II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(Only the Dutch text is authentic)

(92/204/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the application for negative clearance and the notification seeking exemption, presented pursuant to Articles 2 and 4 of Regulation No 17 on 13 January 1988 by the association Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid, Amersfoort, in respect of the *Uniforme Prijsregelende Reglementen* of 9 October 1986 issued by that association and the *Erecode voor ondernemers in het Bouwbedrijf*, which was made binding on the undertakings belonging to its member organizations by a decision taken by the association on 3 June 1980,

Having regard to the complaint lodged by the municipality of Rotterdam, on 26 July 1989, against the abovementioned association in respect of those rules and regulations,

Having regard to the Commission's decision of 7 November 1989 to initiate proceedings in the case,

Having given the parties concerned the opportunity of being heard on the matters to which the Commission has taken objection and to make known any other observations they might have in accordance with Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

(1) This proceeding relates to:

— the Statutes of the Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (hereinafter referred to as the 'SPO'),

— the decisions adopted on 9 October 1986 by the SPO and entitled Uniforme Prijsregelende Reglementen and the annexes thereto (hereinafter referred to as the 'UPR rules'), brought into force on 1 April 1987 and amended on 23 June 1988,

— the similar decisions adopted between 1967 and 1979 by each of the 29 member organizations of the SPO and approved by the SPO, which were superseded by the UPR rules,

— 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 (hereinafter referred to as the 'Code of Honour'), which has remained in force since then.

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No 127, 20. 8. 1963, p. 2268/63.

(2) The SPO notified the UPR rules and the Code of Honour on 13 January 1988 (date of registration). The notification was supplemented by a report, registered on 19 July 1989.

On 26 July 1989, the municipality of Rotterdam lodged a complaint relating to, *inter alia,* the abovementioned rules and regulations.

A. THE ASSOCIATIONS OF UNDERTAKINGS CONCERNED

(3) The SPO was set up in 1963. The object of the association, 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'. The means to be employed in order to achieve this objective include SPO decisions which are directly binding on undertakings belonging to member associations and the appropriate implementation and monitoring of compliance with such decisions (SPO Statutes, Article 4).

(4) Membership of the SPO is open only to associations of undertakings in the building and construction industry having legal personality and having as their sole object the achievement of objectives consistent with the object of the SPO (SPO Statutes, Article 5). The members are at present 27 associations and one foundation. The list of the member organizations of the SPO is set out in Annex No 2.

With a few exceptions, according to the Statutes of each of the member organizations, all building and construction undertakings, regardless of the place of their establishment, may become members of the SPO.

The 28 member organizations of the SPO include more than 4 000 building and construction undertakings established in the Netherlands. One other member organization, to which this Decision is also addressed, withdrew on 1 January 1989. At the time when the Statement of Objections was sent, it was in the process of liquidation.

B. THE DECISIONS REGULATING PRICES AND COMPETITION

1. The uniform price-regulating rules (UPR) enacted by the SPO on 9 October 1986

(5) On 9 October 1986, the General Assembly of the SPO adopted a 'binding decision', under which, on the one hand, it adopted the text of the UPR rules and the annexes thereto with effect from 1 April 1987 and, on the other, made the UPR rules binding on all the member undertakings of its member organizations.

Under another 'binding decision', which was adopted on 23 June 1988 and entered into effect on 1 July 1988, the SPO amended the UPR rules.

(6) There are two sets of UPR rules — one relating to the tendering of prices in response to an invitation to tender under the restricted procedure (hereinafter referred to as the 'UPRR rules') and the other relating to the tendering of prices in response to invitations to tender under the open procedure (hereinafter referred to as the 'UPRO rules').

The UPR rules apply to all building and construction works to be carried out in the Netherlands and falling within one of the following building and construction sectors:

(a) *the building sector* comprises the building, maintenance, restoration etc. of residential and non-residential buildings;

(b) *the drilling, drainage, pipe work and cable laying sector* comprises activities such as vertical drilling (wells) and horizontal digging (road or rail tunnels), the laying of pipes for the carriage of substances such as gas and water (excluding the construction of sewers) and the laying of cables (including all activities relating to cable television);

(c) *the earthworks, road construction and planting sector* comprises activities such as the construction and maintenance of dykes, sewerage systems, roads and highways (including the supply of asphalt), and parks (sport or recreational), excluding planting work ordered by private persons;

(d) *the road marking sector* comprises only the marking of roads and highways;

(e) *the demolition sector;*

(f) *the water-engineering works sector* comprises activities such as the building and maintenance of viaducts, tunnels, dams, locks, bridges, sewerage and other water purification installations, embankments etc. (excluding dredging).

(7) The two sets of rules have the same structure and contain very precise and detailed provisions concerning, on the one hand, the obligations incumbent on undertakings belonging to the SPO and, on the other, the operating conditions of the UPR system.

Thus, the object of the UPR rules is to organize a system of reciprocal information and coordination between the building and construction undertakings participating in tenders for building and construction contracts, the aim being in particular to increase the tender prices by certain amounts to cover calculation costs and trade and organizational levies and to protect the 'entitled' undertaking.

Essentially, the two sets of rules differ only in the methods of allocating the amount of the compensation for calculation expenses which the participating undertakings will ultimately receive.

(8) The following are annexed to the UPR rules:

— a regulation concerning non-simultaneous tenders,

— a regulation concerning tenders for subcontracted work,

— a regulation setting up the 'guarantee fund' and governing its operation,

— a regulation concerning the responsibility of the 'offices' which administer the implementation of the UPR rules,

— an annex setting out the sectoral and regional authority of the 'offices',

— an annex setting out the table of the amounts of reimbursement for calculation expenses,

— an annex on the points table of the 'calculation cash office'.

(9) The SPO has entrusted the implementation of all the rules and regulations, known as the 'institutionalized regulation of prices and competition' to eight approved 'offices', namely private limited liability companies all of whose shares are held, directly or indirectly, by the SPO member organizations (with the exception of two of the member associations). The operation of the offices is controlled by the SPO.

The eight offices are the following:

— Bureau Burger- en Utiliteitsbouw Noord Nederland BV, Leeuwarden,

— Centraal Bureau Aannemersverenigingen Holland Zuid BV, Rotterdam,

— Centraal Bureau Prijsregeling Boringen Kabels en Leidingen BV, Soest,

— Centraal Bureau Prijsregeling Waterbouw BV, Utrecht,

— Prijsregeling Midden Nederland BV, Utrecht,

— Sponwest BV, Amsterdam,

— WAC Centraal Bureau BV, Zeist,

— Zuid Nederlandse Aannemersvereniging Centraal Bureau BV, Heeze.

(10) The authority of each office is limited either by region of the country or by sector of the building and construction industry, as indicated in recital 6 above.

The division into sectors and regions also exists in the SPO member organizations, some of which include building and construction undertakings that operate in several of the sectors mentioned.

(11) Participation in the UPR system is not reserved exclusively to the some 4 200 undertakings which are members of the SPO member organizations. Other undertakings are entitled to accede to the rules, on a case-by-case and voluntary basis. The number of undertakings in this category, shown in the list of participants which the offices have supplied, is around 3 000 (of which nearly 150 undertakings are established in other Member States of the European Communities).

Although the UPR rules, like the previous rules and regulations, provide for voluntary accession on a case-by-case basis, the accession of an undertaking which is not a member of an SPO member organization is in point of fact permanent. An undertaking operating on the building and construction market in the Netherlands, sometimes within the SPO and sometimes outside it, runs the risk of being excluded from the rights and benefits of the system on the grounds of 'arbitrary conduct' (Article 19 UPRR, Article 21 UPRO) or of being excluded from the SPO organization (Article 4 UPR) on the grounds of 'inconsistent conduct' (see reply by the SPO to the formal requests for information sent on 10 August and 14 November 1988).

2. The Code of Honour

(12) In the event of infringement of the UPR rules, a series of measures is provided for, in the UPR rules themselves and in the Statutes of the member organizations. In addition, infringement of the UPR rules constitutes an infringement of the Code of Honour (Article 29 UPRR and Article 31 UPRO in conjunction with Article 9 of the Code of Honour), which was adopted by the SPO General Assembly on 3 June 1980. At the same time, by a decision which became effective as from 1 October 1980, the SPO General Assembly made the Code binding on the undertakings participating in the SPO. The Code of Honour contains both material provisions (such as the obligation to notify an intention to tender a price and, in the case of non-simultaneous tenders, to participate in the meeting within the SPO, and also the definition of the protection of the entitled undertaking) and rules concerning sanctions and the procedure in the event of infringements.

(13) The Code of Honour is covered by this proceeding in so far as it plays a specific role, on the one hand, in the control of compliance with the obligations deriving from the UPR rules (see recitals 47 and 48 below) and, on the other, in the mutual coordination within the SPO organization in the event of the application of the rules concerning non-simultaneous tenders (see recitals 52 to 54 below). Article 10 of the Code of Honour does not play any role in this context and, for that reason, is outside the scope of this proceeding.

3. Supplementary regulations

(14) Subject to approval by the SPO, the member organizations may adopt supplementary regulations additional to the UPR rules as was previously also the case with similar earlier rules and regulations.

Some member organizations have adopted such regulations, such as those relating to the destination of a specified part of the price increases, cooperation between members and non-members of the SPO organization, and the notification of intended tenders for foreign building and construction works (the latter two regulations were abolished during 1988).

These supplementary regulations are not examined as such in this Decision in so far as their importance remains incidental to the main object of the proceeding.

4. Rules and regulations previous to the UPR rules

(15) Before 1 April 1987, when the current UPR rules came into effect, the SPO member organizations applied their own price regulating rules. The implementation of such rules was ensured, directly or indirectly, by each member organization.

The first association to adopt rules and regulations of this nature was the Zuid Nederlandse Aannemersvereniging (ZNAV) in 1952. Subsequently, the other sectoral/regional associations introduced similar rules and regulations.

In 1969, most of these associations acceded to the SPO. In the period from 1973 to 1979, the associations replaced most of their initial rules and regulations by standard regulations approved by the SPO.

(16) The UPR rules adopted by the SPO on 9 October 1986 and effective as from 1 April 1987 replaced such earlier standardized rules and regulations which, consequently, ceased to be applied.

(17) Because of the adoption of the UPR rules currently in force, three associations of building and construction undertakings withdrew from the SPO. These were, on the one hand, two associations of undertakings operating in the dredging sector (the UPR rules do not cover this sector), which withdrew on 1 January 1987, and, on the other, the NAC association (Nederlandse Aannemers Combinatie), which had performed, for building and construction undertakings operating on a national scale, certain functions currently dealt with solely by the offices and which withdrew on 1 January 1989. The two associations in the dredging sector apply their own price regulating rules. The NAC was in the process of liquidation when the Statement of Objections was sent.

C. THE MARKET AND THE PRODUCT

(18) According to the SPO, the number and total value of the contracts put out to tender in the Netherlands in the sectors referred to in recital 6 above and involving coordination within the SPO are as follows:

(Hfl million)

Year	Number	Value
1982	24 660	9 932,4
1983	28 283	10 191,7
1984	28 390	10 723,9
1985	29 189	10 785,5
1986	29 372	11 263,8
1987	27 757	12 784,9 (1)
1988	30 043	12 177,1

(1) According to the notifying parties, in their joint reply to the Statement of Objections, the turnover for building contracts carried out by general contractors (including private contracts, etc.) in the Netherlands was Hfl 35 400 billion in 1987.

The information obtained from the SPO shows that the SPO member undertakings applying the UPR rules win the contracts within the abovementioned sectors in more than 90 % of cases.

(19) In calculating the share of the market in works put out to tender in the Netherlands held by all the participants in the UPR system, the above figures should be compared with those compiled by the Economisch Instituut voor de Bouwnijverheid (hereinafter referred to as the 'EIB').

(20) According to the EIB, the total amount of the building and construction works put out to tender in the Netherlands in the period 1982 to 1987 was as follows (2):

(Hfl million)

Year	Amount
1982	10 744,8
1983	10 345,6
1984	11 748,1
1985	12 281,9
1986	12 909,8
1987	11 724,2

The figures published by the EIB do not include earthworks and the demolition sector. As from 1984, the figures include the cable laying and pipework sectors. It should be pointed out that the SPO's financial figures show the value of the contracts awarded annually, whereas the EIB's figures show the value of the contracts actually carried out in whole or in part each year (turnover).

(2) See *De bedrijfseconomische situatie van bouwbedrijven in 1987*, EIB publication, May 1989.

(21) Comparison of these two categories of financial figures shows that all or virtually all of the contracts put out to tender in the Netherlands and falling within the scope of application of the UPR rules are handled through the SPO, i.e. most of them involve mutual coordination within the SPO.

This observation is confirmed by the following findings:

(a) According to the information provided by the SPO in its notification of the rules and regulations concerned, the share of the building and construction market in the Netherlands involving tendering and falling within the scope of application of the UPR rules is 41,5 % in value terms and 22,3 % in terms of the total number of building and construction works in the Netherlands (relevant period: 1975 to 1979). In the explanatory memorandum to the Royal Decree of 29 December 1986 (see recital 66 below), the relevant percentages are 41 and 25 (1978, source: SPO).

The figures published by the EIB and set out above give a percentage of some 40 (for the period 1982 to 1986; in 1987, the percentage was 35,45).

(b) Examination of the information gathered during investigations shows that:

— according to some large-scale clients, virtually all the contracts put out to tender by them are 'handled' by the SPO,

— all the large and medium-sized Dutch building and construction undertakings are included in the lists of the member undertakings of the SPO member associations. The Dutch building and construction firms not participating in the UPR system in the framework of the SPO are (with a few exceptions) either too small in size to be interested in the contracts put out to tender or so specialized that their output is geared to the construction of standardized units.

(c) In its reply to the Statement of Objections, the SPO confirms that the 'lion's share' of the contracts put out to tender in the Netherlands is processed by it.

(22) The demand side is made up of a multitude of public and private sector customers who, either through statutory requirement or voluntarily, make use of the tendering system (successive tendering procedures included) so as to bring competition into play between the suppliers operating on the market, with the aim of obtaining the lowest price possible or the economically most advantageous tender for the work required, whose specifications and conditions they themselves determine in the job description and the contract documents.

The supply side which meets this demand is made up virtually exclusively of the building and construction undertakings participating in the UPR system.

(23) Given the particular characteristics of building and construction as defined in recital 6 above, covering as it does activities varying widely in nature and value and undertakings of very different sizes, a distinction should be made, in determining the relevant geographical market, between relatively simple and routine building and construction work of relatively low value (for example, houses) and heavy, complex or highly specialized work of relatively high value. The geographical market within which supply and demand operate is more restricted in the case of the first type of work than in the case of the second.

D. THE OPERATION OF THE UPR SYSTEM

(a) Compulsory notification of the intention to submit a price tender (Article 3 UPR)

(24) Any contractor which is a member of an SPO member organization must notify the relevant SPO office if it intends to submit a price tender in response to an invitation by a client or even to reply to a consultation and negotiation request relating to a contract or again to carry out a project for its own account and at its own risk. This obligation relates not only to public and private sector tenders and to selection procedures, but also to private contracts (single tendering procedure) and to subcontracting.

The notification must contain all the data and information which the office deems useful and/or which are necessary for the implementation of the UPR system. The same obligation is incumbent on any contractor which, though not belonging to an SPO member organization (and, consequently, not bound by the UPR rules), is bound by the Code of Honour by virtue of belonging to an Algemeen Verbond Bouwbedrijf (AVBB) member association.

According to the joint reply to the Statement of Objections given by the parties to which this Decision is addressed, the number of building and construction undertakings falling within this category is around 2 000.

On request, the office communicates the number of other undertakings that have also notified their intention of tendering a price for the same contract and that will be invited to participate in the prior meeting within the framework of the SPO.

This system of compulsory notification allows the SPO, i.e. the relevant office, on the one hand, to apply the mutual coordination procedure in good time and, on the other, to check that the rights and obligations arising from the rules and regulations are being complied with. The office is required to

organize a meeting of the undertakings concerned once it has received at least two notifications relating to one and the same contract.

The notifying undertakings belonging to the SPO member organizations are required to attend the meeting. Notifying undertakings which are not members of the SPO member organizations and which are the subject of disciplinary proceedings for 'inconsistent conduct' are excluded from the meeting.

Any undertaking which has failed to comply with its obligation to attend the meeting is not allowed to tender a price (Article 4 UPR). Any undertaking which has attended the meeting is required to tender a price, unless it withdraws (Article 15 UPRR, Article 17 UPRO).

(b) **Meeting of the undertakings** (Articles 5 *et seq.* UPR)

(25) The meeting, called by the office, is chaired by an official from the office. The chairman checks whether all the undertakings present have signed the list stating that they agree to submit to the rules of the organization. Any undertaking which has not filled it in is excluded from the meeting (Article 5 UPR). The chairman draws up a record of the meeting which shows the decisions taken and the agreements concluded during it. In general, the undertakings attending the meeting decide by a simple majority.

(26) (b) (1) *Decision on whether to designate an entitled undertaking* (Article 6.1 UPR)

The chairman asks the meeting to decide whether to designate an entitled undertaking, i.e. the contractor which will alone be entitled to negotiate the contract with the client after the prices have been tendered. The decision is taken by simple majority including, in the case of the UPRR rules, at least 10 votes if there are more than 10 undertakings at the meeting, and unanimously if there are not more than 10 undertakings. In practice, an entitled undertaking appears to be designated in virtually all contracts where the tenders are considered to be comparable.

(27) (b) (2) *Comparing the cost elements of contracts* (Article 6.3 UPRR, Article 6.2 UPRO)

Once the decision has been taken to designate an entitled undertaking, discussion begins between the participants in order to establish on the basis of which technical and economic data prices should be compared, since an entitled undertaking can be designated only on the basis of comparable price tenders. The data include the various elements of the contract to be taken into consideration, the specifications of the contract documents, etc.

On the basis of the outcome of this discussion, each of the participants of the meeting must fill in the form indicating what is known as a 'blank figure', which is 'the proposed price tender of a contractor'.

(28) (b) (3) *Handing in of the proposed price tenders* (Article 6.4 and Article 7 UPR)

The contractors attending the meeting must hand in to the chairman the form indicating their blank figure or proposed price tender.

The chairman looks at the figures and ascertains the name of the contractor which submitted the lowest proposed tender figure.

The meeting can then decide by a majority as described in recital (b) (1) above:

— either to communicate all the proposed tender figures to all the participants,

— or to communicate the figures (or only their order of succession and, possibly, the names of the corresponding undertakings) only to the undertaking submitting the lowest proposed tender figure,

— or to let the chairman alone have knowledge of the figures (Article 7 UPR).

Any participant who wishes, in respect of the same contract, to submit a price tender comprising an alternative proposal for certain products or construction processes is required to communicate the proposed price on the same form. He is required to make known his intention immediately after the handing in of the initial proposed tender figures, failing which he will be prohibited from submitting such alternative price tender. The meeting decides what action to take in response to this intention.

It should be noted that the handing in of the proposed price tenders is not reserved for the only cases of comparable tenders. In all cases (including those in which tenders are not comparable) the proposed price tenders constitute one of the elements to be taken into account when calculating the calculation costs to be reimbursed.

(29) (b) (4) *Possibility of withdrawal* (Article 10 UPR)

After having been informed of the proposed tender figures of its competitors, each contractor attending the meeting has the right not to maintain its proposal. According to the UPRR, any such contractor can then either withdraw from the contract concerned, i.e. decide not to tender a price, or tender a higher price than the prices of its competitors. If it has presented the lowest proposed tender figure, it is prohibited from participating, in any manner whatsoever, in the carrying out of the building and

construction project. Should it do so, the UPRO also provides for a fine amounting to a maximum of Hfl 25 000.

(30) (b) (5) *Preference* (Article 11 UPR)

Before being informed of the proposed tender figures of its competitors, each participant at the meeting has the right to ask for preference. If the meeting decides, unanimously, to give preference to the applicant, the contractor concerned will tender the lowest price, this being the price that would have been set for the contractor which submitted the lowest proposed tender figure.

In setting the tender figures for the other participants, the order of succession of the initial proposed tender figures is maintained. For the contractor which submitted the lowest proposed tender figure, a figure is set which takes account of the preference granted to another participant.

The meeting may make the granting of preference subject to conditions which, however, may not involve any financial compensation borne by the participant which obtains preference and payable to the other participants.

The investigations carried out show that the number of cases in which the meeting has granted preference is small.

(31) (b) (6) *Price increases* (Articles 12 to 14 UPRR; Articles 12, 15 and 16 UPRO)

The final tender prices of the contractors concerned are the result of a concerted adjustment of the initial proposed tender figures consisting of the addition of certain price increases. These increases are intended to cover reimbursement of the costs of calculating the work estimates and a contribution to the operating costs of the trade organizations. It should be noted that the meeting may decide to raise the proposed tender figures by these increases, irrespective of its decision on the designation of an entitled undertaking.

(32) (b) (6) *Reimbursement of calculation costs* (Article 12 UPR)

The amount to be reimbursed for calculation costs — identical sum or percentage for each participant — is established at the meeting. The maximum figure for such amount is indicated as a maximum value or percentage in the price list annexed to the UPR rules and depends on the construction sector, contract value and the nature (standard or non-standard) of the contract documents. In the building sector, the maximum also depends on the nature (residential or non-residential) of the buildings and on the nature (maintenance, renovation, construction, etc.) of the work to be carried out.

The value of the contract concerned is calculated on the basis of the average of the proposed tender figures which the contractors have submitted, weighted to take account of the number of participants and the spread between the proposed tender figures (average figure). The proposed tender figures are increased, where necessary, by an amount representing the value of materials to be supplied and work to be carried out by third parties. The value of such materials and work is established by the chairman of the meeting, following consultation of the contractors present at the meeting; the maximum value to be added to the average of the proposed tender figures is equal to the lowest proposed tender figure in the case of materials to be used by the contractor and equal to 25 % of the estimated real value in other cases, where the supplementary conditions concerning the simultaneousness of all the work are fulfilled.

If the data required for establishing the average of the proposed tender figures are not available, the reimbursement of calculation costs is determined on the basis of the estimated value of the contract concerned or in a percentage of the lowest price tender.

The amount thus established for reimbursing the calculation costs of each contractor participating in the meeting is multiplied by the number of such contractors. The maximum multiplication factor is 20 where the client has issued either a restricted invitation to tender or an open invitation to tender, without any limit as to the number of undertakings. The same ceiling applies in the case of invitations to tender to which NATO tender rules apply, provided that any foreign contractors invited to tender also participate in the meeting within the SPO organization.

Where, within the framework of the carrying out of the work, other undertakings have already tendered their prices, the total amount of the reimbursement of calculation costs set for such tenderers or still to be set must also be added.

(33) In the UPRR system, unless the meeting takes an express decision to the contrary, the increase in the proposed tender figures by way of reimbursement of calculation costs is always set at the maximum allowed.

However, by the majority described in recital 26 above, the meeting may decide before the handing in of the proposed tender figures:

— to forgo any increase,

— to increase the proposed tender figures by a lower amount than the maximum amount permitted,

— to leave the decision regarding such increase up to the contractor which submitted the lowest or next to lowest figure.

In the UPRO system, in principle, the contractor which presented the lowest proposed tender figure decides on the increase. Any decision to forgo any increase by way of reimbursement of calculation costs must be taken by the meeting, before the handing in of the proposed tender figures.

(34) (b) (6) (ii) Contribution to the operating costs of the trade organizations (Article 14 UPRR, Article 16 UPRO).

The UPR rules also provide for an increase in the proposed tender figures by a maximum amount of 1,5 % of the lowest proposed tender figure to cover:

— reimbursement of the costs of the office concerned (0,4 %),

— the contribution to the SPO (0,1 %),

— the contribution to a contractors organization (0,3 %) approved by the AVBB or the SPO,

— the contribution for general purposes in the building and construction industry (0,7 %).

(35) The office pays one quarter of the contribution for general purposes in the building and construction industry to a national foundation and three-quarters to a regional foundation (eight regional foundations, one for each office).

These nine foundations were set up and are administered jointly by the AVBB and the SPO. The eight regional foundations are controlled by a standing committee in which the AVBB and the SPO cooperate (Commissie Aanbestedingswezen en Prijsvorming). The purposes of general interest include staff training, security measures, research and development, etc.

The contribution to a contractors' organization may be channelled to various organizations such as the SPO and AVBB member organizations.

(36) The increase in the proposed tender figures to cover reimbursement of the expenses of the office concerned and the contribution to the SPO is a general rule in the UPR system. The other contributions are decided on by the undertaking which submitted the lowest proposed tender figure. The increase by way of contribution to purposes of general interest in the building and construction industry is permitted only if the maximum amount of reimbursement for calculation expenses has been added to the proposed tender figures.

(37) A look at the replies to the requests for information and at the documents examined during the inspections shows that the total amount of the abovementioned increases may, in extreme cases, be almost 20 % of the lowest tender price. The parties to which this Decision is addressed stated, in their joint reply to the Statement of Objections, that, in the period 1987 to 1988, the total amount of such increases averaged 3,1 % of the lowest tender price.

(38) (b) (7) *Concerted setting of the final price tenders* (Article 15 UPRR, Article 17 UPRO)

Once prices have been compared and the amounts of the increases referred to in recitals 31 to 37 above have been established, the final prices to be tendered to the client are set for each of the participants. The order of sequence of the final price tenders must match that of the initial proposed tender figures. The final price tenders are set by raising each proposed tender figure by the total of the amounts of the increases, though the proposed tender figures of all the participants, excepting the participants which have submitted the lowest and next to lowest proposed tender figures, must be increased only by an amount that will leave the order of sequence of the initial proposed tender figures unchanged.

However, with the agreement of the participants which submitted the lowest and the next to lowest proposed tender figures, the final price tenders of the other participants may be reduced, provided that the order of sequence of the proposed tender figures is not altered, so that the price differences between the tenders submitted to the client do not appear excessive.

If the meeting has granted preference to one of the participants, the final price tenders may be increased, by the chairman, after consulting the contractor granted preference and the contractor which submitted the lowest proposed tender figure, so that the price differences between the tenders submitted to the client ensure a preferential position for the contractor so designated by common agreement.

It is also evident from the investigations that the setting of the final prices is not confined to the total price of the contract concerned. The prices relating to specific parts of the contract and unit prices are also set, where appropriate, taking account of the order of sequence of the proposed tender figures. In addition, the meeting decides, where appropriate, on other conditions of the transaction apart from the price and the elements which make it up.

It is prohibited to submit to the client a price other than that established at the meeting under the procedure described above.

(c) **Protection of the entitled undertaking** (Article 28 UPRR, Article 30 UPRO in conjunction with Article 5 of the Code of Honour)

(39) Except in the case of non-simultaneous price tenders, the so-called 'entitled' undertaking is the contractor designated as such by the meeting or, where appropriate, by the office, after the prices have been tendered. In principle, such contractor is the one which submitted the lowest proposed tender figure, unless it withdraws or preference is granted (see recitals 29 and 30 above).

The entitled undertaking is protected from any current or subsequent competition from other contractors participating in the UPR system in that it alone, once the official tender has been made, has the right to negotiate with the client regarding the contract concerned.

(40) The other tenderers are prohibited from having any contact with the client regarding the work and/or the price tender (Article 28 UPRR and Article 30 UPRO in conjunction with Article 5 (2) of the Code of Honour). They can thus win the contract only by accepting it at the price which they tendered and in accordance with the contract documents.

(41) In the case of non-simultaneous price tenders, the protection of the entitled undertaking also covers subsequent price tenders (Article 28 UPRR, Article 30 UPRO and the rules concerning non-simultaneous price tenders, in conjunction with Article 5 (3) of the Code of Honour). Contractors subsequently invited by a client to tender a price are prohibited from having any contact with the client regarding the work and/or tendering a price without the consent of the entitled undertaking or, should it refuse, of an *ad hoc* committee appointed by the office concerned. In principle, such protection is intended to prohibit any subsequent tendering of a price lower than the price tendered by the entitled undertaking. Nevertheless, if the subsequent envisaged price tender is substantially lower than the price tendered by the entitled undertaking, the *ad hoc* committee may take a positive decision. Such protection of the entitled undertaking lasts for two or five years (depending on the value of the contract concerned).

(d) **Paying over of the amounts of the price increases** (Article 16 to 18 UPRR; Articles 13 and 18 to 20 UPRO)

(42) In general, the amounts relating to reimbursement of calculation costs and to trade and organizational contributions are added uniformly to all price tenders. The cost is borne in full by the client in the total price for the work paid to the successful tenderer.

These amounts are then paid over in part by the successful tenderer to the SPO office, generally by payment into a current account.

The SPO office then in turn pays over the sums in the manner indicated below.

(43) (d) (1) *UPRR system* (restricted procedure)

The office pays over the amounts for each contract. When the contractor begins carrying out the work, it receives an invoice from the office relating to the total amount of the reimbursement of calculation costs and trade contributions agreed at the meeting, minus:

— the amount for reimbursement of its own calculation expenses,

— a 10% discount for settlement within the deadlines laid down. (The discount is 15% for payment of the contribution intended for expenses in the general interest in the building and construction industry within the deadlines laid down.)

The amount received by the office in respect of reimbursement of calculation costs is then allocated as follows:

— 3% for a 'guarantee fund' account intended, *inter alia*, to reimburse participants in the SPO organization which have tendered for a contract subsequently awarded to an 'outsider'. The amount of this reimbursement is limited to 30% of the reimbursement of calculation costs decided at the meeting, with a maximum of Hfl 5 000,

— the rest is divided equally among the other tenderers.

The amounts received by the office in respect of trade and organizational contributions are passed on to the organizations referred to above in recitals 34 and 35.

(44) (d) (2) *UPRO system* (open procedure)

In the UPRO system, the payment of reimbursement for calculation expenses is carried out per calendar year as follows:

the contractors which have obtained contracts put out to open tender pay the amounts due to the 'calculation cash' account kept by the office concerned. They obtain points in accordance with the arrangements indicated in the tables in Annex III to the UPR rules, the number of points obtained being established on the basis of the value of the contract concerned.

The office pays a maximum amount of Hfl 2 500 per year from the account to each contractor which participated in one or more meetings organized within the framework of the UPRO, provided that the contractor obtained one or more contracts falling within the scope of the UPR rules, whose value is at least equal to the total value of the element of the contract(s) which was/were the subject of the meeting(s) concerned.

(45) The office also pays the total amount of the reimbursement of calculation costs to the contractor which presented the lowest proposed tender figure at a meeting concerning a contract covered by the UPRO, if an 'outsider' obtained the contract and provided that the proposed tender figure of the contractor concerned is lower than the price tendered by the outsider.

(46) Lastly, the balance of the calculation cash account remaining after deduction of the abovementioned amounts is paid to the participants which, in accordance with the provisions of the UPRO rules, obtained contracts put out to open tender during the year. The amount due to each of them is established on the basis of the points awarded during the year. As regards the payment and passing on of the amounts in respect of trade and organizational contributions, there is no difference between the UPRR and UPRO rules.

(e) Monitoring of compliance with the obligations deriving from the UPR rules

(47) Infringement of the provisions of the UPR rules constitutes an infringement of the Code of Honour (Article 29 UPRR and Article 31 UPRO in conjunction with Article 9 of the Code of Honour), the text of which was adopted by the SPO General Assembly on 3 June 1980. The penalties provided for in the Code of Honour range from a warning to fines of up to Hfl 100 000, which amount can be raised to 15 % of the estimated value of the construction project in question.

(48) Infringements of the Code of Honour are examined by the Stichting Berechtingsinstituut Erecode Bouwbedrijf, where a supervisory committee hands down a decision that may be appealed against before an appeals committee. The procedural rules are contained in the Berechtingsreglement Erecode Bouwbedrijf.

Complaints may be lodged with the supervisory committee by the undertakings bound by the Code of Honour, the SPO and its member organizations. The offices referred to in recital 9 above are mandated, on a case-by-case basis, by such member organizations to lodge complaints in their name.

(f) Behaviour of the SPO vis-à-vis non-participating contractors

(49) The UPR rules provide for a system of exchange of information between undertakings governed by them allowing the participants to respond effectively to and resist any pressure from outside competitors.

(50) (a) At the meeting, the participating contractors are provided with information supplied either by the office or by one or more of them.

This is, firstly, information communicated pursuant to the Code of Honour. The Code of Honour, like the UPR rules, requires the SPO office to be notified of any intention to tender a price. However, the Code of Honour does not require participation at a meeting within the SPO, prior to the tendering procedure (except in the case of non-simultaneous price tenders). The Code of Honour binds not only SPO member undertakings, but also undertakings which, though not belonging to an SPO member organization, belong to an AVBB member association.

Thus, the meeting is aware of any participation in a given tender procedure by a contractor which is bound only by the Code of Honour and which does not wish to participate in the meeting. However, in the case of non-simultaneous price tenders, such contractor is required to participate in the SPO meeting.

The information is, secondly, information which the undertakings participating in the SPO have obtained themselves and subsequently communicate to the office, with their notification, or to participating competitors at the meeting.

The information gathered during the investigations indicates that, in a number of specific cases, participating contractors or the SPO office have tried to get outsiders to participate on an *ad hoc* basis in the SPO. In addition, the records of a large number of meetings show that the contractors not wishing to participate in an open tendering procedure inform the office accordingly.

(51) (b) On the basis of such exchanges of information, the UPR rules allow flexible and effective protection against the risks of competition from outsiders. Such protection may consist in dispensing with the designation of an entitled undertaking and/or a restriction in, or indeed the waiving of, the increases in the proposed tender figures. In addition, the exchanges of information enable the participants at the meeting to take the risks of outside competition into consideration in establishing their proposed tender figures.

The investigation carried out in this case and in particular analysis of the replies to questions C.1(d) and (e) of the requests for information sent to the offices on 14 November 1988 show that such conduct resulted in success against tenders by outsiders in at least 80 % of cases (this percentage differs from sector to sector).

(g) **The rules concerning non-simultaneous price tenders**

(52) As indicated in recital 41 above, protection of the entitled undertaking also extends to subsequent price tenders, for a period of two or five years depending on the value of the contract. In such cases, the status of entitled undertaking does not necessarily result from a decision by the meeting or by the office (see recital 39 above). Such status may result from the fact that the first tenderer — bound by the UPR rules or bound only by the Code of Honour —, after having communicated its intention of tendering a price and at the time of tendering its price, did not have any knowledge of competing tenders.

(53) In that case, the meeting organized by the relevant office serves only, in accordance with the procedure prescribed, to enable the first (entitled) contractor to agree to or refuse subsequent price tenders and, where appropriate, to set the price increases and the final prices themselves. If, because of differences between the characteristics of the contract, as defined and described by the client, it is not possible to compare or to make comparable the original price tender (by the entitled undertaking) and the subsequent price tenders, the tendering of such subsequent prices remains prohibited. In so far as the price tenders are comparable, or have been made comparable, each subsequent price tender requires the express assent of the entitled undertaking, which is free to agree to or refuse them. However, if the entitled undertaking does not participate in the meeting or expressly waives its rights and obligations under the UPR rules, this is deemed to constitute implicit assent to subsequent price tenders by other contractors. According to the parties to which this Decision is addressed, in their joint reply to the Statement of Objections, the application of these rules resulted in only 10,5 % of cases in the protection of the first tenderer against subsequent lower price tenders.

(54) The obligation to participate in the meeting referred to in paragraph 53 applies to contractors bound by the UPR rules and to contractors bound only by the Code of Honour. However, the latter are not necessarily properly informed of the UPR rules of procedure, to which the Code of Honour makes only general reference.

(h) **The rules concerning price tenders for subcontracted work**

(55) Where the main contractors participating in an invitation to tender in turn put out to tender certain parts of the contract, these rules are applicable in so far as the subcontractors invited to tender are bound by the UPR rules and provided that they tender their prices before the main contractor tenders its price.

Where the main contractor invites price tenders after it has itself tendered its own price, the UPR rules and the rules concerning non-simultaneous price tenders are fully applicable.

(56) The subcontractors are required to communicate to the relevant office their intention to tender a price and the price tendered. The office organizes a meeting of such subcontractors only after it is informed of the result of the tender procedure in which the main contractors are participating. Only subcontractors which have tendered a price to the main contractor which obtained the contract are invited to participate in the meeting.

During the meeting, the entitled subcontractor is designated on the basis of the price tenders communicated to the office, provided that they are comparable.

(57) The price tender by a subcontractor bound by the UPR rules must include an amount equivalent to 3 % of the price tendered to cover the increases referred to in recitals 31 to 37 above. If such subcontractor wins the relevant part of the contract and if it is apparent that it is the only tenderer, it must pay the office an amount equivalent to 0,5 % of its price tender, to cover the costs of the office (0,4 %) and the contribution to the SPO (0,1 %). If, on the other hand, such subcontractor wins the contract in competition with other subcontractors invited by the main contractor concerned, it must, in addition, pay the office an amount equivalent to a maximum of 2,5 % of its price tender, to cover the reimbursement of the calculation costs of the other participating subcontractors.

(58) These rules mean in practice that a subcontractor invited to submit a single tender must increase its tender systematically by 3 % so that, if the main contractor decides to invite other subcontractors to tender for the same contract, it can make the payments provided for. The rules also mean that the reimbursement of calculation costs applies only to subcontractors which have tendered their prices to the main contractor which successfully bid for the contract.

(59) It is evident from the investigations carried out by the Commission that, in the road marking sector, which is a sector characterized by subcontracting, the SPO suspended the rules concerning price tendering for subcontracting for the period from 1 August 1988 to 1 August 1989 and decided to apply the UPRR rules instead.

(i) **Treatment of private contracts** (single tendering procedure) (Article 16.1.d UPRR)

(60) In principle, private contracts do not involve any concerted coordination within the SPO. Nevertheless, any contractor participating in the UPR system which is consulted by a client on a direct basis must notify the SPO office of its intention to respond to the consultation and to tender a price. If the client does not subsequently consult any other contractor, the contract is considered by the SPO to be a genuinely private contract and is not subject to any further rules. If, however, the client subsequently consults one or more other contractors, the rules on non-simultaneous price tenders apply.

Where such rules can no longer be applied because the contract has already been awarded, the contractor carrying out the work must pay the office an amount equivalent to a maximum of 3 % of the value of the contract obtained, by way of reimbursement of calculation costs and trade and organizational contributions (Article 16.1.d UPRR).

(61) As a result, a contractor invited to make a single tender must increase its tender systematically by 3 % so that, if the client decides to invite other firms to tender, it can subsequently make the payment provided for by the rules and regulations.

E. THE SITUATION BEFORE 1 APRIL 1987

(62) Before 1 April 1987, the date on which the current UPR rules entered into force, the SPO member organizations applied their own price regulating rules. The implementation of such rules was ensured, directly or indirectly, by each member organization itself.

The UPR rules adopted by the SPO on 9 October 1986 and effective as from 1 April 1987 are clearly the continuation of similar rules (known as price rules) established within 29 sectoral and national or regional building and construction associations, each in respect of the relevant sector and region. The structure and content of these various rules had been standardized and approved by the SPO since 1973.

However, the rules prior to the UPR rules currently in force differed from the UPR rules in certain essential respects, the main ones of which are described below.

(63) (a) The previous rules provided for a procedure known as 'counter notification'.

The office communicated to the notifying contractor the names of the other undertakings which had notified their intention of tendering a price for the same contract. The UPR rules currently in force expressly prohibit such communication. Nevertheless, if so requested, the office will provide notification of the number of such other interested undertakings, which are invited to participate in the meeting.

(64) (b) The previous rules provided for the possibility of 'improving' and 'correcting' prices. The 'improvement' of the price meant increasing the lowest proposed tender figure on the basis of a very detailed and complex calculation. The 'correction' of the price meant increasing all the proposed tender figures with the aim of maintaining 'a reasonable price level'. The amount obtained through such increase was to be used for general purposes in the building and construction industry.

The UPR rules currently in force no longer provide for the possibility of improving prices. Price correction has been replaced as a source of financing by the system of trade and organizational contributions.

(65) (c) The preference mechanism provided for in the previous rules resulted in an increase in the prices of all the participants. The proposed tender figure submitted by the contractor having preference formed the basis of a detailed and complex calculation used to establish an amended proposed tender figure. The amended proposed tender figure was deemed to be the lowest proposed tender figure, and the initial tender figures submitted by the other undertakings had to be increased accordingly.

F. STATE MEASURES AND PRACTICES

(66) The Royal Decree of 29 December 1986 adopted pursuant to Article 10 of the Law on Economic Competition, brought into force on 1 April 1987 for a period of five years and published in the Staatsblad (Dutch Official Journal) No 676 of 30 December 1986, was intended to restrict or prohibit certain provisions in the previous rules that were deemed to restrict competition. However, the Royal Decree leaves intact the key provisions of such previous rules, as incorporated in the UPR rules currently in force.

(67) The Ministerial Decree of 2 June 1986 (*Staatscourant* No 118 of 24 June 1986) lays down the *Uniform Aanbestedingsreglement* (hereinafter referred to as the 'UAR') brought into force on 1 November 1986 and replacing a previous regulation dating from 21 December 1971. The purpose of the UAR is to lay down the procedures to be followed by the public contracting authorities in the awarding of contracts.

Article 3 of the UAR provides that:

'The contracting authority shall not be entitled to ask a tenderer or applicant:

— not to hinder the contracting authority in its attempts to conclude an agreement with third parties for the carrying out of the work,

— not to seek to influence the price tenders of third parties,

— not to hamper the carrying out of the work.'

Under the terms of the explanatory memorandum to this Ministerial Decree, the aim of these provisions is to prohibit the contracting authorities from requiring tenderers to renounce the rights and obligations deriving from their membership of a price-regulating contractors' organization.

(68) Since the UAR is mandatory only for the State in its capacity as contracting authority (see Royal Decree of 6 April 1973 as amended by the Royal Decree of 7 April 1987), other public and private purchasers, and in particular the municipalities and the organizations dealing with subsidized housing, are requested (or urged) to comply with its provisions. Thus, in response to such a request, the association of Dutch municipalities, on the basis of an agreement which it concluded in April 1988 with the SPO, recommended its members, i.e. all the municipalities in the Netherlands, to apply the UAR in full.

According to the SPO, the UAR is generally applied voluntarily by the local and regional and decentralized public authorities in the Netherlands.

(69) The measures and practices described in this part are mentioned in this Decision only for information and are the subject of separate infringement proceedings pursuant to Article 169 of the Treaty.

II. LEGAL ASSESSMENT

Section I

Article 85 (1) of the Treaty

(70) Article 85 prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

The agreement and the decisions described in recitals 3 to 17 and 24 to 65 above fall within the scope of the ban laid down in Article 85 (1) in so far as they seek to organize the supply side of the market and to alter trading conditions on bases not resulting from the free play of competition.

I. THE BUILDING AND CONSTRUCTION MARKET

(71) According to the SPO, the building and construction market is different from other markets in goods and services because of the immovable nature of the product:

— there is only one purchaser for each building and construction product (the client) who lays down the conditions which the product must meet, its form, content, quality and the date by which it must be supplied, thus constituting a type of partial market with a single buyer,

— building and construction does not allow stocks to be built up, since each product is unique and has to be produced at a given place.

The SPO also claims that the supply side of the market is in a structurally weak position compared with the demand side, resulting in ruinous price competition between building and construction firms. The private rules and regulations to which this proceeding relates are, it claims, intended principally to ensure balanced and economically healthy price formation and to prevent serious disruptions of supply on the market.

However, the Commission cannot accept that the characteristics of the building and construction industry can have the effect of removing the industry from the application of the competition rules laid down in the Treaty.

(72) According to the SPO, the prime characteristic of the industry is the complex and highly specialized nature of the product, placing a particular burden on building and construction firms, since each project is to some extent different, or indeed unique, depending on its nature (building for housing or professional use, roads, bridges, etc.), the physical and geographical conditions (position of the works site, nature of the soil, etc.) and the conditions laid down by the purchaser (specification of the work and contract documents). If a building and construction firm's offer is not accepted, it cannot submit it later to another purchaser.

The Commission notes, however, that most trade and professional services are, in principle, of a highly individualized nature. Furthermore, building and construction firms tend to specialize in certain fields. In each field, projects are often similar or indeed

identical, while building and construction methods are tending gradually to become standardized. Furthermore, if the purchaser is a regular purchaser of building and construction works, building and construction firms often know what sort of conditions and specifications they can expect. For these reasons, a building and construction firm which has had one tender refused can normally use the know-how which it has invested in preparing a subsequent tender.

(73) According to the SPO, the second characteristic relates to tendering as the method applied in order to obtain the best offer: there is only one would-be buyer for each product (the client), whereas there is a multitude of tenderers (an indeterminate number in the case of open procedures and a number determined by the client in the case of restricted procedures). In order to obtain the lowest price or economically most advantageous tender, the client can play off tenderers one against another. By contrast, the tenderer is bound by the price which he has tendered.

In the Commission's view, the SPO's argument that each contract constitutes a partial market cannot be taken to mean that there is no such thing as a building and construction market. The putting out to tender of contracts is an almost continuous process. Many building and construction firms, if they consider that they have enough work in the short and medium term, are tempted to refrain from tendering (in an open procedure) or will try less hard to tender the lowest price (in a restricted procedure). In other words, contracts are, for building and construction firms, broadly equivalent alternatives, which shows that there is indeed a building and construction market as such. Other building and construction firms, notably the largest firms, possess, for all the main categories of work, or most of them, almost identical knowledge and know-how, appropriate equipment and machinery, qualified staff, etc. In addition, most of the tenderers, and in particular specialized or large building and construction firms, do not have a passive attitude with regard to the market; they pursue an active promotion policy in order to ensure as far as possible that they have a sufficient and regular quantity of work.

Nor does the Commission accept the SPO's argument that the tendering process tends to 'institutionalize' the dominance of the demand side of the market compared to the supply side and, consequently, to create a structural imbalance on the market. Both the demand side and the supply side comprise widely varying categories of persons and undertakings. In many cases, especially where the client is a private person or a small firm, the knowledge and experience of the suppliers called upon to tender will be superior to those of the would-be buyer. In other cases, especially where the client is an undertaking or body putting many contracts out to tender, it will generally be the large firms (or groups of firms) which will submit a price tender.

Furthermore, the SPO's claim that the tendering method results in artificially low prices is not acceptable either. Far from being unique to the construction industry, the method has the effect of allowing price offers to be compared.

A system of invitations to tender is an ideal way of generating competition [1]. This is all the more so with public procurement: Council Directive 71/305/EEC [2] provides for procedural requirements for the public contracting authorities designed to create greater transparency in contracts put out to tender, allowing all interested undertakings to respond on a comparable footing. The equality of opportunity thus created for tenderers must not be distorted by a system of concerted action between them providing systematically for meetings prior to the submission of price tenders. Such a system undermines the tendering instrument.

Lastly, the Commission cannot accept the argument that the tendering method creates ruinous competition. In the first place, there is no such thing as a given price which alone is 'the' economically correct price in a specific case: a price which allows an undertaking to cover its costs and achieve a profit margin is a fair price for it, while the same price could mean a loss for another undertaking with higher costs.

Secondly, even if it may be the case that, particularly in periods when the economy is weak, certain building and construction firms are not able to carry out a project at the price which they have tendered, such a possibility, which also exists in the industrial products sector where products may be sold at a loss, cannot justify the introduction of concerted action arrangements between building and construction firms. It is for the client either to negotiate as hard as possible in order to obtain the lowest price, or to accept a higher price while at the same time making sure that the bid is the most advantageous in terms of constituent factors other than the price, such as quality, date of delivery, etc. — all of this in so far as the public rules and regulations on invitations to tender, where applicable, allow it to carry out such an assessment.

(74) According to the SPO, the third characteristic of building and construction relates to the fact that the preparation of a tender generally entails calculation

(1) See judgment of 16 December 1975, *Suiker Unie and Others v. Commission* [1975] ECR 1663, ground 559.

(2) OJ No L 185, 25. 8. 1971, p. 5 (as last amended by Directive 90/531/EEC, OJ No L 297, 29. 10. 1990, p. 1.).

costs, which are frequently high. Such costs can be passed on to the purchaser only if the tenderer wins the contract.

The Commission considers, however, that, in theory, there are two ways of recovering calculation costs: either the client remunerates the price tender separately; or the building and construction firm includes the costs in its general business costs. The first possibility cannot be applied in principle in so far as, in civil law, the invitation to submit a tender and the submission of a tender do not give rise to any contractual payment obligations. The second possibility is thus the appropriate and generally applied method throughout the Community of recovering calculation costs, in the same way as promotion costs and the costs of marketing products form part of the general expenses of an undertaking.

In the joint reply to the Statement of Objections, the SPO put forward the 'theory of transaction costs', under which, when building and construction work is put out to tender, both the clients and the tenderers incur transaction costs which are often high.

While it is true that such costs may be high, it is not evident what precisely the legal consequence of this should be; high costs for the client are his responsibility alone; high costs for the tenderer should not restrict the application of the competition rules laid down in the EEC Treaty to the building and construction industry. It is significant, in this respect, that the competent national authorities of several Member States, including the Dutch authorities [1] and the French authorities [2], have also applied their national competition law to concerted practices in invitations to tender.

The SPO also emphasized that tenderers on the building and construction market do not have any possibility of comparing prices because of the lack of transparency in transactions from the tenderer's point of view. It argues that this, taken together with the high costs, means that the submission of a price tender on the building and construction market is a 'much more hazardous' operation than a similar operation in any other sector of industry.

In this respect, it should be noted that a lack of transparency seems to be a characteristic common to all service sectors where, in particular, there are no price lists. For the rest, transparency between tenderers (as opposed to transparency from the point of view of the consumer) cannot be deemed to be a prior condition for effective competition; on the contrary, a high degree of transparency would rather be liable to give rise to illicit concerted action if the number of tenderers is limited.

[1] See recitals 66 *et seq.* above.

[2] Decision No 89-D-34 of the Conseil de la concurrence concerning restrictive practices in the road works sector, BOCCRF of 8 November 1989, p. 257.

II. THE DUTCH BUILDING AND CONSTRUCTION MARKET

(75) Though it does not claim that the Dutch building and construction market is very different from that in other Member States, the SPO has put forward a series of factors which it regards as specific to the Netherlands, namely the organization of the sector and the absence of any public rules and regulations prohibiting the clients from negotiating on the prices tendered. However, the Commission cannot accept the SPO's argument here.

As regards the organization of the sector, it is true that in the Netherlands the 'main contractor' is, in general, responsible for the carrying out of the work as a whole, while the subcontractors operate under his responsibility *vis-à-vis* the client. However, this situation is not unique to the Netherlands, since similar arrangements exist in other Member States, notably Belgium and France, as the SPO itself has affirmed.

With regard to the other factor, while it is true that national rules and regulations in some Member States restrict or indeed prohibit, expressly or implicity, any negotiation after the tender procedure between the client and the candidates or tenderers in respect of the essential elements of the contracts, such as the price tendered, such restrictions always form part of objective rules and regulations relating to the whole of the conduct of clients at all stages of the tendering procedure. Furthermore, such rules and regulations are generally applicable only to public procurement, while the rules and regulations implemented by the SPO apply to all the contracts put out to tender, whether private sector or public. Furthermore, in the document entitled 'Information on the application for negative clearance or exemption' (p. 38) of 13 July 1989, the SPO itself seems to limit the need for 'private' rules and regulations (UPR rules and Code of Honour) to private-sector contracts alone.

(76) The SPO has also adduced a number of macroeconomic factors. It has in particular stated that the average level of building and construction prices in the Netherlands is not any higher than in neighbouring countries, whereas the profitability of the Dutch building and construction industry is weak even during periods when the economy is strong. It thus attempts to justify in particular the system of recovering calculation costs as provided for in the UPR rules.

In the Commission's view, the SPO's arguments are not pertinent if the intention is to show that, for the reasons adduced by it, its rules and regulations are not caught by Article 85 (1) of the Treaty. The assertion that there is no obvious effect on the level of prices does not alter the fact that an agreement, a

decision by an association of undertakings or a concerted practice may have as its *object* the restriction or distortion of competition. Any beneficial effect of such an agreement such as a less high price level can be taken into consideration only pursuant to Article 85 (3).

(77) It follows from recitals 71 *et seq.* that, notwithstanding the fact that the building and construction industry has certain specific characteristics, these are not such as to exclude or reduce the application of Article 85 of the Treaty to the industry.

III. RESTRICTIVE NATURE OF THE AGREEMENT AND OF THE DECISIONS WITHIN THE MEANING OF ARTICLE 85 (1)

1. *The SPO Statutes* (see recitals 3 and 4 above)

(78) The associations of building and construction firms to which this proceeding relates set up the SPO, whose task under its Statutes is to regulate the coordination of prices and tenders on the market. The Statutes consequently constitute an agreement between associations of undertakings within the meaning of Article 85 (1). The setting up by competitors of an association of trade associations (SPO) amounts to the conclusion of a horizontal cooperation agreement. In this particular case, the fact that the undertakings or associations of undertakings have set up an independent legal entity to which they have allocated certain regulatory functions is not sufficient to exempt them from the application of Article 85 (1).

The SPO Statutes have as their object the restriction or distortion of competition within the common market in so far as they make the rules and regulations described in recitals 5 to 13 and 24 to 61 above binding on the SPO associates and their members (permanent or ad hoc). The rules and regulations, which themselves constitute decisions by associations of undertakings within the meaning of Article 85 (1), have as their object or effect the restriction or distortion of competition, since they:

— provide for exchanges of information prior to tendering procedures,

— provide for concerted action on price tenders and directly or indirectly fix in whole or in part selling prices and other trading conditions in respect of building and construction contracts,

— share between members the demand side of the market through the prior designation of successful tendering undertakings, the protection of the entitled undertaking and the possibility of withdrawal or of preferences,

under the conditions outlined below.

2. The decisions taken within the framework of the SPO

A. *Restriction of competition between building and construction firms participating in the SPO*

(79) 1. Notification of the intention to submit a price tender (see recital 24 above)

The notification mechanism has the object of restricting or distorting competition since it requires the notifying undertaking to limit its freedom of action *vis-à-vis* its competitors and the client.

Thus, the participating undertakings forgo any independent behaviour as from the stage of determining their intention to submit a tender. This restriction is reinforced by the clause in the UPR rules prohibiting members from waiving the obligations deriving from these trade rules and regulations unless the notifying undertaking is the only tenderer (subject to approval and control by the office).

Furthermore, communicating the number of competitors who will be invited to participate in the meeting reinforces this restriction, since it allows the participants, in particular, to anticipate the price increases and to plan their conduct accordingly.

(80) 2. Agreement on the principle of the designation of an entitled undertaking (See recital 26 above)

The fact that the meeting of the undertakings is empowered to designate from among the participants the undertaking which will have the status of entitled undertaking, i.e. the exclusive right to negotiate the terms with the client, has the object of shielding it from competition from the other participants.

In point of fact, the designation of the entitled undertaking is based on the decision taken jointly by the tenderers to consider tenders as comparable or to make them comparable.

The number of cases in which the meeting of firms decides to forgo such designation, thus allowing undistorted competition to operate, is small. However, there is no doubt that the concerted action between undertakings, whether or not it leads to the designation of an entitled undertaking, constitutes a restriction in the individual capacity of the undertakings participating in the SPO to have access to the market.

(81) 3. Comparing the cost elements of the contract (See recital 27 above)

The cost elements allowing the proposed tender figures to be established are examined at the meeting of undertakings. Although, according to the brochure published by the SPO (mentioned above, recital 16), 'the proposed tender figure (is) the price tender envisaged by a firm, based on its own estimate', the proposed tender figure is in fact established, by each participant during the meeting, on the basis, *inter alia*, of exchanges of information between competitors. The estimate is thus made on the basis of items of information which have not all been collected, in an independent and autonomous manner, on the market. As the investigations carried out by the Commission show, the meeting allows each undertaking participating to take account not only of the elements which are liable to determine the costs of its competitors and the choice made by the client, but also of various items of information on the terms of the contract, such as the participation or otherwise of 'outsider' competitors and particular features of the contract in question which it would not have been able to obtain without such exchanges of information.

This concerted action prevents or at least distorts and restricts competition between the participants. It has as its object the elimination as far as possible of the risk inherent in independent competitive behaviour.

(82) 4. Handing over of the proposed tender figures (see recital 28 above)

The proposed tender figures established by each of the participants are handed to the chairman of the meeting.

The order of sequence of the proposed figures provides the order of sequence of the final tender prices to be submitted by the participants (except in the case of withdrawal and preference). Furthermore, once the proposed tender figures have been handed in, they cannot be changed.

By thus deciding, on a common basis, the proposed tender figures which, in their turn, determine the order of sequence of the final tender prices, the participants substitute practical cooperation amongst themselves for the risks of competition. Since the initial order of sequence is maintained, the participants do not run any risk against each other as regards possible price increases. The restrictive effect of such cooperation is reinforced by the ban on submitting an alternative price tender without the meeting being informed of any such intention and having been able to take a decision on it.

(83) 5. Possibility of withdrawal (see recital 29 above)

Any withdrawal decision is taken in full knowledge of the proposed tender figures of all the other participants.

It is thus only the exchange of information at the meeting which allows each participant to gain knowledge of the prices proposed by its competitors and to decide, on the basis of comparison of such prices, not to maintain its own initial price.

Thus, the normal conditions of competition are artificially changed in such a way as to allow the participants to take a decision on maintaining or withdrawing their tender which they would not have been able to take without the concerted arrangements, since only the client would have been in a position to make such a comparison.

(84) Although, in the notification and in their joint reply to the Statement of Objections, the parties to which this Decision is addressed imply that exercise of the right of withdrawal is reserved to cases in which a manifest and serious error of calculation has been made, the UPR rules do not provide for any particular condition governing the exercise of such right.

The argument put forward in the joint reply to the Statement of Objections, namely that the arrangement was used only in such cases, is not convincing and, furthermore, is contradicted by the information obtained during the proceeding. Such information points to a number of examples of withdrawal on other grounds, for example because the firm was not interested in the contract.

The possibility of withdrawal on the basis of a comparison of the proposed tender figures confirms the conclusion that such figures are established on the basis, *inter alia*, of economic or accounting information exchanged between the participants at the meeting and liable to determine prices.

Exercise of the right of withdrawal results in the tendering of prices other than those which would have been tendered to clients if there were no concerted approach, notably through the abstention of undertakings exercising such right, and this means that the final tendering procedure is different from that which would have prevailed in a system in which building and construction firms submit their tenders independently.

(85) 6. Preference (see recital 30 above)

The right of preference has the object of changing the initial order of sequence of the

prices to be tendered, with the tenderer with the lowest bid in the 'first round' being replaced by the tenderer who has been granted preference.

This provision is thus designed to strengthen cooperation between building and construction firms at the expense of true competition. This system allows the participants to share markets. The client thus receives tenders whose structure is in line with the scale of price tenders established during the initial round, but with the actual contractors submitting such tenders possibly being changed through substitution as a result of concerted action between the members of the arrangement. Such substitution of the firms making price tenders could not exist in a system of competition which left tenders entirely up to each tendering firm.

(86) 7. Price increases (see recitals 31 to 37 above)

The joint establishment of the price increases amounts to the direct fixing of selling prices, or at least of part of them, within the meaning of Article 85 (1) (a). Furthermore, such price increases result in tender procedures having a different outcome than those which would have resulted if each of the participants had independently determined the prices to be tendered.

Since the order of sequence of the proposed tender figures is in principle maintained, the participants do not run any risk one against the other in each increasing the proposed tender figures by the increases provided for.

This system prevents the most competitive undertakings whose relative costs for preparatory studies and drawing up estimates are lowest from making use of this advantage, since the price increases, which are flat rate, do not take account of the individual situation of each participant. On the contrary, it shields the less efficient undertakings from competition and dissuades them from improving their productivity.

The inclusion of the value of materials to be supplied and/or work to be carried out by the client or by third parties, in calculating the basic amount used in establishing the amount of reimbursement of calculation costs, reinforces the restrictive nature of this system.

(87) The concerted increases in prices have the additional effect of prompting undertakings to establish token price tenders, their objective being merely to recover the reimbursement amounts paid to the SPO, but also to encourage clients to invite only a very limited number of building and construction firms to make tenders, since they have to bear the calculation costs of all tenderers for each contract.

Such a system has the effect of limiting the number of tenderers for each contract and thus of restricting competition in the building and construction industry.

The overall amount of the price increases thus agreed within the SPO in the sectors of the building and construction market described in recital 6 above is far from being negligible, since in the period 1987 to 1988 it amounted to an annual sum which may be estimated at Hfl 300 million net of VAT by way of reimbursement of calculation costs and at Hfl 100 million net of VAT by way of trade contributions (more than 50 % of which is intended to cover the organization costs of the cartel — offices and SPO).

(88) 8. Concerted fixing of the final prices to be tendered (see recital 38 above)

The concerted establishment of the price tenders to be submitted by the building and construction firms to the client also constitutes a restriction of competition, within the meaning of Article 85 (1), between the tenderers attending the meeting.

Certainly, the final prices to be tendered to the client are established in such a way as to maintain the order of sequence of the proposed tender figures (unless changes are made due to withdrawal or preference). However, such final prices are not determined merely by adding the price increases indicated above to the initial tender figures. The highest prices which would result from such addition may be changed by means of an overall decrease (even to a level below the corresponding initial proposed figures), so as to prevent the presentation of excessive price differences to the client.

Such elimination of excessive price differences serves to protect certain tenderers deemed to be 'too expensive' against the risk of being eliminated, *a priori,* from subsequent contracts, involving restricted or single tendering procedures.

Conversely, when preference is granted to a building and construction firm, the final price tenders of the other participants may be increased so as to present the client with a set of prices comprising price differences which reinforce the position of the building and construction firm granted preference.

In both cases, the UPR system restricts the freedom of choice of clients and distorts the choices they make. The presentation to the

client of final prices which have been concerted and predetermined in this way provides him with artificial information on the level of prices, misleading him on the real state of the market and of tenders (also as regards comparison of the prices tendered by outsiders), and also possibly leading him to make major errors of judgment in implementing subsequent tendering procedures or private contracts.

(89) The same view must be taken of the concerted fixing of prices for specific parts of the contract and of unit prices, etc. In so far as the meeting deems it necessary, such prices are fixed, in respect of each participating building and construction firm, in such a way as to safeguard the position of the building and construction firm that will tender the lowest price. Thus, the client is dissuaded from awarding parts of the contract to several building and construction firms or from awarding the entire contract to another building and construction firm than that which tendered the lowest price.

(90) It is clear from the investigations carried out by the Commission that the concerted action between building and construction firms may also relate to contract conditions other than the price and the elements making up the price, such as the time limit for completion of the work to be indicated in the price tender.

(91) Lastly, the concerted action on the content of the information to be communicated by the building and construction firms with their price tender as regards the elements making up the price and the increases applied similarly constitutes a restriction of competition designed to distort the comparison of tenders. It is clear from the Commission's investigations that it is not uncommon for deliberately misleading information to be communicated to the client.

(92) In short, the concerted establishment of tender prices involved in the UPR system constitutes in itself a restriction or a distortion of competition within the meaning of Article 85 (1) (a).

The Commission considers that the concerted fixing of prices relating to specific parts of the contract, unit prices, etc., elements making up prices, conditions other than the price and the content of the supplementary information to be provided to the client in price tenders is not inherent in the concerted fixing of the final prices, as expressly provided for in the UPR rules.

These are separate restrictions of competition which, even if they are not expressly provided for in the UPR rules, necessarily result from the fixing of the final prices and are in a way complementary to it.

(93) 9. Protection of the entitled undertaking (see recitals 39 to 41 and 52 to 59 above)

The designation of the entitled undertaking, as such, prevents or at least distorts and restricts competition. It should be borne in mind that, ultimately, it is the meeting of tenderers which decides whether tenders are comparable or not, i.e. whether the would-be buyer has formulated his request in an identical manner *vis-à-vis* each of the tenderers invited. The meeting replaces the freedom of choice of the client and his capacity to negotiate with several tenderers by a decision taken jointly by the tenderers and constraining the client in so far as it prevents him from allowing competition to operate between the various building and construction firms that have submitted a tender.

In the same way, the tenderers deprive the competitors of the entitled undertaking of any right to negotiate with the client after the prices have been tendered.

Where non-simultaneous price tenders are involved, the system aims to prevent competitors from tendering a lower price than the price tendered by the entitled undertaking.

This system confers on the entitled undertaking a temporary monopoly of two or five years in respect of a given contract and thus prevents competition from operating.

If the client decides not to award the contract, for whatever reason, and to issue a new invitation to tender or to award a contract by private agreement, the system for protecting the entitled undertaking makes his freedom of choice totally illusory and in practice prevents any competition between the building and construction firms.

(94) With regard to the system for protecting the entitled undertaking, as provided for in the UPR rules and the Code of Honour, it is claimed, in the joint reply to the Statement of Objections, that the objective pursued by the private-law rules and regulations in question, governing the relations between building and construction firms, is identical to the objective pursued by the public-law rules and regulations in force in Member States other than the Netherlands and by the Community rules laid down in Directive 71/305/EEC governing the behaviour of the contracting authorities. Consequently, it is claimed, this private-law system cannot be deemed to run counter to Article 85 (1) of the Treaty.

In addition, it is maintained by the parties to which this Decision is addressed that the system

is intended merely to create the most favourable conditions for effective and efficient competition on the building and construction market and to prevent ruinous competition.

(95) The Commission cannot accept these arguments. The Community and national rules and regulations to which the SPO refers are, for the reasons already set out in recital 75 above, not comparable with the system for protecting the entitled undertaking, which disregards all the constituent elements governing the behaviour.

For the rest, the SPO has not succeeded in showing that, if there were no protection of an entitled undertaking, tenderers would be open to 'pressure' by the client. In addition, it has not provided any evidence of the allegedly ruinous nature of the competition which would result.

(96) 10. Paying over of the amounts of price increases (see recitals 42 to 46 above)

The system and arrangements for paying over the amounts of reimbursement for calculation costs and trade contributions have as their object or effect the restriction or, at least, the distortion of competition, since the firms which obtain the contracts benefit much more from the paying over of such increases than their competitors whose tenders are unsuccessful. Their competitive position is thus artificially strengthened compared with such competitors.

(97) 11. Monitoring compliance with the obligations deriving from the UPR rules (see recitals 47 and 48 above)

The provisions of the UPR rules and of the Code of Honour (including the disciplinary rules) providing for the imposition of penalties in the event of non-compliance with the obligations deriving from the rules have as their object the strengthening, in particular, of the anti-competitive commitments entered into by the participants in the SPO (including member associations).

B. *Measures to protect the SPO with regard to non-member building and construction firms* (see recitals 49 to 51 above)

(98) The systematic exchange of information within the SPO regarding non-member building and construction firms as a concerted response by the SPO to tenders by outsiders constitutes a practice having as its object the prevention or distortion of competition within the common market within the meaning of Article 85 (1).

The exchange of information within the SPO makes it possible to exert pressure, often effective, on non-member undertakings so as to induce them to comply with the UPR rules on a more or less permanent basis.

Such pressure is applied not only with regard to undertakings bound by the Code of Honour but not affiliated to the SPO, and thus subject in principle only to the requirements that they notify their intention to submit a tender and that they respect the position of the entitled undertaking, but also with regard to undertakings which are wholly outside the SPO, i.e. which are subject neither to the rules of the Code of Honour nor to those of the SPO.

The exchange of information carried out during the meeting of building and construction firms that is organized by the office also enables such firms to take account of the risk of any outside competition in establishing the proposed tender figures and the final figures, allowing them to dispense with the designation of an entitled undertaking and/or the increases described in recitals 31 to 37 above. Conversely, when it is apparent that there is no risk of intervention by known outsiders, the meeting may be induced to increase the proposed tender figures by the maximum amount of such increases.

(99) A building and construction firm not belonging to the SPO and wishing to submit a price tender is not in a position to measure its competitive economic capacity within the normal framework of a tender by a number of different firms, but is faced with a concerted and flexible tender designed to limit or impede its ability to enter the market.

In the case of a foreign building and construction firm not participating in the SPO, its position is aggravated by the fact that, in general, it is involved in the building and construction market in the Netherlands only through the intermediary of cooperation with a building and construction firm established in the Netherlands, which as a general rule is bound by the UPR rules and must therefore comply with the concerted action arrangements.

This restriction is all the more appreciable as the SPO ensures strict protection for the designated entitled undertakings and has substantial economic resources deriving from the concerted price increases paid over to the SPO.

The investigation has shown that the number of contracts on which there was concerted action within the SPO and which were nevertheless obtained by non-member undertakings is very low. The number varies depending on the sectors and geographical

areas concerned (from 0,7 to 10,5 % of the number of contracts handled by the SPO, and from 0,8 to 6,6 % of the value of such contracts).

C. The treatment of private contracts (see recitals 60 and 61 above)

(100) A client who concludes a private contract negotiated with a single building and construction firm is nevertheless subject to the effects of the restrictions of competition imposed by the SPO. The building and construction firms protect themselves against the risk of having to pay the office 3 % of the price of the building contract by applying a corresponding increase in their price tender in case, having won the contract, the SPO office reveals to them that other building and construction firms had also been consulted.

This arrangement (which is also found in the context of subcontracting: see recitals 55 to 59 above) thus has the effect of bringing about a general and uniform increase in all the prices of private contracts, whether negotiated with one or several building and construction firms.

The investigations carried out by the Commission showed a large number of examples of application of the above rule, with 3 % of the prices of the contracts being paid over, *a posteriori,* by the building and construction firms to the various offices.

D. *Conclusion*

(101) The restrictions of competition noted above are the result of each of the constituent elements of the system and of the system as a whole. The SPO has itself emphasized that its rules and regulations form a whole, the main elements of which are the protection of the entitled undertaking and the spreading of calculation costs. The restrictions are appreciable, since virtually all contracts in the Dutch building and construction industry put out to tender are subject to the SPO's rules and regulations. As stated in recital 87 above, the total amount of the price increases agreed within the SPO is far from negligible. The cumulative effect of applying the rules and regulations to all the works contracts covered is crucial.

IV. EFFECT ON INTRA-COMMUNITY TRADE

(102) In view of the above, the Commission considers that the implementation of the UPR rules, and of similar previous rules, and the implementation of the Code of Honour are liable to affect trade between Member States in the following way:

1. Impact on supply from the other Member States

A. *Interpenetration of building and construction markets*

(103) The Commission wishes to point out firstly that the market for public and private works put out to tender in a Member State is not and must not be reserved only to undertakings from that Member State. Furthermore, as far as the public works market is concerned, directives such as Directive 71/305/EEC require Member States to open up such markets to undertakings from all Member States.

(104) In the building and construction industry, the interpenetration of markets in the various Member States is still relatively low, but real [1]. The factors restricting such interpenetration include the specific conditions of the building and construction market at Community level at present, such as the different rules on building and construction and the different standards from one Member State to another, and the particular characteristics of building and construction firms, but these factors are not in themselves such as to prevent such interpenetration.

(105) In the joint reply to the Statement of Objections, the SPO argued that the setting of the threshold provided for in Directive 71/305/EEC meant that any interest by building and construction firms in contracts outside their own Member State of a value below such amount, currently ECU 5 million, was without significance for the operation of the common market. It also argued that the number of contracts put out to tender and covered by its rules and regulations, with a unit value above the threshold of ECU 5 million, was too low for the operation of the common market to be influenced. The number of such contracts was 199 for the whole of 1987 and 1988, equivalent to 0,35 % of the total number of contracts processed by the SPO during that period.

The Commission cannot accept such arguments. In the first place, the non-applicability of Directive 71/305/EEC does not mean the non-applicability of the competition rules, since these are two categories of different legal norms pursuing parallel, but separate objectives. Secondly, whether or not the effect on intra-Community trade of such restrictions

[1] 'Estimates in the EEC construction business indicate that at the most 5 % of all construction activities within the countries of Europe are exported, respectively imported, and that it will remain like this; Dutch export opportunities on Community markets up to the year 2000 — prospects for the Dutch construction sector in the Community single market, by Prognos Basel (p. 4) — report drawn up at the request of the Dutch Ministry for Economic Affairs, January 1989.

of competition is appreciable must not be assessed only in relation to the number of individual contracts concerned, but in terms of the total value which such contracts represent as a whole. According to the statements made by the SPO at the hearing on 12 June 1990, the 199 contracts represented more than 23 % of the total value, which cannot be described as 'negligible'. Lastly, it should be pointed out that the threshold of ECU 5 million was introduced pursuant to Council Directive 89/440/EEC [1], i.e. after the period taken into account by the SPO. During such period, the threshold was still set at ECU 1 million.

B. *Participation of foreign undertakings in the SPO*

(106) After having, in its notification of 13 January 1988, stated that there were no statistics on the participation of building and construction firms from other Member States in the Dutch market, the SPO nevertheless communicated certain figures on the participation of such undertakings at meetings which two offices (considered to be representative) organized in 1987. These were the ZNAV office (building and water engineering sectors, south region of the country) and the WAC office (roads and road marking, the whole of the country).

The figures are as follows:

— ZNAV: 5 200 contracts were the subject of a meeting, 32 of which involved foreign participation. This figure represents 5,9 % (Hfl 117 million) of the total value of the contracts.

— WAC: 6 900 contracts were the subject of a meeting, 19 of which involved foreign participation, representing 3,5 % (Hfl 77 million) of the total value of the contracts.

In their joint reply to the Statement of Objections, the parties to which this Decision is addressed state that, in the period 1986 to 1988 (up to 1 October), 241 contracts involving foreign participation were the subject of a meeting within the SPO, which is equivalent to 3,6 % (Hfl 1 172 million) of the total value of such contracts.

It should be pointed out in addition that the participation of undertakings from other Member States in the meetings resulted in a positive outcome for such undertakings in only an even more limited number of cases.

(107) Although these figures do not cover the whole of the building and construction activities of undertakings from other Member States in the Netherlands (such as the figures relating to private contracts and to subcontracting, and those concerning contracts put out to tender and won by an outsider foreign undertaking), they confirm that there is actual interpenetration.

The low degree of such interpenetration compared with the activities of building and construction firms established within the Netherlands (or, in general, within any Member State) is attributable to the specific characteristics of the market and product in question.

This fact cannot be interpreted, from the point of view of the application of Article 85 of the EEC Treaty, as demonstrating the negligible nature of intra-Community trade. On the contrary, the restrictive practices described above are all the more harmful as they occur in a domaine where the interpenetration of national markets is relatively limited, thus affecting intra-Community trade in all the more appreciable a manner.

(108) Examination of the information gathered during the investigations shows that some 150 undertakings established in other Member States subscribe, on a more or less permanent basis, to the UPR rules. Such undertakings are established mainly in Germany and Belgium, including all the largest German and Belgian undertakings, the others being French, Luxembourg or Italian undertakings. Sometimes, the Syndicale Kamer voor de Bouwnijverheid in Antwerp (or an organization belonging to it) communicates to an SPO office the intention of Belgian undertakings subscribing to the UPR rules to submit a price tender in the Netherlands.

C. *Position of 'outsider' foreign undertakings*

(109) More generally, undertakings from other Member States wishing to obtain a contract in the Netherlands, but refusing to subscribe to the SPO must, in addition to the natural barriers to market entry resulting from their remoteness, overcome a substantial additional obstacle resulting from the existence of the SPO, grouping together as it does virtually all the Dutch building and construction undertakings interested in the contracts put out to tender, to which must even be added building and construction firms from other Member States. Competition on the supply side is no longer fragmented and multiple, bur concerted and collective, and all the more difficult to deal with. In so far as the machinery established by the SPO actually dissuades the public authorities and private sector clients from making use of the open tendering procedure, it has the effect of restricting at least

[1] OJ No L 210, 21. 7. 1989, p. 1.

indirectly the scope for building and construction firms from other Member States to participate in the Dutch market.

D. *Appreciable nature of the effect on trade between Member States*

(110) The Commission considers that trade between Member States is affected appreciably by the agreement and the decisions by associations of undertakings described above. The very nature of the rules and regulations has the effect of influencing trade flows between Member States. The UPR rules can operate effectively only if all (or nearly all) the undertakings liable to subscribe to them actually form part of the arrangement. It is for this reason that the UPR rules are open to undertakings from the other Member States.

The SPO and its member associations carry out promotional activities in respect of such undertakings in order to get them to subscribe to the arrangement.

(111) In this context, the effect on intra-Community trade is all the more appreciable as the SPO groups together virtually all the building and construction firms in the Netherlands interested in the contracts put out to tender and covers virtually all of such contracts.

On top of this, there is the fact that a building and construction firm from another Member State wishing to operate in the Netherlands seeks to cooperate with a Dutch partner for practical and other reasons, on a case-by-case basis or in a more regular manner. Since the Dutch partner generally subscribes to the UPR rules, the undertaking from the other Member State cannot avoid the application of the UPR rules.

2. Impact on demand from the other Member States

(112) Since the UPR rules apply to any invitation to tender for a contract in the Netherlands, any foreign organizer of a tender procedure (and any national organizer of an invitation to tender acting on behalf of a foreign client) who wishes to put out to tender a building and construction contract in that Member State cannot escape the application of the UPR rules imposed under the SPO. The only way to ensure the inapplicability of the concerted action measures within the SPO is to resort to a private contract negotiated with a single building and construction firm. However, even recourse to this procedure cannot afford protection against the general and uniform increase in prices as described in recitals 60, 61 and 100 above.

The same applies to the contracts put out to tender in the Netherlands by (or for the account of) international organizations such as NATO and Eurocontrol, in so far as they apply their own regulations concerning international invitations to tender.

3. The impact on supply from participating undertakings in the other Member States

(113) The Commission considers that trade between Member States is also liable to be affected appreciably on the building and construction markets in other Member States by the implementation of the agreement and decisions described in this Decision.

The (Dutch) undertakings participating in the SPO can, through the application of the UPR rules, recover, at least in part, the calculation costs of the work relating to contracts put out to tender in the Netherlands and not awarded to themselves. They thus obtain, through the intermediary of the SPO, an economic advantage in terms of the financing of their tender-preparation activities and thus a corresponding decrease in their general expenses, giving them a competitive advantage over competing building and construction firms from other Member States as regards contracts put out to tender in the other Community countries.

V. THE RULES AND REGULATIONS PREVIOUS TO THE UPR RULES

(114) In so far as the UPR rules currently in force are, essentially, merely the continuation of the previous rules and regulations, as described in recitals 62 to 65 above, the legal assessment set out in recitals 70 to 76 and 79 to 113 above also applies *mutatis mutandis*, to such rules and regulations.

Section II

Article 85 (3)

(115) The UPR rules and the Code of Honour, described above, and the previous price rules do not qualify for exemption pursuant to Article 85 (3), for the reasons set out below.

1. The rules and regulations notified

(116) It should firstly be examined whether the rules and regulations currently in force, which were notified on 13 January 1988, meet the conditions laid down in Article 85 (3).

A. *Contribution to improving the distribution of goods or to promoting technical or economic progress*

(117) Both within the context of Article 85 (1) and within that of Article 85 (3), the parties to which this Decision is addressed have put forward the argument that the public rules applicable to invitations to tender are such as to create an imbalance between demand and supply on the building and construction market in terms of the transparency of transactions.

According to the associations concerned, this imbalance enables the awarders of contracts to impose selling prices at levels which are too low or ruinous for building and construction firms. This situation is also liable, in the long term, to create serious disturbances in supply on the market and makes necessary the measures thus adopted by building and construction firms to offset its effects.

(118) As regards more particularly the system for protecting the entitled undertaking provided for under the UPR rules and the Code of Honour, such a system, according to the joint reply to the Statement of Objections, is designed solely to underpin the transactional structure of the tender procedure so that competition between firms can operate in full, without the awarder of the contract being able to abuse the particular position he holds within such a structure.

The Commission takes the view that, far from merely underpinning a transactional structure, the system for protecting the entitled undertaking, as provided for by the UPR rules and the Code of Honour, substitutes the principle of unilateral decisions, taken on a joint basis by the tenderers, for comparison of the individual tenders submitted by each of them. It should be emphasized that the meeting of tenderers reserves the right to designate or not to designate an entitled undertaking. However, the system for protecting the entitled undertaking provides for the designation of the successful bidder before the tenders have been submitted, and this applies to all contracts put out to tender and covered by the rules and regulations, whether they are public or private sector contracts and whether they involve small or large amounts, and regardless of whether or not there is a real risk of 'pressure'. The system consequently protects not only the firms against any 'pressure' on the part of the awarder of the contract, but also against the normal operation of competition. The protection of the entitled undertaking is thus not such as to contribute to maintaining, or indeed improving, supply on the Dutch building and construction market.

(119) As regards more particularly the system of compensation for calculation costs, as established under the UPR rules, the notifying parties have claimed that the UPR rules encourage the participation of building and construction firms in invitations to tender, thus promoting competition. However, the argument put forward by the notifying parties does not contain anything to suggest that the UPR rules do promote real competition by encouraging the participation of building and construction firms in invitations to tender. On the contrary, the concerted price increases have the effect of prompting clients to invite only a very limited number of building and construction firms to submit tenders, since they know that they will have to bear, in respect of each contract, not only the trade contributions, but also the calculation costs of all the tenderers. The effect which the system of increases is claimed to have, i.e. a reduction in calculation costs, at both macroeconomic and microeconomic level, can be achieved only by reducing the number of building and construction firms invited by the awarder of the contract to submit a price tender. In addition, the system encourages undertakings to establish token price tenders, with the objective solely of recovering calculation costs. The decisions to which this proceeding relates are thus in actual fact liable to limit appreciably competition between a number of tenderers for one and the same contract.

B. *Allowing consumers a fair share of the resulting benefit*

(120) According to the SPO and its members, the benefit to consumers results in particular from the operation of the decisions making for more balanced price formation, leading in the long term to a reasonable choice as to quality deriving from a larger number of tenderers wishing to participate in invitations to tender. The Commission considers that, even if the application of the rules and regulations may produce beneficial effects for consumers, the disadvantages outweigh such benefits.

(121) As regards the protection of the entitled undertaking, such disadvantages result essentially from the fact that the awarder of the contract, where there are no tenderers other than the participants, is faced with three possibilities: either negotiating (and accepting) the tender submitted by the entitled undertaking; or accepting the tender of another participant as its stands, without being able to negotiate on any of its constituent elements; or accepting none of the price tenders submitted.

(122) As regards the recovery of calculation costs, consumers do not benefit either. The flat-rate and global nature of the amount of reimbursement for calculation costs means that all those undertakings which incur fewer costs than the amount provided for receive reimbursement in excess of their real costs, all of which is borne by the awarder of the contract. It is at all events unlikely that the whole of the calculation costs passed on to the awarder of the

contract will be less high than the amount by which the building and construction firm which wins the contract would have reduced its price tender to take account of the reimbursements. The level of the reimbursements is all the higher as they are calculated on the basis of the initial tender figures increased by the amount representing the value of the material to be supplied and the work to be carried out by the client himself or by third parties (see recital 32 above).

(123) The same applies, with all the more reason, to most of the other components of the rules and regulations to which this proceeding relates. Thus, the comparison of the cost elements of the contracts (see recital 23 above) calls into question the allegedly independent nature of the setting of the initial proposed tender figures. The preference arrangement, even if accompanied by relatively strict conditions (see recital 30 above), prevents the awarder of the contract from knowing which building and construction firm submitted the lowest initial tender figure. The concerted fixing of prices to be tendered may distort the submission of tenders unjustifiably through the mechanism of the 'global decrease' designed to conceal the real differences between the initial tender figures submitted. Nor can the generalized and uniform increase in all the prices of private contracts (see recitals 60 and 61 above) be deemed to be a benefit to the consumer.

C. *Indispensable nature of the restrictions*

(124) Even if it were supposed that the rules and regulations met the first two tests of Article 85 (3), it is not established that such a situation could justify measures designed to ensure a concerted approach in supply, artificially change the level of tender prices and designate in advance the successful tenderer. The SPO has stated that the abolition of its rules and regulations, in whole or in part, would bring about the re-emergence of unofficial cartels between building and construction firms. However that may be, the Commission cannot accept that an infringement of the competition rules is justified merely because of the risk of another infringement, whether it be as serious or indeed more serious.

(125) The protection of the entitled undertaking is not indispensable because an entitled undertaking may be designated irrespective of the real risk of 'pressure' on the part of the awarder of the contract. It should be noted, in addition, that an entitled undertaking is not designated where the tenders are not comparable, i.e. in particular in cases where the awarder of the contract has left it up to the building and construction firms to a large extent to define the details of the work. In such cases, the calculation costs will, according to the SPO itself, often be relatively high. The fact that the protection of the entitled undertaking is thus not guaranteed precisely in such cases, in which the financial risks for the building and construction firms seem in principle to be greatest, provides further evidence that such protection is not indispensable at all.

(126) The reimbursement of calculation costs is flat-rate and global, which is not justified by the individual situation of the undertakings concerned. It is thus likely to entail restrictions of competition that go beyond what is necessary in order to achieve the objective pursued. This assessment applies, with even more reason, to the recovery (at least partial) of calculation costs where a non-member competitor wins the contract. In such cases, the participants benefit from a collective defence by means of the payment of reimbursement by the Guarantee Fund or the SPO's calculation cash office.

Furthermore, the rules applicable to price tenders for subcontracted work (see recitals 55 to 59 above) provide for reimbursement of calculation costs only for the subcontractors of the main contractor awarded the contract, while subcontractors who made a price tender to the other main contractors tendering for the contract do not receive any reimbursement, which tends to indicate that the notifying parties themselves do not consider such a system to be really indispensable.

(127) The aspects noted in recital 123 above go well beyond what is necessary in order to achieve the objectives pursued by the rules and regulations. The same is true of the comparison of initial tender figures at the meeting, in so far as such comparison allows the participants to ascertain whether their price tender is 'abnormally low'.

D. *Absence of any possibility of eliminating competition in respect of a substantial part of the products in question*

(128) Even if the whole of the market for building and construction services is taken into account (i.e. including private contracts), the rules and regulations afford the participants the possibility of eliminating competition in respect of a substantial part of the products and services in question in the following manner. The entitled undertaking is shielded from competition from the other participants. Even if one accepts the SPO's argument that competition is complied with up to the meeting preceding the submission of tenders, the fact remains that competition between the participants is excluded at the stage of the tender itself. Furthermore, the concerted setting of the price increases is liable to eliminate competition as regards calculation costs. Even if such costs constitute only a limited percentage of the price tender, the fact remains that it is often differences of the order of one

or two per cent that determine which undertaking will win a contract. Lastly, the fact of intentionally forgoing price increases in cases where the participants at the pre-tender meeting are informed that one or more outsiders have been invited to tender is also liable to eliminate competition. It should be noted in addition that this latter hypothesis casts even more doubt on the allegedly indispensable nature of the arrangements for reimbursing calculation costs.

2. The rules and regulations prior to the UPR rules

(129) The rules and regulations prior to the UPR rules currently in force were not notified in accordance with Article 4 of Regulation No 17. Contrary to what the SPO claims, the previous rules and regulations, and indeed the UPR rules, were not exempted from the notification requirement under Article 4 (2) (1) of Regulation No 17, in so far as it is established that undertakings from Member States other than the Netherlands participate in such rules and regulations and that contracts to be carried out in the Netherlands and put out to tender by or for the account of clients from other Member States are also subject to the rules and regulations. Even if the former rules and regulations had been notified, they would not have qualified for exemption under Article 85 (3) either, for the same reasons as those which apply to the rules and regulations currently in force.

3. The SPO statutes

(130) The SPO statutes were not notified pursuant to Article 4 of Regulation No 17. However, even if they had been notified, they would not have been eligible for exemption pursuant to Article 85 (3), for the same reasons as those outlined above in recital 116 to 129 with respect to the UPR rules and the Code of Honour currently in force and the rules and regulations prior to the UPR rules.

4. Conclusion

(131) For these reasons, the Commission cannot grant exemption pursuant to Article 85 (3) of the Treaty. Nor can it accept the SPO's statement that it failed to 'lend its active support to the SPO in order to obtain the exemption requested in the alternative'. As has consistently been made clear in the case law of the Court of Justice [1], it is in the first place for the undertakings concerned to present to the Commission the evidence intended to establish the economic justification for an exemption.

[1] Joined Cases 43 and 63/82 *VBVB and VBBB v. Commission* (1984) ECR 19 and Case 42/84 *Remia v. Commission* (1985) ECR 2545, ground 45.

Section III

Article 3 of Regulation No 17

(132) Pursuant to Article 3 (1) of Regulation No 17, where it finds that there is infringement of Article 85, the Commission may by decision require the undertakings concerned to bring such infringement to an end.

The decision requiring the undertakings concerned to bring the infringements to an end does not apply to the similar rules and regulations preceding the UPR rules, as described in recitals 55 to 59 described above, since they ended on 1 April 1987 and were superseded as from that date by the UPR rules.

(133) Pursuant to Article 3, the Commission may also adopt a decision even if the conduct in question has already been brought to an end. This is possible not only in order to impose a fine pursuant to Article 15 (2) of Regulation No 17, but also where it is deemed necessary, in the public interest, in order to prevent identical or similar infringements, also on markets other than those in question [2].

(134) Consequently, the decision must include a formal requirement on the associations of undertakings exercising their activities in the building and construction sectors in the Netherlands referred to in recital 6 above to bring the infringement to an end and to refrain in future from any collusive practice having a similar object or effect.

Section IV

Article 15 (2) of Regulation No 17

(135) Pursuant to Article 15 (2) (a) of Regulation No 17, the Commission may by decision impose fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of turnover in the preceding business year, on undertakings or associations of undertakings which, either intentionally or negligently, infringe Article 85 (1) of the Treaty. In fixing the amount of the fines, regard must be had both to the gravity and to the duration of the infringement.

(136) The Commission considers that the establishment of such a system of exchanges of information, concerted action on prices and market sharing within the SPO, as provided for by the UPR rules and the Code of

[2] Case 7/82 *GVL v. Commission* (1983) ECR 483.

Honour and by the similar rules and regulations preceding the UPR rules, constitutes a deliberate effort to thwart one of the main objectives of the Treaty, namely the creation of a single market based on free competition, since undertakings from other Member States participate in it and since, in addition, the system is applicable to invitations to tender issued by or on behalf of clients established in other Member States. Accordingly, the Commission considers that the undertakings and associations of undertakings in question have deliberately or, at the very least, through serious negligence, committed the infringements described above.

(137) The Commission considers, as regards the SPO Statutes, that the creation and operation of an association grouping together associations of building and construction firms, whose task is to regulate concerted action on prices and tenders on the market, constitute an infringement within the meaning of Article 85 (1).

(138) The infringements have been committed over a period of time which goes back at least to 1 October 1980 in the case of the SPO and the 29 associations which, within the framework of the SPO, took the price regulating decisions between 1973 and 1979, subsequently amended and codified in the UPR rules adopted on 9 October 1986 by the SPO. In this context, the Commission takes account of the fact, firstly, that the standardized procedures for penalizing infringements of the private-law rules and regulations were brought into force on 1 October 1980 on the basis of the SPO decision making the Code of Honour binding on the member undertakings and, secondly, that the infringements constituted by the notified decisions are merely, in essence, the continuation of the infringements constituted by the previous similar rules and regulations.

(139) These infringements have still not been brought to an end and have thus extended over a particularly long period. In respect of the period starting on the date of notification of the rules and regulations in question (13 January 1988), however, the undertakings and associations of undertakings concerned are covered by the immunity provided for in Article 15 (5) (a) of Regulation No 17.

(140) The Commission considers that the SPO has committed these infringements intentionally or, at the very least, negligently. The concerted action on prices and the assignment of contracts are among the most serious infringements prosecuted, prohibited and penalized by the Commission under a consistent approach well known to undertakings and consistently upheld by the Court of Justice.

The fact that the infringements were committed within the framework of organizations and trade associations comprising most of the Dutch undertakings operating in the building and construction industry involving tendering in the Netherlands, and in particular the largest of such undertakings, can only strengthen the Commission's conviction that the authors of such infringements could not be unaware that the conduct at issue had and has as its object the restriction of competition.

Furthermore, as has been made consistently clear in the Commission's decisions and the case-law of the Court of Justice [1], an agreement covering the whole of the territory of a Member State is liable through its very nature to have the effect of consolidating the partitioning of national markets, thus impeding the economic interpenetration pursued by the Treaty and ensuring the protection of national production.

Consequently, the question whether the authors of the infringements described above were or were not aware that the infringements affected or were likely to affect trade between Member States is irrelevant.

(141) In determining the general order of magnitude of the fines to be imposed, the Commission has also taken account of the following considerations:

— the institutionalized concerted action covered and still covers virtually all of the contracts falling within the sectors referred to above in paragraph 6 and put out to tender in the Netherlands,

— the SPO notified the UPR rules and the Code of Honour only after the Commission had initiated the proceeding.

The Commission is willing, however, in fixing the amount of the fines, to take account of the following facts:

— as a result of the publicity which has accompanied the rules of the professional organizations under consideration, the concertation has not been one of a hidden, clandestine nature,

— the SPO, in its own right and as a representative of its member organizations, endeavoured from the outset of the investigation actively and voluntarily to provide all the necessary and relevant information that made it possible to establish the objections against it and against its member organizations,

— the intervention by the Dutch authorities, in adopting the Royal Decree of 29 December 1986, may be considered to have created a certain ambiguity on the part of the building and construction undertakings as well as on its

[1] Commission Decision 72/22/EEC (Vereniging van Cimenthandelaren) (OJ No L 13, 17. 1. 1972, p. 34) and Judgment of the Court of Justice in Case 8/72 VCH (1972) ECR 977.
Judgment of the Court of Justice in Case 73/74 Papier peints v. Commission (1975) ECR 1491.

associations as to the compatibility of the concertation with the competition rules of the Treaty,

— finally, the present case is the first one in the construction sector in which the Commission applies Article 85 (1) of the Treaty.

In determining the amount of the fine to be imposed on each of the various associations, the Commission has had regard to the total value of the contracts put out to tender and involving concerted action within each association during the period concerned. As regards the NAC association, the Commission considers that it cannot impose a fine on it, since the association performed only a purely administrative function on behalf of its member undertakings, whereas the abovementioned concerted action by such undertakings took place and is taking place within other SPO member organizations,

HAS ADOPTED THIS DECISION:

Article 1

1. The statutes of the Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid, of 10 December 1963, as subsequently amended, constitute an infringement of Article 85 (1) of the EEC Treaty.

2. Similarly, the *Uniforme Prijsregelende Reglementen,* governing tenders under the restricted and the open procedure respectively, adopted by the Vereniging van Samenwerkende Prijsregelnde Organisaties in de Bouwnijverheid on 9 October 1986, which entered into force on 1 April 1987 and were amended on 23 June 1988, and the *Erecode voor ondernemers in het Bouwbedrijf,* except for Article 10 thereof, as made binding on the undertakings belonging to the member organizations of that association by its decision of 3 June 1980, constitute infringements of Article 85 (1) of the EEC Treaty.

3. Similarly, the previous rules and regulations similar to the *Uniforme Prijsregelnde Reglementen* referred to above in paragraph 2, as adopted, under the control of the Vereniging van Samenwerkende Prijsregelnde Organisaties in de Bouwnijverheid, by its member organizations, each on its own behalf, between 1973 and 1979, and as applied at least since 1 October 1980 up to the date on which they were effectively superseded by the said *Uniforme Prijsregelnde Reglementen,* constitute infringements of Article 85 (1) of the EEC Treaty.

Article 2

The application for exemption pursuant to Article 85 (3) of the EEC Treaty of the decisions referred to in Article 1 (2) is hereby rejected.

Article 3

1. The Vereniging van Samenwerkende Prijsregelnde Organisaties in de Bouwnijverheid and its member organizations are hereby required to bring to an end immediately the infringements referred to in Article 1 (1) and (2). They are hereby prohibited from taking any measure having the same purpose or the same effect as those referred to in Article 1.

2. The Vereniging van Samenwerkende Prijsregelnde Organisaties in de Bouwnijverheid and its member organizations are hereby required to inform the member undertakings of its member organizations and the other undertakings participating in the application and implementation of the rules and regulations referred to in Article 1 (1) and (2) in writing of this Decision and of the fact that the infringements referred to in Article 1 (1) and (2) have been brought to an end, stipulating the practical consequences deriving from this, such as the freedom of each of such undertakings to withdraw at any time from the said rules and regulations.

3. The Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and its member organizations are hereby required, within two months of notification of this Decision, to communicate to the Commission the information transmitted to the undertakings in accordance with the above paragraph.

Article 4

In respect of the infringements stipulated in Article 1, the following fines are hereby imposed on the associations specified in this Decision:

1. Amsterdamse Aannemers Vereniging:
   a fine of ECU 1 451 250;
2. Algemene Aannemersvereniging voor Waterbouwkundige Werken:
   a fine of ECU 436 500;
3. Aannemersvereniging van Boorondernemers en Buizenleggers:
   a fine of ECU 436 500;
4. Aannemersvereniging Velsen, Beverwijk en Omstreken:
   a fine of ECU 202 500;
5. Aannemers Vereniging Haarlem-Bollenstreek:
   a fine of ECU 337 500;
6. Aannemersvereniging Veluwe en Zuidelijke IJsselmeerpolders:
   a fine of ECU 445 500;
7. Combinatie van Aannemers in het Noorden:
   a fine of ECU 198 000;
8. Vereniging Centrale Prijsregeling Kabelwerken:
   a fine of ECU 180 000;
9. Delftse Aannemers Vereniging:
   a fine of ECU 162 000;
10. Economisch Nationaal Verbond van Aannemers van Sloopwerken:
    a fine of ECU 184 500;

11. Aannemersvereniging 'Gouda en Omstreken':
a fine of ECU 249 750;

12. Gelderse Aannemers Vereniging inzake Aanbestedingen:
a fine of ECU 996 750;

13. Gooise Aannemers Vereniging:
a fine of ECU 270 000;

14. 's-Gravenhaagse Aannemersvereniging:
a fine of ECU 1 188 000;

15. Leidse Aannemersvereniging:
a fine of ECU 317 250;

16. Vereniging Markeer Aannemers Combinatie:
a fine of ECU 38 250;

17. Nederlandse Aannemers- en Patroonsbond voor de Bouwbedrijven (NAPB Dordrecht):
a fine of ECU 324 000;

18. Noordhollandse Aannemers Vereniging voor Waterbouwkundige Werken:
a fine of ECU 238 500;

19. Oostnederlandse-Vereniging-Aanbestedings-Regeling:
a fine of ECU 1 116 000;

20. Provinciale Vereniging van Bouwbedrijven in Groningen en Drenthe:
a fine of ECU 474 750;

21. Rotterdamse Aannemersvereniging:
a fine of ECU 2 103 750;

22. Aannemersvereniging 'de Rijnstreek':
a fine of ECU 96 750;

23. Stichting Aanbestedingsregeling van de Samenwerkende Bouwbedrijven in Friesland:
a fine of ECU 384 750;

24. Samenwerkende Prijsregelende Vereniging Nijmegen en Omstreken:
a fine of ECU 200 250;

25. Samenwerkende Patroons Verenigingen in de Bouwbedrijven Noord-Holland-Noord:
a fine of ECU 670 500;

26. Utrechtse Aannemers Vereniging:
a fine of ECU 1 055 250;

27. Vereniging Wegenbouw Aannemers Combinatie Nederland:
a fine of ECU 4 792 500;

28. Zuid Nederlandse Aannemers Vereniging:
a fine of ECU 3 948 750.

Article 5

The fines imposed in Article 4 shall be payable within three months of the notification of this Decision to the following bank account:

Account No 310-0933000-43,
Banque Bruxelles-Lambert,
Agence Européenne,
Rond Point Schuman, 5,
B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i. e. 13,75 %.

Article 6

This Decision is addressed to:

Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid,
Koningin Wilhelminalaan 15,
NL-3818 HN Amersfoort;

Amsterdamse Aannemers Vereniging,
Muzenplein 9,
NL-1077 WC Amsterdam-Zuid;

Algemene Aannemersvereniging voor Waterbouwkundige Werken,
Europalaan 101,
NL-3526 KR Utrecht;

Aannemersvereniging van Boorondernemers en Buizenleggers,
Middelwijkstraat 23 – 25,
NL-3764 CD Soest;

Aannemersvereniging Velsen, Beverwijk en Omstreken,
Velserdijk 32,
NL-1981 AA Velsen Zuid;

Aannemers Vereniging Haarlem-Bollenstreek,
Van Merlenlaan 1,
NL-2103 GA Heemstede;

Aannemersvereniging Veluwe en Zuidelijke IJsselmeerpolders,
Zwolseweg 290,
NL-7315 GZ Apeldoorn;

Combinatie van Aannemers in het Noorden,
Prins Hendrikstraat 6,
NL-8911 BK Leeuwarden;

Vereniging Centrale Prijsregeling Kabelwerken,
Prins Hendrikstraat 6,
NL-8911 BK Leeuwarden;

Delftse Aannemers Vereniging,
Thomas Mannplaats 307,
NL-3069 NJ Rotterdam;

Economisch Nationaal Verbond van Aannemers van Sloopwerken,
Europalaan 101,
NL-3526 KR Utrecht;

Aannemersvereniging 'Gouda en Omstreken',
Thomas Mannplaats 307,
NL-3069 NJ Rotterdam;

Gelderse Aannemers Vereniging inzake Aanbestedingen,
Roëllstraat 1,
NL-6814 JC Arnhem;

Gooise Aannemers Vereniging,
De Ruyterstraat 31,
NL-1271 SR Huizen;

's-Gravenhaagse Aannemersvereniging,
Van Stolkweg 11,
NL-2585 JL 's-Gravenhage;

Leidse Aannemersvereniging,
Rijnsburgerweg 159,
NL-2334 BP Leiden;

Vereniging Markeer Aannemers Combinatie,
Utrechtseweg 44,
NL-3704 HD Zeist;

Nederlandse Aannemers- en Patroonsbond voor de Bouwbedrijven (NAPB Dordrecht),
Singel 91,
NL-3311 PB Dordrecht;

Noordhollandse Aannemers Vereniging voor Waterbouwkundige Werken,
Von Liebigweg 39,
NL-1097 RL Amsterdam;

Oostnederlandse-Vereniging-Aanbestedings-Regeling,
Almelosestraat 22,
NL-7495 TH Ambt-Delden;

Provinciale Vereniging van Bouwbedrijven in Groningen en Drenthe,
Heresingel 19,
NL-9711 ER Groningen;

Rotterdamse Aannemersvereniging,
Thomas Mannplaats 307,
NL-3069 NJ Rotterdam;

Aannemersvereniging 'de Rijnstreek',
Thomas Mannplaats 307,
NL-3069 NJ Rotterdam;

Stichting Aanbestedingsregeling van de Samenwerkende Bouwbedrijven in Friesland,
Prins Hendrikstraat 6,
NL-8911 BK Leeuwarden;

Samenwerkende Prijsregelende Vereniging Nijmegen en Omstreken,
Groesbeekseweg 14,
NL-6524 DB Nijmegen;

Samenwerkende Patroons Verenigingen in de Bouwbedrijven Noord-Holland-Noord,
Justus van Effenstraat 7—9,
NL-1813 KW Alkmaar;

Utrechtse Aannemers Vereniging,
Ramstraat 20,
NL-3581 HJ Utrecht;

Vereniging Wegenbouw Aannemers Combinatie Nederland,
Utrechtseweg 44,
NL-3704 HD Zeist;

Zuid Nederlandse Aannemers Vereniging,
Jan Deckersstraat 45,
NL-5591 HP Heeze;

Vereniging Nederlandse Aannemers Combinatie,
P/a TRN-groep,
Zoeterwoudsesingel 62,
NL-2313 EL Leiden.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 5 February 1992.

For the Commission
Leon BRITTAN
Vice-President