaired by the fact that, in the course of such bargaining, contract awarders might give priority to subjective preferences rather than to the lowest price. They claim that the system at issue goes no further than is necessary to deal with the problem of playing-off and state that it is less rigorous than national and Community legislation having the same aim.

166 Against that background, the applicants emphasize that protection of the entitled undertaking is the result of an objective procedure leading to automatic designation as the entitled undertaking of the lowest bidder and therefore, far from restricting competition, it merely changes the time at which competition takes place. They also claim that the Commission cannot criticize the rules for preventing the contract awarder from giving priority to considerations other than the price in his negotiations with contractors since the fact that the contract awarder asks for comparable tenders shows his intention to concentrate competition on the price.

167 They consider that the rules on non-simultaneous price tenders and partial price tenders are essential to ensure that the rules on simultaneous price tenders are not evaded by successive price tenders or partial price tenders being played off against each other.

168 As regards the practical consequences of the system, the applicants deny that the system creates a temporary monopoly for the entitled undertaking in respect of a given contract. First, the system does not operate in such a manner that, in the case of simultaneous tenders, the party awarding the contract cannot award it to a tenderer other than the entitled undertaking. Secondly, in the case of non-simultaneous tenders, the system does not prevent contractors tendering after the entitled undertaking from submitting a price tender but makes it conditional, in the case of calls for comparable tenders, either upon consent of the entitled undertaking or that of an *ad hoc* committee established to check that the tenders are not the result of successive bargaining. Such consent is in fact rarely withheld and cannot be withheld if the new tender is lower by a certain percentage than the tender of the entitled undertaking. That percentage, which differs according to the sector involved, reflects the advantage which might accrue to the contractor submitting the new tender if he was apprised of the old tender. It is clear from Hartelust's empirical study entitled 'Balance of demand and supply on the Netherlands building market during the period 1975-1979' that if the new tenders reflect an invitation which is not comparable to that reflected by the previous tenders relating to the tendering procedure, the entitled undertaking is never protected. Indeed, in the case of non-simultaneous tenders, the system results in protection for the entitled undertaking in only 10.5% of cases.

169 The Commission replies that the system of protection of the entitled undertaking leads not only to protection of contractors against 'haggling' and the severely damaging competition which would ensue, but also against all forms of competition since it excludes tenderers other than the entitled undertaking from negotiations with the contracting party or, at least, makes participation in those negotiations subject to consent from the entitled undertaking or a committee of contractors.

170 It considers that the applicants cannot compare the system of protection of the entitled undertaking to the legislative rules applicable in other Member States and those introduced by Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682, hereinafter 'Directive 71/305/EEC'). Those rules concern only public contracts and pursue an aim different from that of the rules at issue here since they seek to preserve equality of opportunity for contractors vis-à-vis the public authorities. Moreover, the rules at issue not only limit the freedom of negotiation of the contract awarder, as do the Community and national provisions, but also provide for exchange of information and mutual prior adjustment of price tenders. Finally, the Commission observes that the Netherlands legislation, too, provides a degree of protection for contractors in the negotiations following the submission of price tenders and that the system established by the rules was not therefore as necessary as the applicants claim.

171 The Commission also states that the applicants cannot claim that the protection of the entitled undertaking arises only after competition has taken place. In the case of simultaneous tenders, the procedure in which the entitled undertaking is designated is not as objective as the applicants claim, in particular where the contractors themselves judge the comparability of tenders. The Commission adds that the applicants' arguments are based on the misconception that a contract awarder who obtains several price tenders has, for that very reason, decided that he will base his choice on the price. A contract awarder may legitimately consider it necessary to negotiate with tenderers other than the lowest bidder and there is no justification for his being deprived of that possibility by a unilateral decision by the contractors.

172 In its view, the system of protection of the entitled undertaking is even less justifiable in the case of non-simultaneous price tenders. In such cases, protection of the entitled undertaking operates as soon as the contract awarder decides, after initially receiving only one price tender, to seek another one or others, that is to say at a time when competition has not yet taken place. However, the effect of such protection of the entitled undertaking is that the contractors subsequently invited to participate will be unable, if the call for tenders is comparable with that to which the entitled undertaking responded, to submit their tender to the contract awarder unless it is lower by a specified percentage than that of the entitled undertaking. That percentage exceeds by a considerable margin the percentage needed to protect the first tenderer against use of the content of his tender by subsequent tenderers.

173 The Commission also maintains that the system of fixing partial or unitary prices is entirely unnecessary to protect contractors from haggling since, contrary to the applicants' assertion, it is open to them to make their partial price tenders conditional upon the entirety of the works being awarded to them.

174 It observes that in any event the applicants have admitted that, in 10.5% of cases, the entitled undertaking retains its status thanks to the priority provided for in the rules on non-simultaneous price tenders. According to the Commission, that 10.5% represents those cases in which that status entitled the undertaking in question to prevent the submission of subsequent price tenders lower than its own.

175 The Commission emphasizes, with regard to transparency of the market, that the system established by the applicants renders the market entirely opaque for occasional clients. In such cases, it is the contractors who are in a position of strength in the market, not the reverse.

(3) Subcontracting (decision, paragraphs 55 to 59 and the third subparagraph of paragraph 100)

176 The applicants maintain that the rules on subcontracting are intended to ensure that main contractors do not haggle on the basis of the tenders received by them from different subcontractors. To that end, the general rules were adjusted to the specific nature of subcontracting, by moving from the client-tenderer relationship to the main contractor-subcontractor relationship.

177 The Commission refers to its submissions concerning protection of the entitled undertaking regarding the need to protect subcontractors against the risks of haggling.

Findings of the Court

178 The Court finds, first, that the applicants' arguments to the effect that protection of the entitled undertaking is necessary to avoid haggling, which would lead to ruinous competition, are irrelevant in the context of a plea concerning infringement of Article 85(1) of the Treaty; they will be examined in connection with the plea concerning infringement of Article 85(3) of the Treaty.

179 Where the price tenders of the various participants in the meeting have been adjudged comparable or made comparable by the meeting, the procedure provided for seeks to result in the designation of an entitled undertaking. It is necessary, first, to outline the aim of the protection enjoyed by the entitled undertaking. Only that undertaking is entitled to negotiate its tender with the contract awarder. The other tenderers are deprived of the right to contact the contract awarder to negotiate the price of services or other matters covered by the contract (Article 28 of the UPRR rules and Article 30 of the UPRO rules in conjunction with Article 5(2) of the Code of Honour). They can thus obtain the contract only by accepting it at the

price tendered by them and in accordance with the specifications. In the case of non-simultaneous price tenders, protection of the entitled undertaking also extends to subsequent price tenders (Article 28 of the UPRR rules, Article 30 of the UPRO rules and Article 5(3) of the Code of Honour). Contractors approached subsequently by a contract awarder are prohibited from submitting a price without the consent of the entitled undertaking or, in the event of refusal, the consent of an *ad hoc* committee appointed by the office concerned. That committee can give an affirmative decision only if the price proposed in the subsequent tender falls considerably short (by 2.5% to 10%, according to the sector concerned) of the price tendered by the entitled undertaking. That protection of the entitled undertaking lasts for two to five years (according to the value of the contract concerned).

180 The rules provide for three methods of designating the entitled undertaking. This will either be the lowest bidder at the meeting, or the contractor first approached in the case of non-simultaneous price tenders, or, finally, the contractor designated *a priori* as such by the meeting in accordance with the preference procedure.

181 As regards simultaneous price tenders where there is no withdrawal or grant of preference, the entitled undertaking is the contractor whose blank figure is lowest. The question arises, however, whether or not that protection, besides coming into being after an anti-competitive exchange of information has taken place and follows the fixing of parts of prices, itself likewise results in a restriction of competition.

182 The system of protecting the entitled undertaking is intended to grant the contractor who has submitted the lowest blank figure at the meeting (that is to say the lowest price tender from which the price increases have been subtracted) protection of his tender as regards its content and price against negotiations which might take place between the contract awarder and other members of the SPO, both those who took part in the meeting and those who did not, the former being precluded from negotiating their tenders whilst the latter must obtain the consent of the

entitled undertaking or an arbitration committee in order to be able to tender. To that end, the contractors taking part in the meeting start by agreeing between themselves the terms on which they will compete. Thus, they determine what should be the content of the various tenders so that they can provide equivalent alternatives for the contract awarder, from which a choice must be made thereafter only on the basis of the price.

183 It must be emphasized that, even if, at the meeting, the judgment as to the comparability of the tenders is as objective as possible, it is unacceptable for contractors unilaterally to substitute their judgment for that of the party awarding the contract, which must legitimately be entitled to bring to bear subjective preferences, such as the reputation of the contractor, his availability and his proximity, and to make a judgment itself, as future user, as to the equivalence, from its own point of view, of the various tenders.

184 In the case of non-simultaneous price tenders, it is important to note that the applicants merely state that it is essential to designate the first contractor approached as the entitled undertaking in order to ensure that the rules on simultaneous price tenders are not evaded, but that they do not deny in that connection that protection is granted without competition having taken place. It follows that the restriction of competition deriving from the protection enjoyed by the entitled undertaking in the case of non-simultaneous invitations to tender is not disputed, but that it will be necessary to consider whether that mechanism, as a necessary complement to the rules on simultaneous invitations to tender, fulfils the prescribed conditions for an exemption to be granted under Article 85(3) of the Treaty (see below, second plea in law).

185 As regards preference, this enables the person concerned to be designated as the entitled undertaking by the participants in the meeting, whatever the blank figure submitted by him, provided that he adopts as his definitive tender figure the lowest blank figure plus the applicable reimbursements. As the Commission points out (decision, paragraph 85), the preference mechanism constitutes a sharing of the

market in that it is the participants in the meeting who decide which of them is to benefit from protection as the entitled undertaking at a time when competition has not yet taken effect. By so doing, they share the market amongst themselves to the detriment of the freedom enjoyed by consumers to choose their suppliers (judgment of the Court of Justice in *Suiker Unie*, cited above, paragraph 180). In that regard, it is of little importance that the participants in the meeting do not compete with each other on a permanent and structured basis because of the specific features of each project. Indeed, there is absolutely no need to inquire into the motives of undertakings which share the market amongst themselves in order to determine whether such sharing of the market is caught by the prohibition laid down in Article 85(1) of the Treaty.

186 It may be true that the machinery for protecting the entitled undertaking does not entirely eliminate the freedom of choice of the contract awarder, who may still award the contract to a participant in the meeting other than the entitled undertaking (but without being able to negotiate his tender) or to another contractor (subject to the consent of the entitled undertaking or an arbitration committee if he is a member of the SPO). It must nevertheless be stated that such freedom of choice is extremely restricted by the protection conferred on the entitled undertaking since the other participants in the meeting can accept the contract only in the form contained in their price tenders. Thus, the contract awarder will be deprived of the right to exercise his preferences regarding content and price within each tender and will therefore be limited to choosing between tenders as a whole. Moreover, his possibility of selecting parts of the tender from the entitled undertaking will be severely limited since that undertaking knows that it is protected and is aware of the extent of the protection available to it in relation to SPO members since it knows the figures tendered by the other participants in the meeting and the scales applicable to non-simultaneous price tenders.

187 It follows that the protection afforded to the entitled undertaking restricts competition, and that it will be necessary to consider in relation to the second plea in law whether that protection, which is intended to safeguard contractors from haggling, should qualify for an exemption under Article 85(3) of the Treaty.

V — Behaviour of the SPO towards non-participating contractors (decision, paragraphs 49 to 51, 98 and 99)

Arguments of the parties

188 The applicants maintain that contractors are entirely free as to whether or not to join the SPO permanently or to be bound by its rules for a particular contract. No pressure is brought to bear on non-member contractors to join. However, they consider that, in order to ensure that certain contractors do not abuse the system by sometimes being bound by it and sometimes not, it is necessary to provide for penalties. Since the system of rules constitutes a single whole, it is necessary to ensure that no-one takes the benefits without bearing the burdens.

189 They recognize that the SPO offices have contacts with non-member contractors but, they say, these are occasional and cannot in any circumstances be regarded as constituting pressure. At most, certain non-members would from time to time be invited to take part in a meeting.

190 The applicants also reject the statement contained in the second subparagraph of paragraph 99 of the decision that, in order to operate in the Netherlands market, foreign undertakings must enter into an association with a Netherlands undertaking bound by the rules. That statement, they say, is contradicted by the figures produced by them regarding both the number of cooperation contracts signed and the number of contracts obtained by foreign undertakings which have not subscribed to the rules.

191 They concede that, at meetings, efforts are made to determine whether, besides the participants, third parties have also been invited to tender but they claim that that exchange of information does not restrict competition. The information exchanged is of little value and does not enable participants to adjust their conduct

accordingly, in particular in determining their blank figure, because the latter is dependent upon other economic factors.

192 The applicants deny that the rules enable SPO members to protect themselves effectively against competition from third parties. In arguing thus the Commission overlooks the fact that the members of the SPO none the less compete with each other and with third parties. They therefore deny that, with regard to the designation of an entitled undertaking or the fixing of reimbursements for calculation costs, the participants act differently according to whether or not external competitors present themselves. In particular, the figure of 80% quoted in paragraph 51 of the decision does not indicate that the participants in the meeting enjoy a greater likelihood of obtaining a contract than non-participants, still less that such greater likelihood is the result of collusion.

193 The applicants conclude that the accusations made by the Commission without having undertaken an inquiry are without foundation. As evidence of this, they state that if non-member contractors were really victims of the behaviour of SPO members, they would either have complained about such conduct or would have become members of the SPO. Moreover, it should not be forgotten that in most cases it is the person awarding the contract who, by issuing a restricted invitation to tender, determines the number and identity of the contractors which will compete for the project under tender.

194 The Commission replies that the system of penalties provided for in the rules may encourage non-members to be bound by the rules more or less permanently, even if the purpose of the system is to avoid abuse of the rules.

195 It observes that the applicants do not deny that the offices contact non-member undertakings and states that its inquiries have established that such contacts are not confined to asking those undertakings to be bound by the rules.

196 The Commission also claims that the freedom to comply or not comply with the rules is somewhat relative as far as foreign undertakings are concerned since in most cases they must operate through the intermediary of cooperation with a Netherlands undertaking to gain entry to the market, as is apparent from a recommendation from the German-Dutch Chamber of Commerce — and most of the contractors with which cooperation is possible are SPO members. The Commission considers that the figures produced by the applicants are biased since they relate only to formal associations of undertakings.

197 It refers again to the fact that the nature of the information exchanged at meetings places participants at an advantage over outside undertakings, as shown in the decision paragraphs 49 to 51, 98 and 99.

198 The Commission concludes that there is a restriction of competition since each outsider is confronted by the following dilemma: either to take action alone to attack the united front put up by the participants at the meeting or to participate in that united front and thereby restrict its opportunities to compete with other undertakings.

Findings of the Court

199 The Court considers that, quite apart from any occasional pressure brought to bear by the applicants on non-members to join the SPO, the system of rules in itself, conferring as it does on the participating undertakings considerable advantages, particularly in terms of exchange of information and reimbursement of calculation

costs, by its very existence constitutes pressure exerted on non-members to join the SPO (see paragraph 98 of the decision).

200 Moreover, by its nature, the system of rules comes closer to attaining its objectives if a large number of undertakings agree to be bound by them. The limitation of transaction costs and the effort to reduce haggling are more effective if the number of cases in which contracts are awarded to non-SPO members is reduced. Accordingly, the award of a contract to a non-member is regarded as a risk against which precautionary measures must be taken by payment of part of the price increases into a guarantee fund intended *inter alia* to cover that risk (decision, paragraph 43).

201 It follows that the conditions are fulfilled for pressure to be exerted on non-members to join the system. In those circumstances, the mere fact, admitted by the applicants, that the SPO offices contact non-member undertakings may be regarded as constituting pressure.

202 Moreover, it is common ground that the rules enable the meeting to decide *a priori* not to designate an entitled undertaking (see paragraphs 100, 101 and 117 above) and to apply price increases. Those possibilities enable the participants in the meeting to modify their conduct on the market according to the degree of external competition. They may thus participate in such competition with the advantage that they have, in advance, been reimbursed by the system for calculation costs, so that they are able in specific cases to allocate no calculation costs to the project for which they are competing with undertakings which are not members of the applicants. Similarly, where it is decided from the start not to designate an entitled undertaking, they are, if need be, able to participate in haggling which would bring them up against non-member undertakings and thereby increase the likelihood of one of them securing the contract.

203 It must also be observed that the fact that the applicants' members are constrained to adopt a defensive attitude in concert when confronted with outside competition confirms their interest in increasing their membership and therefore decreasing the number of outside competitors likely to make them give up the advantages of their membership of the applicants.

204 It follows from all the foregoing that the Commission was right to consider that the system of rules introduced in 1987 undermines the freedom of contractors to join or not join it, since 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.

205 It follows that the rules introduced in 1987 constitute an infringement of Article 85(1) of the Treaty.

206 As regards the previous rules, the Court notes that after finding that they differed from the rules introduced in 1987 in certain essential respects, such as the inclusion of a counter-notification procedure, the possibility of improving and amending prices and a procedure for granting preference, leading to an increase in the prices of all the participants, the Commission took the view in its decision (paragraphs 62 to 65) that the rules introduced in 1987 were, in essence, merely a continuation of the previous rules and that, consequently, its legal assessment of the former also applied *mutatis mutandis* to the latter (paragraph 114). The Commission also considers (decision, paragraph 138) that, as from 1 October 1980, the various previous rules were sufficiently standardized, since they were approved by the SPO (paragraphs 15, 62 and 138) and were also subject to a standard system of penalties established by the Code of Honour and made binding on SPO members by resolution of its General Assembly with effect from 1 October 1980 (paragraphs 12, 13 and 138).

207 The Court finds that, in response to those statements, the applicants maintain, first, that the regulations introduced in 1987 do not constitute a 'continuation of agreements of the same nature concluded earlier' but rather 'a departure' from them (application, paragraph 3.14 of the legal submissions) and, secondly, that the SPO never drew up the 'Burger- & Utiliteitsbouw Openbaar' UPR rules (governing residential and non-residential construction under the open procedure) which took effect on 1 January 1973 since the various associations continued to apply their own rules individually until 1987 (reply, p. 24).

208 It must be observed, first, that, far from contradicting paragraphs 62 and 65 of the decision, the arguments put forward by the applicants in fact constitute an admission that the Commission's analysis in those paragraphs is well founded. To show that the rules introduced in 1987 mark a 'departure' from the agreements of the same nature concluded previously, they state that those rules no longer include certain possibilities such as 'counter-notification' or 'improvements' or 'price corrections', the first of which, they concede, 'was liable to offer the contractors concerned the opportunity to engage in unlawful concertation' and, in the case of the second possibility, that it had been prohibited 'because it was applied not only in a disastrous competitive situation but also because, being intended to measure the phenomenon of price compression, that system inevitably incorporated a number of arbitrary factors' (application, paragraph 3.14 of the legal submissions). Thus, by stating that the rules introduced in 1987 are less restrictive of competition than the previous rules and that it is in that respect that they mark a departure from the former, the applicants have indicated that the former are a continuation of the latter.

209 Consequently, the Commission was right to consider that there was continuity between the previous rules and the rules introduced in 1987 and that, in certain respects, the former incorporated restrictions of competition at least as extensive as those contained in the latter.

210 It must be observed, secondly, that, contrary to the view which the applicants appear to take in their reply, the decision does not say that, as from 1 October 1980,

the various previous rules were adopted by the SPO. The decision merely states that, as from that date, those regulations had to be approved by the SPO, a statement not contradicted by the applicants, which have merely stated that until 1987 it was the associations which adopted those rules. It must also be observed, as the Commission points out, that in those respects the decision merely repeats the information provided to it by the applicants in the answers which they gave on 19 December 1988 in response to the requests for information sent to them by the Commission (rejoinder, annex 2). Moreover, it is important to note that the applicants have not denied that, as from 25 November 1980, Article 4 of the Besluit Algemene Bepalingen (Decision concerning geneal provisions) required the approval of the SPO for the adoption and implementation of the rules of the various applicants.

211 It must be observed, thirdly, that as from 1 October 1980, the various previous regulations were indeed subject to a system of standard penalties introduced by the Code of Honour and made binding on the SPO members by resolution of its General Assembly as from that date.

212 It follows that, in all the circumstances, it was proper for the decision not to undertake a separate analysis of the content of the previous rules and to consider that they restricted competition at least as much as the rules introduced in 1987, which represented a continuation of them. It is also correctly concluded in the decision that, as from 1 October 1980, the various rules had been sufficiently standardized by the system of SPO approval and the standard system of penalties to be regarded as a cohesive whole.

213 It follows from all the foregoing that the second limb of the first plea in law must be rejected.

Third limb: no effect on trade between Member States

Arguments of the parties

214 The applicants maintain that Article 85 of the Treaty is applicable to agreements limited to the territory of a single Member State only if they appreciably affect trade between Member States. This presupposes, first, that there is trade between the Member States in the market concerned (judgment of the Court of Justice in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869) and, secondly, that such trade is adversely and appreciably affected by the agreements in question (judgment of the Court of Justice in Case 320/87 *Ottung* v *Klee & Weilbach and Others* [1989] ECR 1177, paragraph 19). In the present case, none of those requirements is met and Article 85 of the Treaty is therefore not applicable.

215 As regards the first requirement, the applicants claim that it is apparent in particular from the study carried out by Mr Hartelust that trade between Member States is almost non-existent in the construction market, in terms both of numbers of sites and of value, and that it is wholly non-existent in specific product markets such as that of demolition or marking. In their reply, they add that the Commission cannot contend, by relying on the judgment of the Court of Justice in Case 19/77 *Miller* v *Commission* [1978] ECR 131, that regard must be had not only to existing trade but also to the future development of trade shaped by legislative amendments or other factors. They consider that the legislative amendments referred to by the Commission were unforeseeable when the applicants drew up and applied their respective rules and regulations.

216 As regards the second requirement, the applicants consider, essentially, that in the absence of trade the rules cannot adversely and appreciably affect trade, unless the Commission establishes that the absence of significant trade is attributable to the rules. In the present case, the Commission has not proved this for the simple reason that the absence of trade is attributable to structural factors, such as the limited geographical area of activity of undertakings, high transport costs, the role of the main contractor, problems connected with the diversity of (standardized)

specifications, culture, taste, languages, and so forth, and to the fact that it is the party awarding the contract which defines the number and quality of contractors it approaches. Moreover, the Commission has not shown that in the case of each of the previous sets of rules there has been international trade in each product market and in each of the geographical markets covered by those rules separately. The Commission may not here apply the 'bundle theory' where this presupposes that the various agreements operate in the same product market and the same geographical market. They consider that they have proved that each sector constitutes a separate market (see above, first limb of the plea). Finally, those rules should be seen in parallel with the Community legislation on public works contracts which, by fixing a threshold of ECU 5 million (which is significantly higher than the threshold of ECU 200 000 fixed by the directive on public supply contracts) indicates that only very large construction projects can give rise to substantial international trade.

217 They also claim that in any event the rules do not have the effect of partitioning the Netherlands market since they apply without distinction to foreign contractors and Dutch contractors, both categories being free to choose whether or not to be bound by them.

218 The applicants deny that the rules reduce recourse to open tendering procedures and thus operate to the detriment of foreign undertakings. Open tendering procedures are no less frequent in the Netherlands than elsewhere and foreigners take no greater part in them than in restricted procedures.

219 Furthermore, they consider that the effects which the rules allegedly have on demand in the Netherlands originating from clients established in other Member States do not come within the concept of trade between Member States within the meaning of Article 85 of the Treaty and that, in any event, the Commission's reasoning is based on the misconception that the rules bring about a uniform increase of prices in the Netherlands.

220 Finally, the applicants maintain that the thesis of the alleged competitive 'advantage' available to Dutch undertakings acting in the market of other Member States, resulting from the rules and more particularly from the system of allocating calculation costs, is disproved by the low profitability of building undertakings in the Netherlands and by the comparison undertaken by PRC BV Management Consultants ('PRC') between, on the one hand, the amount of general costs plus reimbursements in respect of calculation costs in the Netherlands and, on the other, the percentage applied in respect of general costs in four other Member States.

221 The Commission replies by referring to paragraphs 103 to 108 of the decision. It adds that, far from requiring that the regulations oust foreign contractors from the Netherlands market, the consistent case-law of the Court of Justice merely requires that the rules should be capable of appreciably affecting trade between Member States. Consequently, account should be taken not only of present inter-State trade but also of potential inter-State trade (judgment of the Court of Justice in *Miller* v *Commission*, cited above).

222 The Commission considers that it is entirely inappropriate to invoke the judgment of the Court of Justice in *Hugin* v *Commission*, cited above, since that case was concerned with adverse effects on competition which, far from affecting the entire territory of a Member State, covered only a small part or fell into a category entirely different from that of the present rules. Agreements covering the entire territory of a Member State, as in the present case, are inherently liable to give rise to partitioning of the national market in a manner conflicting with the economic interpenetration which the Treaty is designed to bring about (judgment of the Court of Justice in Case 8/72 *Vereniging van Cementhandelaren* v *Commission* [1972] ECR 977). Such agreements result in subdivision of the Common Market into several national markets characterized by artificially differentiated conditions (judgment of the Court of Justice in Case 246/86 *Belasco* v *Commission* [1989] ECR 2117). According to the Commission, it has the responsibility not of establishing that the rules oust foreign contractors from the Netherlands building market but rather, as it has demonstrated in the decision, that they radically affect conditions of competition under which foreign contractors must operate, both when they participate in the system and when they submit tenders as outsiders. It adds

that that type of effect on trade between Member States was covered by the statement of objections (paragraph 98 et seq.) and by the decision (paragraph 106 et seq.).

223 In the present case, it considers that trade between Member States is limited but exists and that Mr Hartelust's study is not significant because it takes no account of trade not covered by the rules, does not state whether it covers the minutes of all the meetings held under the rules and covers only a limited period from 1 January 1986 to 1 October 1988.

224 Moreover, it considers that, by means of the system of reimbursements for calculation costs, the rules have the effect of discouraging contract awarders from having recourse to open procedures. However, open procedures are the best way of allowing foreign contractors access to the Netherlands markets since, when they are used, the identity of the tenderers is not determined by the contract awarder. In support of this, the Commission refers to the complaint lodged by the municipality of Rotterdam.

225 The Commission infers from this that the rules are indeed liable to affect trade between Member States. It adds that it is pointless for the applicants to draw distinctions based on periods of time and the unified nature or otherwise of the rules, since the rules applied prior to 1 April 1987 were in even greater conflict with Article 85(1) of the Treaty than the rules at present in force. They had been drawn up and standardized under the auspices or control of the SPO and, as from 1980, were subject to a uniform system of penalties laid down by the Code of Honour. Consequently, it is important to determine not whether, in certain sectors, there was trade between the Member States but whether the rules, seen as a whole, are liable to affect trade between Member States (see above, first limb of the plea).

Findings of the Court

226 The Commission took the view that the rules affected trade between Member States in three different ways: by affecting supply from other Member States (paragraphs 103 to 111 of the decision), demand from other Member States (paragraph 112) and supply from participating undertakings in the other Member States (paragraph 113).

227 It will be recalled, first, that the condition concerning the effect on trade between the Member States, contained in Articles 85 and 86 of the Treaty, is intended to determine the scope of Community law in relation to that of the laws of the Member States (judgment of the Court of Justice in Joined Cases 56/64 and 58/64 *Consten & Grundig* v *Commission* [1966] ECR 299).

228 It is sufficient therefore if one of the three adverse effects on trade between the Member States referred to by the Commission in paragraphs 103 to 113 of the decision is established for Article 85 of the Treaty to be applicable to the rules adopted by the applicants.

229 It should also be borne in mind that it has been consistently held that 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 (judgments of the Court of Justice in *Vereniging van Cementhandelaren*, cited above, paragraph 29, and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22).

230 In the present case, it is undisputed that the rules introduced in 1987 apply throughout the Netherlands. As regards the previous rules, it should be borne in mind that they are similar to each other and that, as a whole, they cover the Netherlands in its entirety and the whole construction market (see paragraph 81 above).

Consequently, none of those sets of rules can be considered separately from the others with which they form a whole, particularly since those rules were the subject of standardized penalty procedures imposed by a single association as from 1980. The previous rules must thus be treated in the same way as the rules introduced in 1987 (see above, paragraphs 206 to 212). All those rules are, therefore, inherently liable to affect trade between the Member States since they affect the conditions of competition in the Netherlands by differentiating them artificially from those obtaining in other Member States and thus result in fragmentation of the Common Market.

231 In any event, the Court considers that the Commission was right to find that the rules are liable to have an appreciable impact on supply from other Member States and on supply from participating undertakings in the other Member States.

232 As regards the impact of the rules on supply from other Member States, it must be noted, as the Commission observes, that the applicants themselves stated that the system of reimbursements for calculation costs is intended in particular to encourage contract awarders to weigh the advantages and disadvantages of approaching a larger or smaller number of tenderers since, the transaction costs having become visible, the contract awarder knows that he will have to bear the burden of them. In general, such a system leads to higher transaction costs. In order to attain that objective, the system encourages contract awarders to focus their calls for tenders more narrowly and thus to invite a smaller number of tenderers, causing those seeking to award contracts to bear the calculation costs of all the tenderers they have approached. Since it is possible to limit the number of tenderers approached by contract awarders only under a restricted procedure, the system favours restricted rather than open procedures and, within the category of restricted procedures, those which are most restricted, as indicated in the complaint from the municipality of Rotterdam (paragraphs 19 and 34 of that complaint).

233 The Commission is right to consider that the open procedure provides the best opportunity for foreign contractors to penetrate the Netherlands market.

234 It follows that in that respect the rules are liable to have a direct or indirect effect on supply from the other Member States.

235 As the Commission rightly states, the applicants are not entitled to invoke the limited extent of trade between the Member States in seeking to reject that analysis since they do not contest the figures produced by the Commission in the decision which show that, although limited, there is indeed real trade between Member States. Thus, the applicants do not deny that about 150 undertakings established in other Member States comply, more or less permanently, with the UPR rules. Those undertakings are established mainly in Germany and Belgium and include all the largest German and Belgian undertakings, the others being French, Luxembourg or Italian undertakings. The Court of Justice has held that, 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 (judgment of the Court of Justice in *Miller* v *Commission,* cited above, paragraph 15). 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. Finally, as regards the appreciable nature of that effect, it must be noted, as the Commission observes, that the more limited the trade the greater is the likelihood that it will be affected by the restrictive arrangements.

236 The Court also considers that the applicants may not rely on the threshold of ECU 5 million laid down by Directive 71/305/EEC. As the Commission pointed out in its decision (paragraph 105), the aims pursued by Article 85 of the Treaty and by the directive differ too much for the threshold laid down by the latter to serve as a point of reference for the level at which Article 85 applies. It should be observed that the legal basis of that directive has no connection with Article 85 of the Treaty and that provision is not mentioned in its preamble. It cannot therefore be

contended that the threshold laid down in that directive is to guide the Commission in its application of Article 85 of the Treaty.

237 As regards the impact of the rules on supply from participating undertakings in the other Member States, it is indisputable that, when operating in relation to a given project outside the scope of the rules, as is the case outside the Netherlands, the member undertakings of the applicants enjoy advantages over non-member undertakings.

238 In that regard, the comparison made by the applicants is a general comparison, whereas the advantage available to Netherlands undertakings when operating abroad must be assessed case by case. It is undisputable that the system of allocating calculation costs, including the guarantee fund, enables the applicants' members not to include in their general costs the calculation costs incurred in respect of tenders where they have not been successful, whereas foreign contractors have to include those costs in their general costs. Thus, for a given contract, tendered for outside the Netherlands, the applicants' members have to include in their tender only the calculation costs generated by that contract, whereas the other contractors have to include part of the calculation costs incurred in respect of all the tenders in which they have participated unsuccessfully. Thus, they enjoy an artificial competitive advantage over competing undertakings which carry on the bulk of their business in other Member States. Trade between Member States is thereby affected.

239 The applicants cannot refute the probative force of those factors by referring to the low profit margins of Dutch construction undertakings, which, they claim, is apparent from a comparison between the amount of general costs plus reimbursements for calculation costs in the Netherlands and the percentage applied in respect of general costs in four other Member States. The low profitability of Netherlands undertakings may be attributed to numerous factors other than the system of allocating calculation costs.

240 It follows that the rules are liable appreciably to affect trade between Member States and that this limb of the plea must therefore be dismissed.

241 It follows from all the foregoing that the first plea cannot be upheld.

Second plea: infringement of Article 85(3) of the Treaty

First limb: failure to take account of the characteristics of the market and of the rules concerning the burden of proof

(1) The characteristics of the market

Arguments of the parties

242 The applicants claim that it is apparent from the judgment of the Court of Justice in Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraphs 14 and 15, that, although the Community competition rules apply fully to the Netherlands building sector, that certainly does not mean that Community competition law does not enable account to be taken of the particular features of certain areas of economic activity. It is for the Commission, within the scope of its power to grant exemptions under Article 85(3) of the Treaty from the prohibitions laid down in Article 85, to take account of the particular nature of various economic sectors and the of difficulties associated with those sectors. In the present case, they claim, the Commission failed to take account of the particular characteristics of the building sector, such as the fact that it typically comprises small and medium-sized undertakings, and the difficulties peculiar to the sector, which would have justified adoption of the notified rules, which are typically sectoral in character.

243 Among those characteristics, they draw attention in particular to the fact that each contract awarder defines his product and the product can therefore be used only once, the nature of the building business (there is an asymmetrical relationship between the size of the undertaking and the size of the site; there are problems of continuity and no economies of scale; the fact that, in a single product market, building undertakings are largely interchangeable; and the absence of an access threshold for small-scale operators), the fact that the price of the works must be fixed in advance, that the preparation of a tender involves high transaction costs and, finally, the fact that recourse to tendering procedures as a way of awarding contracts is liable to lead to economically unjustified prices.

244 The applicants maintain that those various characteristics lead to structural imbalances in the market between, on the one hand, the awarder of the building contract, for whom the market is entirely transparent and who is able to determine the identity of the undertakings which will have access to it and has the power to set the various tenders submitted to him against each other and, on the other hand, suppliers for whom the market is not transparent, who depend upon the choice made by awarders of building contracts and who must bear high transaction costs in order to enter the market. This structural imbalance leads to economically unjustified prices and ruinous competition.

245 According to the applicants, that structural imbalance between supply and demand, evidenced by numerous specialized studies, is particularly marked in the Netherlands, first because the main contractor is responsible to the contract awarder for the proper execution of the works, including those executed by subcontractors, and, secondly, because the Netherlands legislation does not contain the same rigorous prohibition as the legislation of other Member States whereby a contract awarder may not 'play off' the various contractors one against the other.

246 The applicants claim that the rules at issue are intended solely to correct that structural imbalance, essentially by reducing the transaction costs incurred in respect of tenders and preventing 'playing-off'. The small profit margins observed in the

Netherlands construction market support that analysis. That objective is common to all those involved in the market and the Netherlands authorities themselves, because if the prohibited rules did not exist there would either be severely damaging competition or secret agreements designed to rectify the imbalances.

247 In their reply, the applicants claim that none of the Commission's allegations concerning the operation of other markets in services or the building market in other Member States is founded on any analysis or investigation carried out by the Commission and that they are therefore unjustified. The Commission has, they claim, merely examined, in microeconomic terms, the extent to which the freedom of action of economic agents is restricted and has treated any restriction of freedom of action as if it were a restriction of competition, whereas it should have examined the rules in macroeconomic terms.

248 The Commission concedes that the characteristics of the construction sector must be taken into account in so far as they determine the economic and legal background against which the contested rules must be examined. However, the effect of those characteristics cannot be to remove those regulations wholly or partly from the scope of Article 85. In those circumstances, an abstract discussion of the characteristics of the market, as engaged in by the applicants, is irrelevant.

249 It contends that the construction sector in the Netherlands does not differ from other service sectors or the building sector in other Member States to such an extent that a considerably different approach should be taken in examining it in the light of Article 85 of the Treaty. Consequently, the fact that the market in the various sectors operates correctly in the absence of rules of the kind declared unlawful entirely undermines the view that the contested rules provide the requisite remedy for structural imbalances in the Netherlands building sector.

250 The Commission also refers to paragraphs 71 to 77 of the decision in which it has already answered the applicants' arguments.

251 It states in particular, in reply to the assertion that recourse to tendering procedures as a method of awarding contracts leads to economically unjustified prices, that there is no economically justified level of prices, since the overall cost price is different for each undertaking and varies according to the circumstances. In certain situations, it would in fact be economically justified to charge prices lower than the average cost in order to amortize fixed costs.

252 Finally, the Commission considers that it is not open to criticism for failing to take account of the macroeconomic aspect of the rules. In order to obtain an exemption, it is incumbent upon the applicants to establish, in particular, that the rules make a specific contribution to improving production or distribution or promoting technical or economic progress. In those circumstances, it is insufficient to invoke macroeconomic progress, which has certainly not been proved to be ascribable to the regulations.

Findings of the Court

253 The Court of Justice has held that 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), to take account of the particular nature of different branches of the economy and the problems peculiar to them (judgment of the Court of Justice in *Verband der Sachversicherer*, cited above, paragraph 15).

254 In the present case, the applicants object to the Commission's undertaking a micro-economic analysis of the rules when their aim was to rectify imbalances existing at macroeconomic level between supply and demand as a result of the characteristics of the undertakings operating in that sector and the characteristics of the products involved, and the shortcomings of the Netherlands legislation which imposes responsibility on the main contractor and does not facilitate effective action to counteract 'playing-off'.

255 The Court finds that, in its decision, the Commission noted the characteristics of the market described by the applicants (paragraphs 71 to 77) but considered that those characteristics did not justify an exemption (paragraphs 115 to 128). Their arguments concerning the characteristics of the market must therefore be taken into account when the Court examines the rejection of the applicant's application made under Article 85(3) of the Treaty for the rules at issue to be exempted.

256 It must also be pointed out that the Commission was right to refer — and in so doing was not contradicted by the applicants — to the fact that no rules similar to those at issue in these proceedings exist either in other service sectors having characteristics similar to those of the construction market or in the building sector in other Member States. The Commission was also right to reject the view, advanced by the applicants, that restrictive agreements are inevitable in the building industry. The assertion that, if an exemption is not granted to a notified agreement, other more restrictive arrangements will emerge, cannot be justification for exemption under Article 85(3) of the Treaty. Similarly, it is unacceptable for undertakings to counteract legislation which they consider excessively favourable to consumers by entering into restrictive arrangements intended to offset the advantages granted to consumers by that legislation, on the pretext that it has created an imbalance detrimental to them.

257 It follows from the foregoing that the applicants' arguments concerning inadequate consideration by the Commission of the characteristics of the market must be

rejected to the extent to which they are presented separately in respect of this limb of this plea in law.

(2) The burden of proof

Arguments of the parties

258 First, the applicants claim that in view of all the facts which they brought to the Commission's attention with a view to obtaining an exemption, the Commission was not entitled merely to reject their arguments outright and should have shown that an exemption was not economically justified. Accordingly, in their view, it should in particular have demonstrated that, without the rules, the Netherlands construction market would function better or else it should have indicated what aspects of the rules it considered acceptable.

259 They also maintain that the Commission should have discussed with them the advantages and disadvantages of the rules from the economic point of view instead of rejecting any economic justification outright. In the present case, the Commission did not satisfy its obligation under the case-law to assist actively in the granting of an exemption (judgment of the Court of Justice in *Consten & Grundig*, cited above).

260 The Commission replies that the Court of Justice has consistently held that it is incumbent first and foremost on the undertakings to convince it, on the basis of documentary evidence, that an exemption is justified. Such cooperation as undertakings may claim from the Commission consists in consideration of the arguments which the undertakings put to it in support of their application for an exemption (see the judgment in *Consten & Grundig*, cited above, at 347). That cooperation

does not mean that the Commission is under any obligation to put forward other solutions. *A fortiori* the Commission cannot be required to demonstrate that an exemption is not justified or to indicate what it regards as acceptable.

261 The Commission states that the rules form a single whole, as the applicants themselves have repeatedly emphasized. For that reason, it considers that, although certain aspects of the contested rules satisfied the conditions laid down by Article 85(3) of the Treaty, it could not exempt them separately. In those circumstances, there could be no question of a conditional exemption.

Findings of the Court

262 It is settled law that it is for undertakings seeking an exemption under Article 85(3) to establish, on the basis of documentary evidence, that an exemption is justified. Accordingly, the Commission cannot be criticized for failing to put forward alternative solutions or to indicate in what respects it would regard the grant of an exemption as justified (see the judgment of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 52). 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 the 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 (judgment of the Court of Justice in *Remia* v *Commission*, cited above, paragraphs 26 and 44).

263 It follows that it is incumbent on the applicants in this case to establish that the Commission committed an error of law or of fact by refusing to grant it an exemption under Article 85(3) of the Treaty.

264 In that connection, it must be emphasized that in the course of the administrative procedure the applicants stated repeatedly that the rules constituted a cohesive whole which should be granted an exemption as such. Accordingly, the Commission was right to confine itself, in its decision, to considering whether or not the two central elements of the regulations, the specific purpose of which is to correct the alleged macroeconomic imbalances in the market, namely protection of the entitled undertaking and reimbursement of calculation costs, satisfied the four conditions for the grant of an exemption laid down in Article 85(3) of the Treaty.

265 It follows that the first limb of the second plea in law must be dismissed.

Second limb: failure to observe the conditions for granting an exemption

266 The Court considers that it is appropriate to examine, first, whether the rules contribute to improving production or distribution of products or promoting technical or economic progress, whilst at the same time leaving users a fair share of the resulting profit and, secondly, whether the rules impose on the undertakings concerned restrictions which are not necessary for the attainment of those objectives and whether they enable such undertakings to eliminate competition in respect of a substantial part of the products concerned, in order to establish whether the Commission was right to refuse to grant an exemption, under Article 85(3) of the Treaty, for the rules in question.

267 It must first be borne in mind that the four conditions for granting an exemption under Article 85(3) of the Treaty are cumulative (see in particular the judgment in *Consten & Grundig*, cited above; and the judgment of the Court of First Instance in Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 110) and that therefore non-fulfilment of only one of those conditions will render it necessary to confirm the decision rejecting the application for exemption. Accordingly, the Court will consider more particularly whether the Commission was right to conclude that the rules did not leave users a fair share of

the benefit resulting from the rules and that the restriction of competition imposed by the rules on contractors was not necessary for the attainment of those objectives.

(1) The contribution of the rules to improvement of distribution of products or to promotion of technical or economic progress and the fair share of benefits left to the consumer

Arguments of the parties

268 As regards the contribution of the rules to improved distribution of products or to promotion of technical or economic progress, the applicants state that the contested rules have essentially two objectives: first, to counteract 'playing-off' induced by the structural weakness of supply as against demand, which might lead to ruinous competition, and, secondly, to improve the transactional structure of the market by allocating, as far as possible, the transaction costs to the project for which they were incurred. The machinery for reimbursing calculation costs set up for that purpose encourages parties awarding building contracts to weigh the advantages and disadvantages of approaching a greater or lesser number of tenderers and therefore better to target their calls for tenders, and also to weigh the advantages and disadvantages of more or less rigorous wording of the invitation to tender since, once the transaction costs have become visible, the contract awarder knows that he will have to bear them. Such a system, in their view, leads to a lower overall level of transaction costs and a fairer sharing of costs than a system in which the transaction costs imposed by contract awarders on contractors are allocated to the latter's general costs, which they blindly incorporate in all their prices, with the result that all awarders of contracts have to bear the high transaction costs for which only some of them are responsible. The aims of the rules are common to all those involved in the market and the Netherlands authorities themselves, since in the absence of the prohibited rules there would either be ruinous competition or secret agreements designed to rectify those imbalances.

269 They consider that the Commission committed an error by confining itself to considering the effects of the system of reimbursements of calculation costs in respect of each tendering procedure individually without taking account of the reduction in transaction costs and therefore of prices at macroeconomic level. The need to undertake a macroeconomic analysis is confirmed by scientific studies, which establish, first, that the system does not discourage awarders of contracts from organizing open tendering procedures — as confirmed by the fact that suspension of the system following the order of the President of the Court of First Instance of 16 July 1992 did not lead to an increase in procedures of that kind — and, secondly, that general costs, including tendering costs, are in several nearby Member States the same as, or higher than, general costs in the Netherlands, together with the reimbursements for calculation costs and contributions to the operating costs of the trade organizations.

270 According to the applicants, the way in which the Netherlands building market functions is evidence of the real beneficial effects of the rules in question on production and technical and economic progress. The economic analyses show, on a proportionally comparable basis, that the Netherlands building industry operates very effectively and that its productivity is among the fastest growing in Europe, whereas costs, prices and profit margins in the industry are among the lowest in Europe.

271 They maintain that the Commission misunderstood the nature of the mechanisms established by the rules in concluding that they did not satisfy the first condition for the grant of an exemption. They refer to the criticisms made by them in connection with the second limb of the first plea.

272 As regards the fair share of the resultant benefits for consumers, the applicants maintain that the Commission's misapplication of that condition is apparent from the fact that awarders of building contracts are satisfied with the way the market operates and that the only contract awarder which criticized it (the municipality of Rotterdam) is in favour of adjustments to the rules rather than outright prohibition of them. By its nature, the criterion of a 'fair share' is not a 'fixed' criterion, so that there are few cases in which positive or negative proof of it could be required.

It is precisely from that point of view that the factors just referred to are of particular importance. In their reply, the applicants state that, by contrast perhaps with individuals, large awarders of building contracts are interested not in maximum exploitation of the transactional structure of the market, which would yield them a short-term advantage, but in the existence of a healthy market. That is why they are unanimously in favour of the rules.

273 The applicants maintain that, contrary to the Commission's view, the PRC study showed that a system of reimbursements of calculation costs is certainly not less effective than a system whereby the costs incurred by an unsuccessful tenderer are charged to his general costs.

274 They also claim that the Commission overlooked the fact that, ultimately, the contract awarder also secures benefits from a tendering system which produces clear and unequivocal results. Moreover, the machinery for preventing tenderers from being played off against one another helps to open up the Netherlands market because it makes it more difficult for contract awarders to favour Dutch contractors at the expense of foreign contractors.

275 The applicants again refer to their submissions regarding the second limb of the first plea.

276 The applicants conclude that their whole analysis is confirmed by the fact that Netherlands contractors have low profit margins, showing that the benefits of their great productivity are fairly shared between contractors and contract awarders.

277 As regards the first condition, the Commission replies that it has already refuted the applicants' arguments concerning the content of the rules in connection with the second limb of the first plea.

278 It states that, having no right to examine the question of reimbursements for calculation costs, the contract awarder is unable, to use the applicants' phrase, 'effectively to weigh the advantages and disadvantages' of using one method or another for the award of contracts. Moreover, the scales attached to the UPR rules indicate only maximum levels and do not therefore allow clients to ascertain the extent of the transaction costs actually incurred.

279 The Commission also claims that the reimbursements of calculation costs may encourage contract awarders not to resort to open tendering procedures. In that connection, the fact, referred to by the applicants, that the order of the President of the Court of First Instance of 16 July 1992 did not result in an increased number of open tendering procedures is not significant, in view of the length of the period involved.

280 It also contends, with regard to the redistribution of reimbursements for calculation costs, that the difference between the amounts received by the contract awarder, on the one hand, and those paid over to the other contractors, on the other, results in strengthening of the position of those contractors who have obtained contracts as against those who have not.

281 The Commission adds that the PRC report does not illustrate how the system of reimbursements of calculation costs makes the tendering procedure more efficient, since that report deals with the level of general costs, which is dependent upon so many factors that it is impossible to draw any conclusion from it.

282 Moreover, it observes that the applicants have not shown that the favourable performance of the Netherlands building industry as a whole is attributable to the rules and rejects the view that the rules operate to the satisfaction of all parties concerned. In support of that view, it refers in particular to the complaint lodged by the municipality of Rotterdam and the intervention of Dennendael BV in the present proceedings.

283 As regards the second condition, the Commission considers that the fact that certain contract awarders are in favour of adjustments to the rules rather than outright prohibition of them is not a sufficient basis for stating that that condition is fulfilled. The intervention of Dennendael BV also shows that certain contract awarders are very critical of the rules, which entail substantial and unnecessary increases of costs for them.

284 It adds that the level of profit margins in the Netherlands building sector as a whole is dependent upon so many factors that it is impossible to draw any conclusions from it as to whether a fair share of the alleged benefits accrues to consumers.

285 For the rest, the Commission refers to its answer to the second limb of the first plea.

Findings of the Court

286 In view of the cumulative nature of the four conditions laid down by Article 85(3) of the Treaty for the grant of an exemption, the Court will focus its analysis more particularly on the condition concerning the fair share of benefits for consumers.

287 The arguments of the applicants and of the Commission are on different levels. The applicants base their arguments on a macroeconomic analysis of the advantages which, in their view, may arise from the rules. They consider, referring to macroeconomic analyses such as that carried out by PRC, that the performance of the Netherlands building industry, which charges very low prices and has very narrow profit margins, is evidence of the positive effect of the rules. They consider that that better performance is a consequence of the rules by reason in particular of the fact that the rules make it possible to prevent the formation in the Netherlands of 'underground cartels' of the kind found in other Member States of the Community. On the other hand, the Commission's arguments are in the microeconomic sphere in that they look at the situation through the eyes of individual awarders of building contracts and analyse the effects of the rules on their circumstances. It considers that that microeconomic approach is the only one possible since, unlike the applicants, it categorically rejects the view that underground cartels between contractors are inevitable in the building industry and that the rules have the merit of preventing such cartels. It also considers that the applicants have not successfully proved the existence of a link between the rules and the performance of the Netherlands building industry, in so far as that performance may be attributable to other factors.

288 In view of those differing approaches to the rules, which lead to divergent views as to whether they are eligible for an exemption under Article 85(3) of the Treaty, the review carried out by the Court 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, as previously held by the Court of Justice, 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 (see the judgment of the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62, and the judgment of the Court of First Instance in *CB and Europay*, cited above, paragraph 109).

289 In the present case, the Court must therefore establish whether the facts on which the Commission based its decision to reject the application for exemption are materially correct and whether the Commission committed any manifest error of

assessment in rejecting the macroeconomic approach proposed by the applicants and in adopting a microeconomic approach to the rules.

290 In relation to those issues, the Court finds, first, that the Commission was right to consider that it was inappropriate to take as the starting point for analysing the effects of the rules at issue the fact that without them even more serious infringements of Article 85(1) of the Treaty would be committed on the Netherlands building market and that it could reasonably take the view that the formation of underground cartels was not inevitable.

291 The Court finds, secondly, that the Commission was also right to consider that the applicants have not managed to prove, in particular by relying on the macroeconomic studies which they produced, that a causal link exists between the rules and the performance of the Netherlands building industry; if substantiated, that performance might be attributable to numerous other factors. Thus, it is apparent from the first PRC study (application, annex II, p. 13) that hourly productivity is very high in the Netherlands and that building materials are cheaper there than in neighbouring countries. Moreover, it is apparent from the study dated 22 January 1993 (annex 2 to the reply, pp. 22 to 24) that the best way of comparing the efficiency of the organization of the building process is probably to compare the transaction costs with the contractor's 'production costs'. However, that study shows that, from that point of view, the Netherlands market is not more efficient than the French market and is less efficient than the Belgian market, and in neither of those markets are there any rules similar to those at issue in the present proceedings.

292 In view of those two factors, the Commission, by taking note of the applicants' statement that, on the basis of the macroeconomic analysis presented by them, the rules had beneficial effects and by weighing their analysis against a microeconomic analysis based on specific examinations, tender by tender, of the practical effects of the rules on competition (decision, paragraphs 76 and 120 to 123), committed no manifest error of assessment.

293 It must be emphasized, in particular, that the correctnes of the Commission's approach is clear from, *inter alia*, the fact that the applicants have stated repeatedly that the machinery for protecting the entitled undertaking is intended to prevent prices from reaching an unjustified level, which indicates that the applicants themselves concede that that aspect of the rules is intended to maintain prices at a higher level than would result from competition unaffected by the rules. The benefit of the action to counteract 'playing-off', if it is assumed to be lawful, thus accrues to the contractors. Moreover, because of that system, the party having a building contract to award can negotiate only with the entitled undertaking, whereas if the rules did not exist it could have negotiated both with the entitled undertaking and with the other contractors participating in the meeting.

294 The applicants' response that such negotiations would necessarily lead to ruinous competition which would ultimately have adverse repercussions on contract awarders themselves is not right. As the Commission observed, it is impossible to distinguish between normal competition and ruinous competition. Potentially, any competition is ruinous for the least efficient undertakings. That is why, by taking action to counteract what they regard as ruinous competition, the applicants necessarily restrict competition and therefore deprive consumers of its benefits.

295 Similarly, the claimed limitation of transaction costs operates almost exclusively to the benefit of the contractors. By ensuring that their costs are borne by the contract awarder in their entirety, the system facilitates reduction of transaction costs which would otherwise have to be borne by the contractors, particularly where they are not awarded a contract. Consequently, a cost is transferred from the supply side to the demand side. Whilst it is true that such a transfer of costs is not entirely without economic justification, in so far as the extent of the transaction costs is linked in particular to the number of contractors invited to tender by the contract awarder, who is thus the only person able to limit them, such a limitation of transaction costs nevertheless presupposes that the contract awarder will limit the number of contractors he consults, which limits his choice and therefore limits competition. Even if that limitation may lead to a decrease in the contract awarder's transaction costs since he will have to examine a smaller number of tenders, that benefit is limited by comparison with the disadvantages which he must bear and the benefits obtained from that system by contractors.

296 Moreover, the benefit which contract awarders are deemed to derive from the fact that contractors no longer have to incorporate in their general costs the calculation costs which they had to bear in relation to all the contracts not awarded to them offsets the disadvantage of their having to bear the reimbursements for calculation costs only for those of them who regularly award a large number of contracts covered by the rules. A contract awarder who awards contracts only rarely must necessarily pay reimbursements in respect of calculation costs which considerably outweigh any benefit which he might obtain from the fact that, under the system, the successful tenderer was able to reduce his general costs and therefore the amount of his price tender. Moreover, a result of that system is that contract awarders who feel it necessary to approach a large number of contractors must necessarily pay for reimbursements of calculation costs which considerably exceed the costs which they would have had to bear if the system did not exist.

297 The Commission was right to consider that that system leads to fewer open tendering procedures (see paragraph 232 above) and that the period following the order of the President of the Court of First Instance was not of significant length.

298 Consequently, the system of reimbursements of calculation costs, even if conducive to overall reduction of transaction costs in the market, does not allow of that reduction to be shared fairly between contractors and contract awarders.

299 Contrary to the applicants' assertion, their view is not shared by all those in the market place. It is clear from the complaint which it submitted to the Commission that the municipality of Rotterdam opposes maintenance of the system of reimbursement of calculation costs as provided for by the rules. In particular, it insists that the amount of the reimbursements for calculation costs is excessive and that there is no justification for such reimbursements to be calculated not on the basis of the lowest blank figure but by reference to the average of blank figures submitted by the various contractors.

300 It is apparent from all the foregoing that the Commission was right to consider that, particularly by providing for reimbursements of calculation costs to be borne by contract awarders and for protection of the entitled undertaking against negotiations which the party awarding the contract might conduct with other contractors participating in the meeting, the rules do not let consumers have a fair share of such benefits as may accrue from them.

(2) The indispensability of the restrictions and the impossibility of eliminating competition

Arguments of the parties

301 As regards the rules notified, the applicants maintain that the restrictions of competition are essential to attain their objective, namely to counteract 'playing-off' and make the transactional structure of the market more efficient. They state that the Commission misapprehended the significance of the system for protecting the entitled undertaking and the system for reimbursing calculation costs, as well as the role of the guarantee fund. They consider it normal that the first system should operate only where tenders are comparable and that paragraph 125 of the decision is therefore incorrect. As regards the system for providing reimbursement, it is precisely its flat rate and comprehensive basis which enables competition to be promoted, unlike a system of reimbursement on an individual basis which, moreover, would be impracticable, contrary to the assertion in paragraph 126 of the decision. The rules on subcontracting likewise provide no support the Commission's view.

302 The applicants also state that they informed the Commission that they were prepared to discuss with it the need for the various provisions of the rules and that, in that connection, they submitted a number of suggestions for amendments concerning essential aspects of the system. In response to those proposals, the Commission let it be understood that it intended prohibiting the rules in their entirety, thus making any discussion of the indispensability of certain aspects of the rules

pointless. By refusing to discuss those proposals, the Commission committed an error of assessment regarding the indispenability of the restrictions of competition found to exist.

303 Rejecting the Commission's view, they argue that the suggestions for amendments proposed by the SPO can be dealt with in the present proceedings. In view of the circumstances of this case, the Commission's entire conduct in the administrative procedure should be reviewed by the Court, otherwise the applicants' rights of defence would be infringed. That is the only way of ensuring that the Court reviews the legality of the rejection of the amendments proposed by the SPO since the applicants are unable to institute proceedings under Article 173 of the Treaty against the various administrative letters rejecting those proposals (see the judgment of the Court of First Instance in Case T-116/89 *Vereniging Prodifarma and Others* v *Commission* [1990] ECR II-843).

304 The applicants add that, in view of the circumstances of this case, they cannot be criticized for failing to incorporate those amendments in the rules and failing formally to amend the notification in respect of the rules. The consequences of those amendments for the organization of the SPO and its staff were so wide-ranging that it was neither reasonable nor possible to draw up comprehensively amended UPR rules before having obtained the Commission's approval, at least in respect of their broad outlines. Moreover, the SPO expressly submitted those proposals to the Commission in the context of its notification of 13 January 1988, indicating that it was prepared to amend the rules notified in accordance with the proposals as soon as the Commission gave its go-ahead.

305 They go on to explain how their suggestions for amendments to the rules were capable of satisfying the requirements of Article 85(3) of the Treaty.

306 The applicants conclude that those amendments removed any — theoretical — possibility that contractors might distort competition.

307 The Commission replies, with respect to the rules notified, by referring to the content of the decision (paragraphs 124 to 128) and its rebuttal of the second limb of the present plea. It repeats in particular that a system in which all tenderers receive a reimbursement borne by the contract awarder does not contribute to the effectiveness of the tendering procedure. It adds that the payments made by the guarantee fund where the contract is awarded to an outsider provide tenderers that are members of the SPO with a mutual defence against outsiders.

308 It replies, with regard to the suggestions for amendments to the rules which were the subject of consultations with its staff, that those suggestions were not capable of meeting its objections to the rules. It was for that reason that they had been rejected by its officials.

309 The Commission adds that, since the applicants did not make the proposed amendments to the rules and likewise did not amend the notification relating to them, there was no reason for the Commission to examine the amendment proposals in its decision. Consequently, the decision relates solely to the rules as they stood when the decision was adopted and not to the suggestions for amendments made by the applicants. Accordingly, the proposed amendments are entirely irrelevant (see the judgment of the Court of First Instance in *Publishers Association*, cited above, paragraph 90). By so doing, the Commission did not deprive the applicants of any remedy against the rejection of their proposals for amendments since it would have been sufficient for them to incorporate the amendments in their rules or modify the notification for the Commission to be obliged to give a decision on them, failing which proceedings could be brought against it for failure to act (see the judgment of the Court of First Instance in Case T-23/90 *Peugeot* v *Commission* [1991] ECR II-653). Modification of the notification was essential because only agreements actually notified can be the subject of an exemption. It states that the applicants could have confined themselves to amending the notification without immediately implementing the proposed changes, if and to the extent to which their implementation came up against practical difficulties.

Findings of the Court

310 The Court finds — unnecessarily having regard to the fact that the rules do not let consumers have a fair share of the benefits — that the restrictions of competition brought about by the rules are likewise not indispensable in order to attain the aims which the applicants claim they have, namely to improve the transactional structure of the market by limiting transaction costs and to counteract 'playing-off', which could give rise to ruinous competition. The Commission was right to consider that the serious restrictions of competition which it had found were not indispensable in order to attain the rules' intended objectives.

311 In that connection, it must be observed, first of all, that the fact that the entire process culminating in the designation of an entitled undertaking takes place in the absence of the party having a contract to award does not in any respect seem indispensable for the attainment of the intended objectives. It is the awarding party itself which is best placed to reach a judgment, with the contractors, as to the comparability of their price tenders, so as to ensure that the information exchanged at the meeting does not affect competition, and to ensure that the prices tendered by the various contractors are not altered in order to increase the competitive advantage of some or reduce the competitive disadvantage of others.

312 Secondly, it must be observed that the fact that, under the rules on subcontracting, only subcontractors who have submitted a tender to the main contractor designated as successful tenderer receive reimbursement for calculation costs indicates that the applicants themselves do not consider that it is indispensable, in order to improve the transactional structure of the market, to allocate to each contract awarder all the calculation costs to which his invitation to tender gave rise. Moreover, the applicants have been unable to show that the amount of the reimbursements of calculation costs corresponds overall to the average costs actually incurred by contractors. Against that background, it must be observed that the various bases for the calculation of the reimbursements seem very high, as the municipality of

Rotterdam pointed out in its complaint. Moreover, the fact that the scales applied for calculating the reimbursement in respect of calculation costs are maximum values which are not always reached, whereas the contract awarder is not told which scale was applied and has no remedy against application of the maximum scale, shows that the rules do nothing to ensure that the reimbursement of calculation costs does not exceed what is necessary to cover the transaction costs of the various contractors.

313 As regards protection of the entitled undertaking, the Court observes that this takes place following concertation between the contractors wishing to submit tenders, a process from which the contract awarder is excluded and which substitutes joint decisions by the contractors alone for the choice preferred by the contract awarder.

314 It follows from the foregoing that the restrictions of competition contained in the rules notified by the applicants to the Commission are not indispensable for attainment of their intended objectives.

315 It follows that the grounds of challenge advanced by the applicants in that regard must be dismissed.

316 The Court also considers that the Commission was right not to make any finding in its decision concerning the suggestions for amendments proposed by the applicants in their discussions with the Commission between April 1991 and January 1992, since the applicants had neither withdrawn their first notification nor formally notified those amendments to the Commission. Consequently, the Commission was still under an obligation to give a decision on the rules as notified and, in

the absence of formal notification, had no power to give a decision on the compatibility of the proposed amendments with Article 85(3) of the Treaty.

317 It follows that the applicants cannot criticize the Commission for adopting a decision only on the rules as notified to it.

318 As the Commission has pointed out, that solution does not mean that the applicants have no way of obtaining a review of the conformity with Article 85(3) of the Treaty of the informal rejection by the Commission of their suggestions for amendments. If the applicants had wished to have that rejection reviewed by the Court, they needed only to make those changes to the rules and re-notify them or amend the notification. If the Commission had failed to give a ruling in response to those notifications, the applicants would have been able to compel it to give a ruling by bringing proceedings for failure to act (judgment of the Court of First Instance in *Peugeot* v *Commission*, cited above).

319 Nor can the applicants rely on the fact that immediate modification of the rules would have had excessively far-reaching consequences for their functioning and that they could not therefore undertake such a modification without any guarantee of obtaining an exemption from the Commission. In order for the Commission to be required to give a decision on the proposals for amendments submitted by the applicants, the latter do not necessarily have to bring them into force but need merely adopt them and notify them formally to the Commission.

320 It follows from the foregoing that, having regard to the cumulative nature of the four conditions for an exemption under Article 85(3) of the Treaty, the second limb of the second plea in law put forward by the applicants must be dismissed, it being unnecessary to consider whether the fourth condition is fulfilled.

Third limb: breach of the principles of proportionality and subsidiarity

Arguments of the parties

321 The applicants state that, by refusing to exempt the rules under Article 85(3) of the Treaty, the Commission contravened the principles of proportionality and subsidiarity.

322 As regards the principle of proportionality, they claim that, by refusing to grant an exemption for the rules and by prohibiting them outright, the Commission went further than was necessary to attain the objectives of the Treaty, to such an extent as to achieve a result contrary to those objectives, in view of the characteristics of the sector concerned. In support of that assertion, they refer to the views of the various economic agents in the market, which, they claim, all oppose outright prohibition of the rules. By adhering to an inflexible and abstract view of competition, precluding any measure regulating competition in a market, the Commission breached the principle of proportionality by virtue of which the Commission is required to promote 'efficient competition'. Furthermore, the Commission breached the principle of proportionality by not even considering the possibility of granting an exemption subject to conditions or an exemption for a limited period, subject to an obligation to draw up reports. The Commission also breached the principle of proportionality by not limiting its action to what is strictly necessary to ensure free access to the Netherlands building market for builders established in other Member States. The Commission should have acted with particular restraint in this case since only one national market is involved, for which the competition policy to be followed is closely linked with planning policy, an area outside the Commission's purview.

323 As regards the principle of subsidiarity, the applicants claim that by reason of their experience of the Netherlands building market the Netherlands authorities were much better placed than the Commission to apply competition law to the rules at

issue. They state that the Netherlands authorities cannot be criticized for failing to take action to uphold competition since they prohibited certain parts of the rules which they considered to be contrary to national competition law.

324 They add, finally, that it is for the Court to penalize breaches of the principle of subsidiarity and that in view of the fact that, according to the Commission itself, that principle existed by implication before being expressly incorporated in the second paragraph of Article 3b of the EC Treaty, the Commission cannot contend that a decision antedating the entry into force of the Treaty on European Union which introduced that provision cannot be reviewed in the light of that principle.

325 The Commission replies that, by the present plea, the applicants are challenging the expediency of the decision and that that plea is misplaced since its assessments in relation to Article 85(1) and (3) are matters of law.

326 As regards breach of the principle of subsidiarity, the Commission contends that, as matters stand at present, the principle of subsidiarity is not one of the general principles of law by reference to which the legality of Community measures antedating the entry into force of the Treaty on European Union must be assessed.

Findings of the Court

327 Since the Court has found that the Commission was right to consider that the notified rules did not fulfil the second and third conditions for the grant of an

exemption under Article 85(3) of the Treaty, there can be no question of any breach of the principle of proportionality, particularly since the applicants emphasized, during the administrative procedure and the procedure before the Court, that the rules constitute a single whole from which the various component parts cannot be artificially isolated.

328 Moreover, the arguments put forward by the applicants to challenge the expediency of the decision are, as the Commission points out, based on the — erroneous — view that all those active in the market favour maintenance of the rules, whereas both the municipality of Rotterdam and the consumers' organizations have expressed the view that they should be substantially modified in order to qualify for an exemption under Article 85(3) of the Treaty.

329 It follows from the foregoing that the applicants' complaint of breach of the principle of proportionality must be rejected.

330 As regards breach of the principle of subsidiarity, the Court finds that the second paragraph of Article 3b of the EC Treaty had not yet entered into force when the decision was adopted and that it is not to be endowed with retroactive effect.

331 It must also be noted that, contrary to the applicants' assertion, 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.

332 It follows that the applicants' complaint of breach of the principle of subsidiarity must be rejected.

333 It follows from all the foregoing that the applicants' second plea in law, alleging infringement of Article 85(3) of the Treaty, must be dismissed.

Third plea in law: infringement of Articles 4(2)(1) and 15(2) of Regulation No 17

First limb: absence of any infringement and immunity from fines

Arguments of the parties

334 The applicants state that they have demonstrated in connection with their first plea in law that they have not committed any infringement. They consider therefore that, if their plea is upheld, the fine imposed upon them should be cancelled.

335 They also submit that, by considering that the previous rules were subject to the obligation of notification laid down in Article 4(1) of Regulation No 17, the Commission infringed Article 4(2)(1) thereof. Since the rules are decisions of associations of undertakings, the requirement of notification should have been waived because the members of the association concerned all, with one exception (ZNAV), belong to the same Member State, no foreign contractor ever having been a member of any of those associations during the period concerned.

336 The applicants claim, in the alternative, that, if the criterion of participation in the rules should be adopted, as the Commission contends, no foreign contractor was a party to three sets of rules, at least during the period concerned, and that, as regards the others, the Commission has not established that the position was different, still less that it was different as regards the entire period.

337 They maintain that, in view of the applicability of Article 4(2) of Regulation No 17, the Commission had no right to object that previous rules were not notified. Indeed, it was reasonable for the applicants to consider that the lack of notification did not preclude the possibility of an exemption being granted. In order to justify fines under Article 4(2), the Commission should at least have shown that each of the applicants should have been aware for many years that the previous rules could never have qualified for exemptions. In their submission, it has failed to prove this.

338 The Commission first states that it has proved, to the required legal standard, that Article 85(1) of the Treaty has been infringed.

339 As regards the alleged infringement of Article 4(2)(1) of Regulation No 17, it contends that the applicants' arguments are irrelevant in so far as the fines relate to the period from 1 April 1987 to 13 January 1988.

340 The Commission adds that, even if it were assumed that the previous rules did not have to be notified, which, in its view, is not the case, Article 4(2)(1) of Regulation No 17 confers no immunity from fines since the previous rules could never have qualified for an exemption because they incorporated even more serious restrictions of competition than the UPR rules for which an exemption was also refused.

341 The Commission points out, finally, that the possibility of non-notification under Article 4(2)(1) of Regulation No 17 does not imply that no fine may be imposed in respect of the agreement or decision concerned.

Findings of the Court

342 The Court of Justice has held that 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 (judgment of the Court of Justice in Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 73 to 78).

343 Consequently, even if the previous rules were 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.

344 The Court also finds that the Commission was right to consider that the rules constituted an infringement of Article 85(1) of the Treaty.

345 It follows that this limb of the plea must be rejected.

Second limb: lack of intent or negligence

Arguments of the parties

346 The applicants observe that the Commission stated in the decision that they had committed infringements 'deliberately or, at the very least, through serious negligence', that is to say through what might be termed 'intentional negligence'. They observe that the amount of the fine was fixed on the basis of that assessment, even though there was no negligence, still less serious negligence. It was incumbent upon the Commission to demonstrate that they knew, or should have known, that the rules fell within the scope of Article 85(1) and could not be exempted under Article 85(3) of the Treaty. They submit that it is apparent from the first two pleas in law that, if there was an infringement, it was not a clear infringement and that failure to be aware of it did not constitute negligence.

347 They claim that various factors contributed to their enduring conviction that the rules were lawful: first, the Netherlands competition authorities always responded actively to the rules and their action was reflected in the Royal Decree of 29 December 1986, by which the UPR rules were again expressly endorsed specifically in relation to competition law; secondly, the specialists and economic agents with an interest in this sphere, who always examined the rules closely, likewise never expressed the slightest doubt as to the compatibility of the rules with Community competition law; certain specialists even expressed the view that the rules did not restrict competition; thirdly, the attitude of the various protagonists in the market, in particular on the demand side, comforted the applicants in their conviction; fourthly, the fact that the Commission raised no objections to the rules before 1987, although it had probably been aware of them for a long period because they were in the public domain and certainly since 1982, because the rules had been the subject of a request for a preliminary ruling from the Court of Justice in

Case 34/82 *Peters Bauunternehmung* v *ZNAV* [1983] ECR 987, contributed to the applicants' enduring conviction that the rules were in conformity with Community law. The applicants also cite a 1976 report of the Organization for Economic Co-operation and Development (OECD) specifically devoted to collusion in the building industry. In that report, of which the Commission could not have been unaware, one of the sets of rules antedating the UPR rules is commented on at length.

348 According to the applicants, the Commission's allegation that an infringement of extreme gravity had been committed is belied by the fact that it became apparent in the course of the administrative procedure that, for a long period, the Commission itself was not certain whether the European Community rules applied. Moreover, it is apparent from its defence that the Commission itself deliberately deferred commencement of an investigation by first contacting the Netherlands authorities.

349 They add that, in view of the fact that the Commission itself recognizes that the fines were imposed in respect of the previous rules, their reasoning applies with greater force; since the Commission was under an obligation to prove intention or serious negligence on the part of each of the associations responsible for the sectoral or regional rules, whereas those associations could not have been aware that the condition concerning an adverse impact on intra-Community trade was fulfilled since there was practically no international trade either in the geographical markets or in the product markets to which those rules related.

350 The Commission replies that it is immaterial whether or not the applicants' breach of the prohibition laid down in Article 85(1) of the Treaty was deliberate. What is important is whether the applicants knew, or should have known, that the rules restricted competition and might affect intra-Community trade (see the judgment of the Court of Justice in *Miller*, cited above; the judgment in Joined Cases 32/78,

36/78 to 87/78 *BMW and Others* v *Commission* [1979] ECR 2435; the judgment in Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369; *Stichting Sigarettenindustrie and Others* v *Commission*, cited above; and the judgment of the Court of First Instance in Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157). In the present case, it is difficult to see how the applicants could have been unaware that a system like the one at issue in these proceedings restricted competition.

351 It goes on to reject the various arguments put forward by the applicants to support their denial of serious negligence. First, the applicants wrongly give the impression that the rules were fully approved of by the public authorities in the Netherlands, whereas certain parts of the previous rules were declared non-binding by the 1986 Royal Decree of 29 December 1986 based on Article 10 of the Wet economische mededinging (Law on Economic Competition). Under the scheme of that provision, the fact that rules concerning competition are not declared non-binding implies at most that the public authorities consider that they are not contrary to the public interest. It certainly does not mean that the rules concerned do not restrict competition. Moreover, their effects on trade between Member States play no part in the application of that provision.

352 Secondly, it contends that the two specialists mentioned by the applicants took the view that the rules restricted competition. Moreover, the applicants could not have believed that the rules were not capable of affecting intra-Community trade merely because their application was limited to the territory of the Netherlands (see also in that connection the judgment of the Court of Justice in *Stichting Sigarettenindustrie and Others* v *Commission*, cited above, paragraph 65). Even if the Netherlands authorities had in any way given the impression that Article 85 was not applicable to the case, that would not have released the applicants from their responsibility.

353 The Commission states that if the applicants had actually assumed that the rules could qualify for an exemption under Article 85(3) of the Treaty, they would

have notified them. However, they did not do so until after the Commission had initiated its investigation.

354 It maintains that, since the previous rules had never been notified to it, the applicants cannot complain of lack of action on its part — it was not apprised either of the existence or of the content of all the sets of rules, which had never been made public. Since the judgment of the Court of Justice in *Peters Bauunternehmung* v *ZNAV*, cited above, was concerned with a question from the Hoge Raad der Nederlanden concerning the interpretation of Article 5(1) of the Brussels Convention in relation to the application of one of the sets of rules at issue, the competition law aspects were not touched upon.

355 The Commission concedes that it sent a request for information to the SPO in 1985 and that, after examining the replies, the Commission agreed with the SPO that it would carry out an investigation in April 1986. It also informed the public authorities in the Netherlands. In April 1986, the Ministry of Economic Affairs asked the Commission not to proceed with the planned investigation or, at least, to defer it because of the imminent adoption of the 1986 Royal Decree. The decree was promulgated on 29 December 1986 and the Commission again informed the Ministry of Economic Affairs, in March 1987, of its intention to carry out an investigation concerning the SPO. The investigation took place in June 1987 and was followed by an inspection at the premises of one of the applicants, in July 1987. In no circumstances could the applicants have taken the Commission's action to mean that it considered at that time that the contested rules did not fall within the scope of Article 85(1) of the Treaty. It adds that the applicants cannot invoke the fact that it did not exercise its power under Article 15(6) of Regulation No 17 since that provision could have led to the Commission's imposing heavier fines on them.

Findings of the Court

356 As the Commission points out, it is settled law that, in order for an infringement 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 Article 85 of the Treaty; 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 (see the judgment of the Court of Justice in Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-262, paragraph 29; see also the judgment of the Court of First Instance in *Dansk Pelsdyravlerforening* v *Commission*, cited above, paragraph 157).

357 In the present case, in view of the seriousness of the restrictions of competition resulting both from the rules introduced in 1987 (see above, paragraphs 116 to 123, 140 to 158, 178 to 187 and 199 to 205) and from the previous rules (see above, paragraphs 206 to 212), the applicants could not have been unaware that the agreements to which they were parties restricted competition.

358 Similarly, the applicants could not have been unaware that the rules introduced in 1987 and the previous rules were liable to affect trade between Member States. As associations of undertakings, which in turn were members of an association covering the entirety of the Netherlands, the applicants could not have been unaware that their rules, drawn up by them but approved by the latter association, formed part of a wider framework of rules covering the entire building industry in the Netherlands and that the cumulative effect of those rules was such as to affect trade between Member States (see above, paragraphs 226 to 240). In that connection, it should be noted that the Commission imposed no fine for the period over which the various previous rules were standardized under the auspices of the SPO and

were enforced by a uniform penalty system (see above, paragraph 206) or for the period in which the rules introduced in 1987 were not notified to the Commission.

359 In those circumstances, the applicants could have had no doubt that their rules came within the scope of Article 85(1) of the Treaty. The relatively benevolent attitude of the Netherlands authorities regarding the rules should have encouraged the applicants to notify the rules to the Commission with a view to obtaining an exemption under Article 85(3) of the Treaty and enjoying the immunity from fines available only to agreements which have been formally notified.

360 The applicants cannot criticize the Commission for not taking action against the rules at an earlier stage. The fact that the rules were public and had attracted numerous comments in the specialized press cannot place the Commission under any obligation to initiate a procedure under Article 85(1) of the Treaty in the absence of a formal complaint. In that respect too, the applicants' arguments amount to criticizing the Commission for failing to take action earlier whereas the applicants were entitled to notify their rules to the Commission in order to obtain an exemption and immunity from fines.

361 Accordingly, the Commission was right to conclude in paragraph 136 of the decision that the applicants' infringements were committed deliberately or at least through serious negligence and therefore to impose fines.

362 It follows from all the foregoing that the second limb of the third plea in law must be rejected.

Third limb: excessive fine

Arguments of the parties

363 In the further alternative, the applicants claim that the fines imposed are too high having regard to the seriousness and duration of the infringements and the ceilings laid down in Article 15(2) of Regulation No 17.

364 As regards the matter of seriousness, the applicants maintain that it is clear from all the pleas in law put forward by them that, whilst the Commission may have identified an infringement in the rules drawn up under the auspices of the SPO, that infringement was not as serious as alleged in the decision. In particular, they claim, first, that, this being the first instance of Commission action in the building industry, it should have decided not to impose fines, as it did for the same reason in Decision 92/521/EEC of 27 October 1992 relating to a proceeding undere Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 — Distribution of package tours during the 1990 World Cup, OJ 1992 L 326, p. 31, paragraph 125). They also consider that the Commission was wrong to treat as an aggravating factor the fact that the rules were not notified until 1988, particularly since, prior to 1987, notification was unnecessary by virtue of Article 4(2)(1) of Regulation No 17. They add that it is impossible, from a reading of the decision, to discover how the Commission took account of the attenuating circumstances which it purports to have considered. In their view, the fact that the fines were set at the upper limit gives the impression that the Commission took no account of attenuating circumstances.

365 As regards the duration of the alleged infringements, they maintain that if the Commission had taken action against the rules earlier, as it should have done since it was aware that they existed, the infringement would have been of shorter duration. The Commission should have taken account of its own inexplicably passive attitude when calculating the fines, the course followed by the Court of Justice in its judgment in Joined Cases 6/73 and 7/73 *Istituto Chemioterapico and Commercial Solvents* v *Commission* [1974] ECR 223. Moreover, they maintain that the

Commission adduced no evidence and undertook no investigation whatsoever regarding the period from 1980 to 1982, even though it took account of that period in calculating the amount of the fine.

366 The applicants also submit, in their reply, that the previous rules covered by points IV, V, VI and IX in annex 9 to the decision, had already been withdrawn before the period taken into account by the Commission in the contested decision, that is to say before 1980. Their inclusion in the present procedure was therefore improper.

367 As regards the calculation of the fines, the applicants maintain that the Commission exceeded the upper limit of 10% of the turnover achieved in the previous year by the various associations of undertakings and that it failed to differentiate those fines according to the various relevant markets.

368 Finally, comparing the amount of the fine which the Commission imposed on them with the fine imposed in its Decision 88/491/EEC of 26 July 1988 (OJ 1988 L 262, p. 27) in a proceeding pursuant to Article 85 of the Treaty (IV/31.379-Bloemenveilingen Alsmeer, OJ L 262, p. 27), in a case where rules were observed by more than 4 100 members and the applicability of Article 85 of the Treaty was more obvious than in the present case, the applicants complain that the Commission infringed the principle of equal treatment.

369 The Commission replies by referring, essentially, to paragraphs 136, 140 and 141 of the decision. It states that it did not treat the belated notification as an aggravating factor but indicated why it did not consider that the notification of the rules at issues constituted an attenuating factor, by contrast with the view taken by it in other cases. It adds that the applicants' reasoning overlooks the dissuasive effect that fines must have.

370 As regards the duration of the infringement, it repeats that it was unable to take action earlier because it was unaware of the content of the rules for the reasons set out above and that the applicants' reference to the judgment of the Court of Justice in the *Commercial Solvents* case is inappropriate. It adds, with regard to the period from 1980 to 1982, that it did not need to undertake a separate investigation because the applicants had not claimed that the situation was any different during that period.

371 The Commission also observes that, by claiming, in their reply, that various sets of previous rules had been withdrawn before 1980, the applicants are putting forward a new plea in law, which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance.

372 It adds, in the alternative, that it is untrue that those rules were withdrawn before 1980, as is apparent from the answers given by the applicants listed under paragraphs 3, 5, 6 and 26 in Article 4 of the decision between 12 and 16 December 1988.

373 The Commission considers that the infringements committed by the applicants display nothing new and that the fact that the decision represented its first intervention in the building industry was no reason for it not to impose a fine, otherwise any undertakings operating in sectors in which no Commission decision had yet been adopted could contravene the competition rules with impunity.

374 As regards the calculation of the fines, the Commission states that the applicants are wrong to consider that the upper limit of the fines must be determined according to their own turnover. It is clear from Article 15(2) of Regulation No 17 that it is the turnover of the members of the applicants which must be taken into account

for that purpose. In the present case, the Commission maintains that it kept well within the prescribed upper limits.

375 It considers that the fines cannot be described as high since their total amount represents less than 0.5% of the average annual value of the contracts concerned and therefore they fall considerably short of the fines generally imposed for infringements of this type.

376 Finally, the Commission considers that the applicants' reference to Decision 88/491 of 26 July 1988 in the Bloemenveilingen Alsmeer case is entirely irrelevant in view of the different nature and effects of the two infringements.

Findings of the Court

377 First, examination of the first plea in law shows that the infringement was indeed as serious as stated in the decision. In that connection, it must be emphasized that the fine relates to the previous rules for a period of six-and-a-half years and to the rules introduced in 1987 for nine-and-a-half months. It is important to have regard to the particular seriousness of the restrictions of competition inherent in the previous rules, particularly as regards the concerted action on prices mentioned in paragraph 64 of the decision. Since the Court has upheld that paragraph (see above, paragraphs 206 to 212), it must be taken into account in considering paragraph 140 of the decision, according to which 'the concerted action on prices and the assignment of contracts are among the most serious infringements prosecuted, prohibited and penalized by the Commission'.

378 It must next be observed that all the attenuating circumstances referred to by the applicants in their pleadings were taken into consideration in determining the

amount of the fine, as shown by paragraph 141 of the decision and indicated by the fact that the Commission imposed on the applicants a fine representing — and the Commission's figure has not been challenged by the applicants — only 0.5% of the average annual value of the contracts concerned.

379 It will be observed, however, that, important as they may be, particularly in so far as they relate to the public nature of the rules, those attenuating circumstances must not conceal the fact that the applicants did not exercise their right to notify the rules to the Commission with a view to obtaining a negative clearance or an exemption under Article 85(3) of the Treaty.

380 Furthermore, the applicants cannot criticize the Commission for failing to act earlier, since they had the means of constraining it to do so by notifying the rules to it. The circumstances which gave rise to the judgment of the Court of Justice of 6 March 1974 in the *Commercial Solvents* case, cited above, differed considerably from those of the present case since, as pointed out by the Commission, in that case it had received a complaint but had not acted upon it immediately. In the present case, the Commission received a complaint from the municipality of Rotterdam only after the applicants had notified the rules. This difference is important in that, where the Commission receives a complaint, it receives details of the conduct complained of, whereas in the present case the Commission received details of the rules only through notification of them.

381 It follows that the applicants' argument must be rejected.

382 As regards the fact that the Commission undertook no investigation in respect of the period 1980 to 1982, the Court upholds the Commission's objection that the applicants did not claim, either in the administrative procedure or in their pleadings before the Court, that the situation was different during that period.

383 As regards the withdrawal of the previous rules covered by points IV, V, VI and IX in annex 9 to the decision, the Court considers that the plea concerning them is new and must be declared inadmissible under Article 48(2) of its Rules of Procedure.

384 It must also be pointed out that, whilst the Commission was wrong to bring those rules within the scope of the present procedure, it did so as a result of errors made by certain applicants in their answers to the Commission's requests for information (see the answer of Aannemersvereniging van Boorondernemers en Buizenleggers of 12 December 1988, that of Aannemers Vereniging Haarlem-Bollenstreek of 16 December 1988, that of Aannemersvereniging Veluwe en Zuidelijke IJsselmeerpolders of 15 December 1988 and that of Utrechtse Aannemers Vereniging of 12 December 1988). They cannot therefore raise objections concerning a mistake prompted by their own mistakes.

385 Finally, the Court finds that the applicants are wrong in their assertion that the fine exceeds the upper limit laid down in Article 15(2) of Regulation No 17, namely 10% of the turnover achieved during the preceding business year. It must be borne in mind that 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 that 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 (judgment of the Court of Justice in Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 121) and of the dissuasive effect which such fines must have (judgment of the Court of First Instance in Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309). 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 (judgment of the Court of First Instance in *CB and Europay*, cited above, paragraphs 136 and 137).

386 It must also be emphasized that the applicants cannot rely on the fact that, in Decision 88/491 of 26 July 1988 given in the *Bloemenveiligen Alsmeer* case, the Commission imposed lower fines since in that case the nature of the infringement and its effects were, as pointed out by the Commission, entirely different.

387 It follows from the foregoing that this limb of the plea must be rejected.

388 Accordingly, the plea in law alleging infringement of Regulation No 17 must be dismissed.

Fourth plea in law: infringement of Article 190 of the Treaty

Arguments of the parties

389 The applicants claim that the Commission infringed its obligation to state the reasons for decisions it adopts. By virtue of that obligation, it should not only have reproduced in its decision the applicants' main defence submissions put forward in the administrative procedure but should also have replied in detail to each of those submissions. According to the judgment of the Court of First Instance in *SIV and Others* v *Commission*, cited above, paragraph 159, 'even if the Commission is not required to discuss in its decisions all the arguments raised by the undertakings ...

having regard to the arguments of the applicants ... the Commission ought to have examined more fully ... in order to show why the conclusions drawn by the applicants were groundless'.

390 They maintain that, in the present case, the Commission did not even indicate in its decision the main arguments put forward by them in their answer to the statement of the objections and at the administrative hearing.

391 The applicants also claim, in their reply, that in so far as it refers to the Code of Honour as such, to all the statutes of the SPO, and to all the previous rules, the operative part of the decision is not covered by the statement of the reasons on which it is based. In the case of the Code of Honour, they submit that, in so far as it finds that, with the exception of Article 10 thereof, the Code of Honour, as made binding on the members of the SPO by its decision of 3 June 1980, constitutes an infringement of Article 85(1) of the Treaty, Article 1(2) of the operative part of the contested decision is wider in scope than paragraph 1 of the grounds of the decision, which indicates that the proceeding concerns the SPO decision of 3 June 1980 making the Code of Honour and the annexes thereto binding on the undertakings belonging to its member organizations. Consequently, no reason is stated to support the finding that the Code of Honour as such constitutes an infringement.

392 As regards the statutes of the SPO, the applicants state that, in so far as it finds that the statutes of the SPO of 10 December 1963, as subsequently amended, constitute an infringement of Article 85(1) of the Treaty, Article 1(1) of the operative part of the decision is wider in scope than the grounds of the decision, which relate only to Article 3 of those statutes. However, most of the provisions of those statutes have no bearing on matters of competition and relate exclusively to the internal functioning of the SPO. They maintain that the Commission has confused the statutes of the SPO with the decisions based on them, which prompted the Commission to declare the SPO unlawful as such, without stating any reasons for doing so.

393 Finally, as regards the previous rules, they state that they are considerably more numerous than those mentioned in annex 9 to the decision and that, contrary to the purport of the decision, the 'Burger- & Utiliteitsbouw Openbaar' UPR rules were not drawn up by the SPO but by an individual association of contractors. They also criticize the Commission for making an all-embracing and undifferentiated judgment regarding all the previous rules, without taking account of their differences and specific features. Finally, they state that certain sets of previous rules were withdrawn before 1980.

394 The Commission replies that its decision gives an adequate statement of the reasons on which it is based and that it was under no obligation to produce specialist studies to refute those produced by the applicants, inasmuch as the latter were irrelevant.

395 As regards more particularly the grounds on which the decision rejects the application for exemption lodged by the applicants, it considers that to require it, as the applicants wish, to prove that the rules could not qualify for an exemption would amount to a reversal of the burden of proof.

396 The Commission also contends that the applicants' arguments disputing the finding that the Code of Honour as such, the statutes of the SPO as a whole and the previous rules are unlawful do not appear in that form in the application and are at least in part based on submissions not previously put forward. It considers that they therefore constitute a new plea in law, which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance. In the alternative, it contends that the reference in paragraph 1 of the decision to the decision of 3 June 1980 as the subject-matter of the proceeding, in that it makes the Code of Honour and the annexes thereto binding on the undertakings belonging to the member organizations of the SPO, can refer only to the Code of Honour as such, since the decision of 3 June 1980 has no independent signficance for competition law purposes.

397 As regards the statutes of the SPO, the Commission concedes that only Article 3 thereof raises a problem concerning competition law, the other provisions of those statutes having no independent significance in that regard. However, it considers that, in so far as those other provisions are directed towards enabling the SPO to achieve its objects, as defined in Article 3, they must be covered by the decision. It states that the decision is not intended to declare the SPO unlawful as such but only to the extent to which its object as an association is to restrict competition.

398 As regards the previous rules, the Commission states that it relied on the answers from the applicants to its requests for information in order to determine the number of sets of rules in existence and the role of the SPO in relation to the 'Burger-& Utiliteitsbouw Openbaar' UPR rules. It adds that it confined itself to a general reference to the previous rules in its decision because they are more severely restrictive of competition than the UPR rules. Finally, it again states that it is not true that certain sets of previous rules were withdrawn before 1980.

Findings of the Court

399 The Court does not consider that the Commission has infringed the obligation to state the reasons for decisions laid down in Article 190 of the Treaty. The Commission answered all the relevant arguments put forward by the applicants in the administrative procedure, regarding both the application of Article 85(1) of the Treaty and that of Article 85(3).

400 With more particular regard to Article 85(3), the Court considers that the Commission was right to focus its analysis of the contested rules on the protection of entitled undertakings and reimbursements for calculation costs. Those are two

central factors conducive to the attainment of the aims pursued by the rules, namely counteracting 'playing-off' and limitation of transaction costs. Since the applicants asserted throughout the administrative procedure that the rules formed a single whole and the Commission arrived at the conclusion that the two factors at the heart of that whole could not qualify for an exemption under Article 85(3) of the Treaty, it was no longer necessary for it to examine any advantages which might occasionally arise from any particular provision of the rules at issue.

401 As regards the lack of a statement of reasons for the Commission's rejection of the suggestions for amendments to the rules proposed by the applicants, suffice it to refer to the reasons given for rejection of the second limb of the second plea, from which it is apparent that the Commission was under no obligation to take a position concerning proposals for amendments which had not been notified to it.

402 Finally, the Court considers that by claiming, in their reply, that the operative part of the decision is not covered by the statement of reasons in so far as they refer to the Code of Honour as such, the statutes of the SPO in their entirety and all the previous rules, the applicants have put forward a new plea in law, which is inadmissible by virtue of Article 48(2) of the Rules of Procedure. Moreover, it must be borne in mind that the operative part must be read in the light of the statement of the reasons on which it is based and that Article 1(2) of the operative part of the contested decision is not intended to declare the SPO unlawful as such. Similarly, paragraph 1 of the decision, by referring to the 'SPO's decision of 3 June 1980 making binding on the undertakings belonging to its member organizations the *Erecode voor ondernemers in het Bouwbedrijf* and the annexes thereto' did not refer to the decision of 3 June 1980 as such but to the Code of Honour which was made binding by that decision, and the same applies to the operative part of the contested decision.

403 Finally, the Court considers that the Commission was right to confine itself to a general reference in its decision to the previous rules. It states that the previous

rules had the same object as the rules introduced in 1987 and that, in so far as they differed from the latter, they restricted competition at least to the same extent (decision, paragraphs 62 to 65 and 114; see above, paragraphs 206 to 212).

404 It must be observed that, during the administrative procedure, the applicants put forward no specific arguments to show that the previous rules differed in fundamental respects from the rules introduced in 1987 or that they were less restrictive of competition than the latter.

405 Consequently, the Commission was likewise entitled, in dealing with the previous rules, to confine itself to referring essentially to the grounds of the decision concerning the rules introduced in 1987.

406 It follows that this plea in law must be dismissed.

Fifth plea in law: infringement of the rights of the defence

Arguments of the parties

407 In their reply, the applicants claim, essentially, that the Commission infringed the rights of the defence, first by considering that the Code of Honour constituted an infringement of Article 85(1) of the Treaty, whereas the Code of Honour was not, as such, dealt with in the administrative procedure (reply, p. 19) since it related

solely to the SPO binding decision of 3 June 1980, making the Code of Honour binding on the members of the associations belonging to the SPO and, secondly, by relying on 'leading questions' put to foreign contractors concerning the reasons for their membership of the SPO and concluding as a result, in the decision, that the contested measures affected trade between Member States.

408 The Commission replies that that assertion constitutes a new plea in law which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance. In the alternative, it rejects that assertion.

Findings of the Court

409 The Court considers that the applicants' allegation as to infringement of their rights of defence constitutes a new plea in law which must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure and that it is, in any event, unfounded.

410 It must be emphasized that, at the hearing, the applicants did not contradict the statement made by the Commission in its rejoinder to the effect that its objections to the Code of Honour had been dealt with in paragraphs 18, 33 to 35, 41, 42, 44 and 46 to 48 of the statement of objections. Moreover, the Commission did not rely on the answers to the questions criticized by the applicants in declaring that the measures at issue affected trade between Member States.

411 It follows from all the foregoing that the application must be dismissed.

Costs

412 Under Article 87(2) of the Rules of Procedure, the unsuccessful parrty is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs jointly and severally, including the costs of the application for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1) Dismisses the application;

2) Orders the applicants jointly and severally to pay the costs, including those relating to the application for interim measures.

Schintgen Kirschner Vesterdorf

Lenaerts Bellamy

Delivered in open court in Luxembourg on 21 February 1995.

H. Jung R. Schintgen

Registrar President

Summary