

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 8 December 2005¹

I — Introduction

upheld in its entirety by the Court of First Instance by judgment of 16 December 2003 in Joined Cases T-5/00 and T-6/00³ ('the judgment under appeal').

1. This case has its origin in cartel proceedings initiated by the Commission in respect of the wholesale market for electrotechnical fittings in the Netherlands. In those proceedings, which lasted more than eight years from the initial investigations to the Commission's decision, the Commission imposed fines on the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied ('the FEG') and one of its member undertakings, Technische Unie BV ('TU'), for infringements of Article 81(1) EC.

2. The relevant Commission decision of 26 October 1999² ('the contested decision') was

3. An appeal against that judgment at first instance has now been brought before the Court of Justice by the FEG.⁴ In addition to raising a number of pleas in law essentially alleging failure to state reasons and infringement of Article 81 EC, the FEG accuses the Court of First Instance, in particular, of having failed to draw the necessary conclusions from the excessive length of the procedure before the Commission.

1 — Original language: German.

2 — Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty, Case IV/33.884 — Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU), notified under document number C(1999) 3439 (OJ 2000 L 39, p. 1).

3 — *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission* [2003] ECR II-5761.

4 — In addition, TU has also brought an appeal against the same judgment before the Court of Justice (Case C-113/04 P); see, in this regard, my Opinion of today's date.

II — Relevant legislation

4. Article 81(1) EC prohibits ‘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 ...’.

undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe [Article 81(1) EC] ...;

...

5. In such cases, the Commission may impose fines on the undertakings concerned, as provided for in Article 15(2) of Council Regulation No 17 of 6 February 1962⁵ (‘Regulation No 17’):

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.’

III — Facts and procedure

‘The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the

A — Facts and procedure before the Commission

6. The competition case underlying this dispute concerns the Netherlands wholesale market for electrotechnical fittings, that is to say, for example, wires and cables as well as polyvinyl chloride (PVC) tubes. The Commission found there to be on that market a ‘collective exclusive dealing arrangement’ which the FEG association of undertakings

5 — Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962 (I), p. 87). That regulation has in the meantime been replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). However, since the latter regulation applies only from 1 May 2004, Regulation No 17 alone is relevant to this case.

had entered into, *inter alia*, with the NAVEG⁶ association of undertakings by means of a 'gentlemen's agreement' and which was intended to prevent supplies to non-members of the FEG. It also found that the FEG had restricted the freedom of its members to determine their selling prices independently.

7. In paragraphs 3 to 5 of the judgment under appeal, the Court of First Instance summarises the background to this case as follows:

'3 CEF Holdings Ltd (hereinafter "CEF UK"), a United Kingdom wholesale distributor of electrotechnical fittings, decided to establish itself in the Netherlands market, where for that purpose it established a subsidiary, CEF City Electrical Factors BV ("CEF BV"), in May 1989. Perceiving problems of supply in the Netherlands, CEF BV and CEF UK ... lodged a complaint with the Commission on 18 March 1991, which the Commission registered on the following day.

4 The complaint concerned three associations of undertakings in the electro-technical fittings sector, and the members thereof. In addition to the FEG, these were the Nederlandse Vereniging van Alleenvertegenwoordigers op Elektrotechnisch Gebied (Netherlands Association of Exclusive Representatives in the Electrotechnical Sector, hereinafter "NAVEG") and Unie van de

Elektrotechnische Ondernemers (Union of Electrotechnical Undertakings, hereinafter "UNETO").

5 CEF considered that those associations and their members had concluded reciprocal collective exclusive dealing agreements at all levels of the distribution chain for electrotechnical fittings in the Netherlands. Unless it joined the FEG, it would therefore be virtually impossible for a wholesale distributor of electrotechnical fittings to enter the Netherlands market. The manufacturers and their agents or importers supply only members of the FEG; fitting contractors purchase only from FEG members. By letter of 22 October 1991, CEF widened the scope of its complaint, so as to cover agreements between the FEG and its members concerning prices and price reductions, and agreements designed to prevent CEF from participating in certain projects. As from January 1992, CEF also complained of vertical price-fixing arrangements between some manufacturers of electrotechnical fittings and FEG wholesalers.'

8. Furthermore, paragraphs 6 to 14 of the judgment under appeal, which relate to the course of the investigations and the proceedings before the Commission, read as follows:

'6 [Between June and August 1991, the Commission sent to, *inter alia*, the FEG a number of requests for information on the basis of Article 11 of Regulation No 17.]

⁶ — Nederlandse Vereniging van Alleenvertegenwoordigers op Elektrotechnisch Gebied.

- 7 By letter of 16 September 1991, the Commission sent the FEG a letter of formal notice concerning, among other things, pressure brought to bear on certain suppliers of electrotechnical fittings not to supply to CEF, concerted practices engaged in by FEG members regarding prices and discounts and the turnover criterion applied for admission to FEG membership.
- 8 On 27 April 1993, the Commission questioned a number of suppliers of electrotechnical fittings, under Article 11 of Regulation No 17.
- 9 On 10 June 1994, the Commission requested information from the FEG, under Article 11 of Regulation No 17.
- 10 On 8 and 9 December 1994, the Commission carried out inspections under Article 14(3) of Regulation No 17 at the premises of the FEG and some of its members, including TU.
- 11 On 3 July 1996, the Commission notified its objections to the FEG and to seven of its members [including TU] (hereinafter "the statement of objections"). The FEG and TU lodged observations in response to that statement, on 13 December 1996 and 13 January 1997 respectively.
- 12 The FEG and TU submitted several requests to the Commission for access to the file. After disclosure to them on 16 September 1997 of a number of supplementary documents contained in the file, on 10 October 1997 each of them sent to the Commission further submissions in response to the statement of objections.
- 13 A hearing was held on 19 November 1997, attended by all the addressees of the statement of objections and by CEF.
- 14 Subsequently, on 26 October 1999, the Commission adopted the contested decision ...'

B — *The contested decision*

- 11 On 3 July 1996, the Commission notified its objections to the FEG and to seven of its members [including TU] (hereinafter "the statement of objections").
9. In the contested decision, the Commission essentially found that the FEG had

committed two infringements of Article ...
81(1) EC and fined it for doing so. The
operative part of the contested decision, in
extract, reads as follows:

Article 4

‘Article 1

The FEG has infringed Article 81(1) [EC] by
entering into a collective exclusive dealing
arrangement intended to prevent supplies to
non-members of the FEG, on the basis of an
agreement with NAVEG, and of practices
concerted with suppliers not represented in
NAVEG.

1. The FEG shall forthwith bring the in-
fringements referred to in Articles 1 and 2 to
an end, if it has not already done so.

...

Article 2

Article 5

The FEG has infringed Article 81(1) [EC] by
directly and indirectly restricting the free-
dom of its members to determine their
selling prices independently. It did so by
means of the Binding Decision on fixed
prices, the Binding Decision on publications,
the distribution to its members of price
guidelines for gross and net prices, and by
providing a forum for its members to discuss
prices and discounts.

1. For the infringements referred to in
Articles 1 and 2, a fine of EUR 4.4 million
is imposed on the FEG.

...’

10. On account of the irregularities in the administrative procedure, which it itself acknowledges, not least the considerable length of that procedure, the Commission applied a reduction of EUR 100 000 in calculating the fine.⁷

— order the Commission and the interveners to pay the costs.

12. An application by the FEG for interim measures was dismissed.¹¹

C — Judicial procedure

11. Both the FEG⁸ and TU⁹ brought an action against the contested decision before the Court of First Instance, each claiming that the Court should:

— annul the contested decision;¹⁰

— in the alternative, annul the respective fines;

— in the further alternative, reduce the amount of the respective fines; and

13. The President of the First Chamber of the Court of First Instance granted CEF BV and CEF UK (together 'CEF') leave to intervene in support of the forms of order sought by the Commission.¹²

14. After joining Cases T-5/00 and T-6/00 for the purposes of the oral procedure and judgment, on 16 December 2003 the Court of First Instance gave the judgment under appeal, in which it:

— dismissed the applications; and

— ordered the applicants to pay the costs of the respective proceedings.

7 — See recitals 151 to 153 in the preamble to the contested decision.

8 — Case T-5/00.

9 — Case T-6/00.

10 — In Case T-6/00, TU also claimed in the alternative that the Court of First Instance should annul the finding, in Article 3 of the contested decision, that it had infringed Article 81 EC.

11 — Orders of the President of the Court of First Instance of 14 December 2000 in Case T-5/00 R *FEG v Commission* [2000] ECR II-4121 and of the President of the Court of Justice of 23 March 2001 in Case C-7/01 P(R) *FEG v Commission* [2001] ECR I-2559.

12 — Order of 16 October 2000 in Cases T-5/00 and T-6/00.

15. By its appeal, received at the Court Registry on 26 February 2004, the FEG now claims that the Court should:

- set aside the judgment under appeal in Joined Cases T-5/00 and T-6/00, or at least in so far as it relates to Case T-5/00, and, ruling anew, annul in its entirety or at least in part the decision of the Commission, or at least decide to reduce substantially the fine imposed on the FEG;
- in the alternative, set aside the judgment under appeal in Joined Cases T-5/00 and T-6/00, at least in so far as it relates to Case T-5/00, and refer the matter back to the Court of First Instance; and

- order the Commission to pay the costs of the proceedings at first instance and on the appeal.

16. The Commission contends that the Court should:

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

- order the appellant to pay the costs.

17. For its part, the intervener CEF contends that the Court should:

- dismiss the appeal in its entirety as manifestly inadmissible, as inadmissible, or in any event as unfounded; and

- order the appellant to pay the costs.

18. The appeal was made to the Court first in writing and then orally, on 22 September 2005, together with Case C-113/04 P.

IV — The second to sixth pleas in law

19. By the second to sixth pleas in law, the FEG challenges a number of passages from the judgment under appeal in which the Court of First Instance considers the individual findings of the Commission in relation to the infringements and the duration of those infringements.

20. Before assessing each of those pleas in law, it seems appropriate to recall the criterion governing the review of judgments of the Court of First Instance which is laid down in Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice and which the Court of Justice has consistently applied in appeal proceedings:¹³ an appeal is to be limited to points of law. For that reason, the Court of First Instance alone has jurisdiction to establish and assess the relevant facts and evidence; the assessment of the facts and evidence, unless they have been distorted, does not constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

21. Furthermore, an appeal which merely reproduces the pleas in law and arguments previously submitted to the Court of First Instance, without even including submissions specifically identifying the error of law allegedly vitiating the judgment under appeal, does not satisfy the requirements laid down by law. In reality, such an appeal amounts to no more than a request for re-examination of the application, which falls outside the jurisdiction of the Court of Justice.¹⁴

22. The second to sixth pleas in law must now be examined with the foregoing in mind.

A — The second plea in law: failure to consider exculpatory evidence with regard to the collective exclusive dealing arrangement

23. By its second plea in law, the FEG claims that the Court of First Instance infringed the principle of the presumption of innocence and the requirement to state reasons by failing to recognise as exculpatory evidence certain documents drawn up after the start of the Commission's investigations and its letter of formal notice but before the statement of objections.

24. That plea in law, which is closely linked to the first plea in law, relates specifically to paragraphs 196 and 208 of the judgment under appeal. In those paragraphs, the Court of First Instance considers the probative value of a number of letters, submitted to the Commission by third parties, which, in the view of the FEG, rebut the allegations made in connection with the collective exclusive dealing arrangement. In this regard, the Court of First Instance concludes that the documents concerned are not capable of refuting the Commission's finding that the 'gentlemen's agreement' between the FEG and NAVEG was actually implemented in practice.¹⁵

13 — See, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* ('Cement judgment') [2004] ECR I-123, paragraphs 47 to 49, and Case C-37/03 P *BioID v OHIM* [2005] ECR I-7975, paragraphs 43 and 53.

14 — Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 35; Case C-234/02 P *Ombudsman v Lamberts* [2004] ECR I-2803, paragraph 77; and Case C-286/04 P *Eurocermex v OHIM* [2005] ECR I-5797, paragraph 50.

15 — See also paragraph 209 of the judgment under appeal.

25. The FEG counters that conclusion by arguing that the judgment under appeal is *inherently contradictory*. On the one hand, the letter of formal notice is not taken into account in the determination of the starting point for application of the principle that proceedings must be disposed of within a reasonable time. In that context, therefore, the Court of First Instance regards the FEG as a defendant only as from the date of the statement of objections and not as from the date of the letter of formal notice. As far as the assessment of evidence is concerned, on the other hand, the FEG is treated as a defendant as from the date of the letter of formal notice. Thus, the Court of First Instance does not recognise as exculpatory any documents which post-date the start of the Commission's investigations or its letter of formal notice. It is argued that the Court of First Instance refuses *automatically* and *without further explanation* to recognise the documents at issue as exculpatory evidence.

26. The question whether the grounds of a judgment of the Court of First Instance are contradictory is a point of law which is amenable, as such, to judicial review on appeal.¹⁶ To that extent, the FEG's appeal is therefore admissible.

27. However, contrary to what the FEG appears to assume, the assessment of the

probative value of documents and the evaluation of the reasonableness of the length of proceedings bear no relation to each other. Accordingly, the two paragraphs of the judgment under appeal, in which the Court of First Instance considers, on the one hand, the length of the proceedings and, on the other hand, the probative value of the documents at issue, likewise exhibit no logical connection with each other and, moreover, cannot therefore be substantively contradictory as the FEG claims.

28. In particular, the mere fact that a particular document was drawn up *before* the statement of objections does not necessarily mean that that document constitutes exculpatory evidence. By the same token, a document which was drawn up *after* the statement of objections does not necessarily constitute incriminating evidence. Rather, the probative value of a document must always be considered by reference to all the facts of the case in question. Thus, the value of evidence alleged to be exculpatory evidence may diminish, for example, because it came to light at the initiative of the defendants and at a time when it was already clear that the Commission had begun to suspect a cartel infringement and the undertakings concerned had therefore received a warning (*'in tempore suspecto'*). It was just such an assessment of the case in question which the Court of First Instance carried out, without making any error of law, in the judgment under appeal.

29. In conclusion, the second plea in law is therefore admissible but unfounded.

16 — Case C-401/96 P *Somaco v Commission* [1998] ECR I-2587, paragraph 53, and Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 25. To that same effect, see also Case C-208/03 P *Le Pen v Parliament* [2005] ECR I-6051, paragraph 45.

B — *The third plea in law: the formulation of proof in relation to the duration of the collective exclusive dealing arrangement*

30. By its third plea in law, the FEG accuses the Court of First Instance of having infringed Article 81(1) EC and the requirement to state reasons by finding that the Commission had formulated reasonable proof of the existence, and above all the duration, of the collective exclusive dealing arrangement.

31. This plea in law concerns, in particular, that part of the judgment under appeal entitled 'The claims for annulment' and Section II(B)(1)(b) under that heading. In that section, the Court of First Instance considers in detail the question whether, in the contested decision, the Commission discharged the burden of proof incumbent on it when it concluded that there was a collective exclusive dealing arrangement in the form of a 'gentlemen's agreement' between the FEG and NAVEG.¹⁷ The Court of First Instance concludes that the objections submitted by the FEG and TU are not such as to 'call in question the convincing, objective and consistent nature of the evidence relied on in the contested decision'.¹⁸

32. In addition, the third plea in law makes reference to paragraphs 401 to 406 of the judgment under appeal, in which the Court of First Instance describes the breaches of the competition rules at issue as 'serious infringements of Article 81 EC',¹⁹ and, with regard to their duration, points to the unique character of the infringements.²⁰

33. The FEG claims that the evidence presented by the Commission in support of its findings is exceptionally sparse and indirect. It is not capable of constituting lawful and convincing proof of the existence of a continuous infringement of the competition rules between 11 March 1986 and 25 February 1994. In particular, the FEG criticises the Court of First Instance for having accepted proof formulated on the basis of little evidence, that is to say minutes of meetings and written correspondence between the associations of undertakings concerned. It is argued that the Court of First Instance failed to take into account that the Commission did not adduce any evidence whatsoever of the existence of a collective exclusive dealing arrangement for the periods 12 March 1986 to 28 February 1989 and 18 November 1991 to 25 February 1994.

34. The Commission submits that this plea in law is inadmissible because the FEG is merely repeating complaints which it raised unsuccessfully in the proceedings before the Court of First Instance. It is true that paragraphs 169 to 186 of the judgment

17 — See introductory paragraph 141 to Section II(B)(1)(b) of the judgment under appeal.

18 — See the overall conclusion to that section, in particular paragraph 210 of the judgment under appeal.

19 — Paragraph 402 of the judgment under appeal.

20 — Paragraph 406 of the judgment under appeal.

under appeal, for example, are essentially devoted to the arguments advanced by the applicants at first instance to challenge the probative value of the documents cited by the Commission in relation to the meetings between the FEG and NAVEG. The mere repetition of the complaints raised before the Court of First Instance would be inadmissible.²¹

35. Furthermore, CEF contends that the sole purpose of this plea in law is to call into question the assessment of the facts carried out by the Court of First Instance. The detailed line of argument advanced by the FEG, based on individual documents and the probative value attaching to them, does appear to point to such an intention.²² This too would render the third plea in law inadmissible.²³

36. However, on closer examination, this third plea in law is not merely a criticism of the assessment of the facts carried out by the Court of First Instance or a repetition of the complaints raised at first instance. The FEG also argues that, in its judgment, the Court of First Instance failed to meet the standard laid down by law for proving an infringement of Article 81(1) EC and that, in this respect, the judgment did not duly state the reasons on which it was based. The standard of proof which the Commission must satisfy in a

cartel decision, in particular the *kind of evidence* on which it can base its finding of an infringement of the competition rules laid down in the Treaty, is a point of law which may be referred to the Court of Justice on appeal.

37. Interpreted in this way, the third plea in law is therefore admissible. From the point of view of the substance of the case, however, it cannot be upheld.

38. It is true that the Commission must prove not only the existence of a cartel but also its duration.²⁴ However, the Court of Justice recognises that anti-competitive practices and agreements are by their nature not infrequently intended to be secret and the associated documentation is restricted to a minimum. Documents such as the minutes of a meeting will usually only be sparse and, furthermore, inevitably fragmentary, so that it is often necessary to reconstitute certain details by deduction. Thus, in most cases, the existence of anti-competitive practices or agreements must be inferred from a number of indicia and coincidences which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.²⁵ It is self-evident that the aforementioned indicia and coincidences may provide infor-

21 — See point 21 of this Opinion.

22 — The last sentence of paragraph 7 of the appeal could also be interpreted in this way.

23 — See point 20 of this Opinion.

24 — Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp v Commission* [2005] ECR I-6773, paragraph 31.

25 — *Cement* judgment (cited in footnote 13), paragraphs 55 to 57.

mation not just about the mere *existence* of anti-competitive practices or agreements, but also about the *duration* of continuous anti-competitive practices or the *period of application* of anti-competitive agreements.

39. This is precisely what has occurred in this case. From a number of indicia, the Commission inferred the existence and duration of an anti-competitive collective exclusive dealing arrangement. In the light of the case-law cited, the Court of First Instance was entitled to assume, without erring in law, that this *way of presenting evidence* satisfied the standard laid down by law. In this respect, moreover, the judgment under appeal cannot be held to be vitiated by a failure to state reasons. The FEG's third plea in law is thus unfounded.

40. Furthermore, the probative value to be assigned to the individual indicia relied on by the Commission *in this specific case*, in particular, but not exclusively, as regards the duration of the infringements of the competition rules, is furthermore a question forming part of the assessment of facts and evidence. As I have stated, other than in the event of distortion, which has not been pleaded here, that question falls exclusively within the jurisdiction of the Court of First Instance and is not subject to review by the Court of Justice on appeal.

41. The third plea in law is therefore admissible but unfounded.

C — The fourth plea in law: concerted practices with regard to price fixing

42. By its fourth plea in law, the FEG accuses the Court of First Instance of infringing the requirement to state reasons. At several points, it submits, the Court of First Instance fails to address or accurately reproduce the arguments set out by the FEG. In addition, the Court of First Instance infringed Article 81(1) EC by criticising agreements as being concerted practices without also establishing that such agreements were actually put into practice.

43. This plea in law primarily concerns Section II(D) (paragraphs 279 to 339) of the judgment under appeal, in which the Court of First Instance considers the concerted practices found by the Commission to exist between the FEG and its member undertakings with regard to price fixing. The Court of First Instance concludes that, 'through a series of practices, agreements and decisions', the FEG and its members 'have sought, collusively, to restrict price competition between them by engaging in concertation on prices and discounts and by adopting, within the FEG, binding decisions on prices and advertising'; it finds that the Commission has demonstrated, to the requisite legal standard, that those practices were contrary to Article 81 EC.²⁶ In addition, this fourth plea in law also challenges paragraphs 403 to 412 of the judgment under appeal, which concern the unique, continuous nature of the infringements.

²⁶ — Paragraphs 338 and 339 of the judgment under appeal.

44. Specifically, the FEG puts forward five points of challenge which also form the five parts of this plea in law.

1. The continuous nature of the concerted practices with regard to price fixing (first part of the fourth plea in law)

45. Firstly, the FEG takes the view that the Court of First Instance gives incomprehensible and insufficient reasons for its conclusion in paragraphs 403 to 412 of the judgment under appeal that the concerted practices with regard to price fixing established by the Commission constituted a single, continuous infringement. The Court of First Instance failed to adduce any evidence of the ‘overall plan’ and ‘identical object’ which alone make it possible for a number of practices to become a single, continuous practice.

46. For different actions to be regarded as one single infringement, they must actually ‘form part of an overall plan because their identical object distorts competition within the common market’.²⁷

47. The Court of First Instance did not by any means disregard that criterion. On the contrary, it devoted a separate section to the overall assessment of the infringements in question in paragraphs 340 to 343 of the judgment under appeal. In that section, it held in particular that the two infringements alleged to have been committed by the FEG, that is to say the collective exclusive dealing arrangement and the concerted practices with regard to price fixing, ‘pursue the same anti-competitive purpose’; that purpose consists in ‘maintaining prices at supra-competitive levels’.²⁸ At the same time, it follows implicitly from that finding by the Court of First Instance that each of the individual infringements per se, that is to say both the collective exclusive dealing arrangement and the concerted practices with regard to price fixing, was directed towards that unique purpose. The Court of First Instance refers to this fact, for example, when it points out the unique nature of the infringements in question in paragraph 406 of the judgment under appeal.

48. Read in conjunction, the two sections of the judgment under appeal make it clear that the Court’s findings satisfy the requirements laid down by law that its judgment should contain a sufficient statement of the reasons on which it is based. They enable the persons concerned to understand the judgment under appeal and allow the Court of Justice to review it on appeal.

49. The first part of the fourth plea in law is therefore unfounded.

²⁷ — *Cement* judgment (cited in footnote 13), paragraphs 258 and 260.

²⁸ — Paragraph 342 of the judgment under appeal.

2. The standard discounts for schools (second part of the fourth plea in law)

It thus again challenges the findings of the Court of First Instance in relation to the duration of the infringements. For the same reasons as were given in respect of the third plea in law, this submission is admissible but unfounded.³⁰

50. Secondly, with regard to the sale of electrotechnical fittings to schools, the FEG claims that the Court of First Instance, in paragraphs 324, 409 and 412 of the judgment under appeal, failed to take into account the unique and socially motivated nature of the so-called standard discounts on which the FEG and its member undertakings had agreed. In addition, the FEG submits, it is established that the supplies in question were negligible in volume and their effects on trade between the Member States are unproved.

53. The second part of the fourth plea in law therefore cannot be upheld.

3. The role of the 'wire and cable' product committee (third part of the fourth plea in law)

51. The FEG's complaint under this part of its fourth plea in law is only at first sight concerned with a failure to state reasons. In my view, its argument appears in fact to be an attempt to have the assessment of the facts made by the Court of First Instance re-examined by the Court of Justice. Therefore, in so far as the second part of the fourth plea in law is based on that argument, the appeal is inadmissible, since it does not raise any points of law.²⁹

54. Thirdly, the FEG submits that, in paragraphs 317 to 323 of the judgment under appeal, the Court of First Instance failed to show to what extent practices restrictive of competition were actually engaged in within the context of the 'wire and cable' product committee. On the one hand, it is argued, the Court of First Instance is content to rely on mere indicia and, on the other hand, it fails to observe the requirement to prove the actual effects of an anti-competitive practice on the market.

52. The FEG further complains that there is no evidence of the existence of concertation in respect of prices for the period after 1991.

55. Firstly, as regards the reliance on indicia, I have already stated that this method of

29 — See point 20 of this Opinion.

30 — See, in this regard, points 30 to 41 of this Opinion.

presenting evidence is permissible under the settled case-law on Article 81(1) EC.³¹ Therefore, in this respect, the third part of the fourth plea in law is admissible but unfounded.

56. Secondly, as regards proof of the actual effects of the price-fixing measures on the market, which the FEG claims to be lacking, the following distinction must be drawn.

57. In the context of anti-competitive *agreements* and *decisions*, it is settled case-law that no proof whatsoever of their actual effects on the market is required. Their anti-competitive purpose alone is sufficient to support a finding that there has been an infringement of Article 81(1) EC.³²

58. As is clear in particular from paragraph 323 of the judgment under appeal, the Court of First Instance duly assumed in this case that the ‘wire and cable’ product committee used a system of information exchange between its members as the basis for *deciding* on the establishment of rules for the grant of discounts. For that reason, no actual proof of a manifestation of the concerted practice on the market was required.

59. By contrast, in the context of concerted practices *stricto sensu*, that is to say specifically *not* anti-competitive agreements or decisions, Article 81(1) EC requires proof of concertation between the undertakings, conduct on the market pursuant to such concertation and a relationship of cause and effect between the two.³³ However, that requirement must not be taken to mean that every single occurrence which points to concertation between the participating undertakings must also have produced effects on the market. Rather, several indicia may point *as a whole* to a concerted practice between the participating undertakings. It is then sufficient to prove that that concertation between the participating undertakings has manifested itself *as a whole* in corresponding conduct on the market.

60. In law, therefore, it was wholly unnecessary in this case to establish a direct link between each element of the concertation between the participating undertakings and the market conduct corresponding to each such element. Rather, it was sufficient to conclude from the multiplicity of well-established indicia showing the exchange of information on discounts, prices, sales and trading margins, taken as a whole, that the participating undertakings had been engaging in concerted practices, and then to prove that that concertation manifested itself as a whole in corresponding conduct on the market.

61. The Court of First Instance did precisely that in the judgment under appeal. First, in

31 — See, in this regard, my comments on the third plea in law, in particular points 36 to 40 of this Opinion.

32 — *Cement* judgment (cited in footnote 13), paragraph 261.

33 — Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 118.

paragraph 317 et seq. of that judgment, it considered a number of indicia of concerted practices between FEG members. Then, paragraph 330 of the judgment under appeal shows that the Court of First Instance — albeit in few words — also made findings concerning the transposition of the concerted practices on the market. In that paragraph, the Court of First Instance takes into account in particular the findings in the contested decision on the publication of price lists and catalogues of the FEG member undertakings.

62. In the light of the foregoing, I conclude that the Court of First Instance gave sufficient reasons for its judgment. In this regard also, therefore, the third part of the fourth plea in law is admissible but unfounded.

63. Consequently, this third part of the fourth plea in law cannot be upheld.

4. The binding decisions on fixed prices and publications (fourth part of the fourth plea in law)

64. Fourthly, the FEG makes several criticisms of the judgment under appeal in so far as it concerns the two binding decisions adopted by the FEG on fixed prices and publications (paragraphs 289 to 301).

65. It argues first that, only shortly after its adoption in 1984, the FEG's so-called binding decision on fixed prices ceased to exist other than on paper. The Court of First Instance had absolutely no reason to conclude that the infringement relating to that decision continued until the decision was formally annulled, that is to say until 23 November 1993.

66. In so far as the appeal is based on this argument, the Commission is right to contend that it is inadmissible, since the FEG is attempting to have the assessment of facts and evidence carried out by the Court of First Instance re-examined on appeal. The Court of Justice has no jurisdiction in this regard.³⁴

67. Secondly, the FEG submits that, from the point of view of their legal nature, the two binding decisions differ too greatly from the other alleged infringements relating to concertation on prices for the Court of First Instance to have been able to regard them all as a single infringement. In this regard, it claims that the reasons given by the Court of First Instance for its judgment are incomprehensible.

68. In so far as the appeal is based on the latter argument, it is admissible but, from the point of view of the substance of the case,

³⁴ — See point 20 of this Opinion.

unfounded. After all, it is immaterial whether the individual components of a single allegation of concerted practices, as set out in paragraphs 289 to 339 of the judgment under appeal (binding decisions, concertation concerning prices and discounts, use of identical price lists), all have the same legal status. What is decisive is that each of those individual elements was duly established and proved and that the totality of those elements supports the allegation of a continuous concerted practice with regard to price fixing.

69. Consequently, this fourth part of the fourth plea in law cannot be upheld.

5. Price recommendations sent by the FEG to its members (fifth part of the fourth plea in law)

70. Finally, with regard to the price recommendations sent by the FEG to its member undertakings in the ‘plastic tubes’ product category, the FEG complains first and foremost that, in paragraph 326 et seq. of the judgment under appeal, the Court of First Instance failed to mention the absolutely exceptional nature of those recommendations and their limited scope, and that it therefore committed an error in the statement of its reasons.

71. The FEG’s complaint under this part of its fourth plea in law is only at first sight concerned with a failure to state reasons. Here too, its argument appears in fact to be an attempt to have the assessment of the facts made by the Court of First Instance re-examined by the Court of Justice. Therefore, in so far as the fifth part of the fourth plea in law is based on that argument, the appeal is inadmissible, since it does not raise any points of law.³⁵

72. In addition, the FEG criticises paragraph 337 of the judgment under appeal, in which the Court of First Instance finds as follows with regard to the price level in the Netherlands wholesale market: ‘[t]he FEG, whilst challenging the assertion that prices are higher in the Netherlands than in neighbouring countries, offered no sound evidence to overturn the latter assertion’. In the view of the FEG, the Court of First Instance thus failed to satisfy the standard of proof because it did not ask the Commission to prove the price level it had alleged to exist, but asked the FEG to prove the contrary.

73. This argument shows that the FEG misunderstands the requirements which may reasonably be imposed in relation to the determination of market conditions by the Commission in competition proceedings. In particular, it disregards the respective burdens of adducing evidence precedent to the burden of proof. Thus, the Commission naturally bears the burden of proving all the

³⁵ — See point 20 of this Opinion.

findings which it makes in its decision. However, before there is any need to allocate the burden of proof at all, each party bears the burden of adducing evidence in support of its respective assertions. A substantiated submission by the Commission can be overturned only by an at least equally substantiated submission by the parties. The rules governing the burden of proof are only applicable at all where both parties provide sound, conclusive arguments and reach different conclusions.

75. In this case, the findings made by the Commission in the contested decision³⁶ on the price level in the Netherlands were by no means based on mere assertions or on its subjective assessment of the situation. They were based on specific evidence from reports and brochures, not least evidence from the FEG or TU themselves. In order to refute those findings by the Commission concerning the price level, the FEG would have had to submit a substantiated counter-submission. Instead, as the Court of First Instance noted in paragraph 337 of the judgment under appeal, the FEG furnished 'geen serieuze bewijzen' (no sound evidence) to refute the Commission's findings; in other words, it failed to put forward a substantiated counter-submission.

76. In those circumstances, the Court of First Instance was able, without committing an error in law, more specifically without infringing the relevant rules governing the burden of proof, to conclude that the FEG's criticism of the Commission's findings regarding the price level was unfounded.

74. Therefore, if in its decision the Commission draws conclusions as to the conditions prevailing in a particular market on the basis of objectively verifiable evidence from stated sources, the undertakings concerned cannot refute the Commission's findings simply by unsubstantiatedly disputing them. Rather, it falls to them to show in detail why the information used by the Commission is inaccurate, why it has no probative value, if that is the case, or why the conclusions drawn by the Commission are unsound. This requirement does not represent the reversal of the burden of proof assumed by the FEG but the normal operation of the respective burdens of adducing evidence.

77. Consequently, this fifth part of the fourth plea in law cannot ultimately be upheld either.

78. Taken as a whole, the fourth plea in law is therefore partly inadmissible and partly unfounded.

36 — See recital 119 in the preamble to the contested decision.

D — *The fifth plea in law: responsibility for the extension of the collective exclusive dealing arrangement attributed to the FEG*

contained in documents at the Commission's disposal during the infringement proceedings.

79. By its fifth plea in law, the FEG submits that the Court of First Instance infringed Community law or at least failed to have regard to the relevant case-law by holding it responsible for extending the collective exclusive dealing arrangement to non-NAVEG suppliers. It further submits that the reasons which the Court of First Instance gives for its considerations are incomprehensible.

80. This plea in law relates in particular to paragraphs 231, 236 and 393 of the judgment under appeal.³⁷ In those paragraphs, the Court of First Instance concludes that the arguments submitted, inter alia, by the FEG are not capable of refuting the Commission's findings on the extension of the collective exclusive dealing arrangement to non-NAVEG suppliers.

81. In response, the FEG essentially submits that the Court of First Instance failed to consider the fact that, in the implementation of the anti-competitive practices of which it is accused, the FEG did not play an independent role separate from that of its member undertakings which would justify it being held responsible for such practices. In addition, it is argued, insufficient consideration was given to the exculpatory evidence

82. As the Commission rightly submits, by this plea in law the FEG is primarily questioning the assessment of the facts and evidence made at first instance. This is particularly clear, for example, in paragraph 78 and in the first sentence of paragraph 81 of the appeal: the FEG essentially criticises the — in its view insufficient — number of indicia and the soundness of the conclusions drawn from them. However, as previously stated, the assessment of facts and evidence is not a point of law capable of forming the subject of an appeal: it is a matter which, other than in the event of distortion, which has not been pleaded here, falls exclusively within the jurisdiction of the Court of First Instance.³⁸ In this respect, the fifth plea in law is therefore inadmissible from the outset.

83. However, in so far as the FEG seeks, by this plea in law, to submit that the Court failed to apply the relevant legal criterion in finding that the FEG had participated in anti-competitive practices, its complaint is admissible but nevertheless unfounded.

³⁷ — The FEG supplements its plea in law by referring also to paragraphs 126, 225 to 231, 391 and 392 of the judgment under appeal.

³⁸ — See point 20 of this Opinion.

84. The relevant legal criterion is as follows: in order to find that an association and its members have participated in one and the same infringement, the Commission must establish conduct on the part of that association which is separate from that of its members.³⁹

tion by the association of undertakings in the anti-competitive practices in question. With regard to the application of the relevant legal criteria, it must therefore be concluded that the Court of First Instance did not err in law.

86. Taken as a whole, the fifth plea in law is therefore partly inadmissible and partly unfounded.

85. Even though the Court of First Instance regrettably did not at any point in the judgment under appeal expressly make that criterion the starting point of its considerations, the passages from that judgment which are criticised by the FEG are clearly informed by it. In particular, the Court of First Instance expressly infers from the indicia discussed at first instance the 'direct role'⁴⁰ played by the FEG and finds that it is clear from certain joint actions by members of its board 'that they were acting not individually but on behalf of the members of the association as a whole'.⁴¹ The pressure exerted on certain non-NAVEG suppliers was exerted 'by the FEG and TU', not only by TU.⁴² It is clear from this that the Court did not by any means treat the conduct of the FEG and that of its member undertakings, in particular the TU, as being one and the same, but undertook a separate assessment of the participa-

E — *The sixth plea in law: determination of the duration of the infringements of the competition rules*

87. By its sixth plea in law, the FEG accuses the Court of First Instance of having infringed Community law, in particular Article 15(2) of Regulation No 17, or, at least, of having infringed the requirement to state reasons and the principle of proportionality in the setting of fines.

88. This plea in law, which should be considered in conjunction with the third plea in law,⁴³ concerns paragraphs 406 to 413 of the judgment under appeal, in which the Court of First Instance considers the duration of the infringements at issue. In those paragraphs, the Court of First Instance

39 — Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission ('Wood pulp II')* [1988] ECR I-5193, paragraph 27, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 1325.

40 — Paragraph 226 of the judgment under appeal.

41 — Paragraph 231 of the judgment under appeal.

42 — Paragraph 236 of the judgment under appeal.

43 — See, in this regard, points 30 to 41 of this Opinion.

ultimately upholds the findings of the Commission and proceeds on the premiss that the infringements are unique and of a continuous nature.⁴⁴

89. In essence, the FEG argues that that point of view is incorrect and fails to take account of the heterogeneous nature of the individual infringements at issue.

90. It is clear that, by this plea in law, the FEG is attempting to have the assessment of the facts made by the Court of First Instance reviewed by the Court of Justice. Therefore, since it does not raise a point of law, the sixth plea in law is inadmissible.⁴⁵

V — The first and seventh pleas in law: excessively long proceedings

91. The first and seventh pleas in law form the largest part of the appeal. They are devoted to the consequences which are to be drawn from what the Court of First Instance held to be the excessive length of parts of the administrative procedure before the Commission. The two of them should therefore be examined together.

92. By its first plea in law, the FEG essentially accuses the Court of First Instance of having infringed the principle that proceedings must be concluded within a reasonable period by finding that the contested decision does not necessarily have to be annulled because of the excessive length of parts of the administrative procedure in this case. By its seventh plea in law, the FEG also challenges the refusal by the Court of First Instance to reduce the fine imposed by the Commission in the light of the excessive duration of the proceedings; in this regard, the FEG alleges infringement of Article 15(2) of Regulation No 17 or, at least, of the requirement to state reasons and the principle of proportionality in the setting of fines.

A — The judgment under appeal

93. The first plea in law relates to paragraphs 73 to 94 of the judgment under appeal.

94. In those paragraphs, the Court of First Instance finds, first, that the Commission is required to give a decision within a reasonable period in administrative proceedings in matters of competition under Regulation No 17 which are likely to lead to the penalties provided for by that regulation. In addition, the Court of First Instance recalls that the exceeding of such a time-limit, if proved, does not necessarily justify annulment of the contested decision. Annulment is possible only where it has been proved that infringe-

⁴⁴ — See, in particular, paragraphs 406 and 413 of the judgment under appeal.

⁴⁵ — See point 20 of this Opinion.

ment of the principle that proceedings must be concluded within a reasonable period has adversely affected the ability of the undertakings concerned to defend themselves.⁴⁶

— The Court of First Instance does not consider the stage of the procedure *between the statement of objections and the hearing of the parties*, which lasted 16 months, to be excessive.⁴⁹

95. In the case at issue, the Court of First Instance distinguishes between three stages in the administrative procedure before the Commission and gives a separate assessment of each.

— The Court of First Instance does, on the other hand, consider the stage of the procedure *between the hearing of the parties and the contested decision* — 23 months in total — to be excessive.⁵⁰ However, after further examination, the Court of First Instance concludes that the applicants' rights of defence were not affected by the duration of that last phase of the procedure.⁵¹

— The Court of First Instance considers the stage of the procedure *prior to notification of the statement of objections* on 3 July 1996 to be excessively long and, in this regard, also expressly acknowledges a period of inaction attributable to the Commission which lasted over three years.⁴⁷ However, the excessive duration of that stage of the procedure is not in itself such as to detract from the rights of the defence since, at that time, the statement of objections had not yet been notified to the parties concerned. No formal accusation can be made nor the rights of the defence adversely affected at all until that statement of objections has been notified.⁴⁸

96. Then, in paragraph 438 of the judgment under appeal, to which the seventh plea in law relates, the Court of First Instance comments on the possibility of its reducing the fine imposed by the Commission. It finds that the applicants have produced no evidence to show why granting a further reduction of the amount of the fine should be considered, that is to say a reduction over and above the EUR 100 000 by which the Commission itself has already reduced the fine. Consequently, the applicants' request to that effect cannot be granted.

46 — Paragraphs 73 and 74 of the judgment under appeal.

47 — Paragraph 77 of the judgment under appeal.

48 — Paragraphs 78 and 79 of the judgment under appeal.

49 — Paragraph 84 of the judgment under appeal.

50 — Paragraphs 85 and 93 of the judgment under appeal.

51 — Paragraphs 86 to 93 of the judgment under appeal.

B — *Main arguments of the parties*

97. The FEG takes the view that, *irrespective of any adverse affects on its rights of defence*, the Court of First Instance should have annulled the contested decision solely on the basis of the excessive duration of the proceedings.

98. The FEG is of the opinion that, in the context of the issue of annulment, the Court of First Instance should in any event also have taken into account the period *prior to* notification of the statement of objections of 3 July 1996. It is said to be apparent from the case-law of the European Court of Human Rights⁵² that notification of the defendant as to the commencement of a preliminary investigation against him can itself be interpreted as a charge⁵³ within the meaning of Article 6 of the ECHR.⁵⁴ The FEG therefore considers that the relevant period for the purposes of the reasonableness of the duration of the procedure in this case starts from the dispatch of the very first request for information to the FEG and TU in 1991, or at least from the dispatch of the letter of formal notice to the FEG on 16 September 1991.

99. With regard to the rights of the defence, the FEG contends that the Court of First Instance failed to take account of the difficulties which an undertaking faces when preparing its defence over an extended period of time. In particular, because of changes in managerial and other staff, it is increasingly difficult as time goes by to reconstruct past events and to place them in their earlier context. Furthermore, the FEG contests the finding that the infringements it is alleged to have committed continued after 1991.

100. As regards the amount of the fine, the FEG denies having failed to produce any relevant evidence to justify a significant reduction of the fine. Moreover, the Court of First Instance committed a manifest error when it refused to grant a reduction of the fine over and above the amount by which the Commission had already reduced it. The negligible reduction of the amount of the fine provided for in the contested decision was based on the assumption that the Commission and the undertakings concerned shared responsibility for the excessive duration of the proceedings.⁵⁵ However, the Court of First Instance itself held that the Commission bears full responsibility for the excessive duration of the proceedings.

52 — Footnote not relevant in English.

53 — In its written and oral pleadings, the FEG referred in particular to the judgments of the European Court of Human Rights in *Deweert v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 24, § 46, in *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 33, § 73, and in *Hozee v. the Netherlands*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, § 43.

54 — European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

101. The Commission, however, takes the view that, in the judgment under appeal, the Court of First Instance proceeded on the basis of settled case-law, which it transposed

55 — Recital 152 in the preamble to the contested decision.

correctly to this case. In particular, the Court of First Instance considered the duration of the proceedings both before and after notification of the statement of objections.

104. As regards a possible reduction of the fine, the Commission takes the view that the FEG's submission is inadmissible or, at least, unfounded.

102. In its opinion, the criteria laid down in the ECHR and the case-law of the European Court of Human Rights cannot be transposed indiscriminately to competition law. There is no formal accusation prior to the date of notification of the statement of objections. A letter of formal notice such as that sent by the Commission in this case differs fundamentally from a formal notification of a statement of objections and therefore has no bearing on the question at issue here of the date from which the excessive duration of the proceedings may adversely affect the rights of defence of the interested parties.

105. The arguments put forward by CEF are along the same lines as those of the Commission. CEF also takes the view that the FEG bears principal responsibility for the proceedings as such and that those proceedings could have been avoided if the FEG had brought to an end in good time the infringements of which it is accused.

103. The Commission emphasises that, according to case-law, the mere duration of the administrative procedure cannot in itself render the contested decision unlawful and therefore lead to its annulment. Rather, specific proof is required that the rights of defence of the interested parties have been adversely affected. The appellant, on whom the burden of proof rests in this regard, has failed to produce convincing evidence that the rights of the defence have been adversely affected in this way. The Court of First Instance for its part has, in the Commission's view, comprehensively discussed the effects of the long duration of the proceedings on the rights of defence of the FEG, in particular from the point of view of the length of all stages of the procedure.

C — Assessment

106. According to settled case-law, in competition law, the principle that action must be taken within a reasonable period must be observed in administrative proceedings conducted pursuant to Regulation No 17 which may lead to the penalties provided for therein.⁵⁶

⁵⁶ — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission ('PVC II')* [2002] ECR I-8375, paragraph 179.

1. Introductory remarks

107. The principle that action must be taken within a reasonable period is a general principle of Community law which is based on Article 6(1) of the ECHR⁵⁷ and has since also been incorporated into Article 41(1) of the Charter of Fundamental Rights of the European Union⁵⁸ (right to good administration).⁵⁹

108. Although, pursuant to Regulation No 17, cartel proceedings are not of a criminal law nature⁶⁰ and are not directed against individuals but undertakings, when the Court applies to those proceedings the principle that action must be taken within a reasonable period it adheres closely to the settled case-law of the European Court of Human Rights on Article 6(1) of the ECHR.⁶¹ Accordingly, the principle that action must be taken within a reasonable period may be applicable long before a formal accusation is made. It is sufficient that *formal charges have been brought* against a person or that that person has been *substantially affected* by measures taken as a result of suspicions against him.⁶²

57 — See, to this effect, *Baustahlgewebe v Commission* (cited in footnote 16), paragraph 21, and *PVC II* (cited in footnote 56), paragraphs 170 and 171. However, the Court has also pointed out ‘that, just like observance of the other procedural safeguards enshrined in Article 6(1) of the ECHR, compliance with the adversarial principle relates only to judicial proceedings before a “tribunal”’ (*Cement judgment* (cited in footnote 13), paragraph 70). It can be concluded from this that Article 6(1) of the ECHR is not in any event *directly* applicable in administrative proceedings before the Commission.

58 — Signed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1). The Charter of Fundamental Rights as such does not yet have binding legal effects comparable to those of primary law. However, as a legal reference, it provides information on the fundamental rights guaranteed by Community law. See, in this regard, my Opinions in Case C-540/03 *Parliament v Council* [2006] ECR I-5769, point 108, and in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, footnote 83; see, to the same effect, the Opinion of Advocate General Poiares Maduro in Case C-181/03 P *Nardone v Commission* [2005] ECR I-199, point 51; the Opinion of Advocate General Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, point 126; the Opinion of Advocate General Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, point 28; and the Opinion of Advocate General Léger in Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, points 82 and 83; Advocate General Alber takes a more cautious approach in this regard in his Opinion in Case C-63/01 *Evans* [2003] ECR I-14447, point 80.

59 — The Charter of Fundamental Rights is not applicable to this case *ratione temporis*, it having come into force after the contested decision was adopted. In the future, however, it must be taken into account in cartel proceedings that the Commission has made a solemn commitment to comply with the Charter of Fundamental Rights; it has thus bound itself (statement of the President of the European Commission, Romano Prodi, at the Nice European Council on 7 December 2000); see also recital 37 in the preamble to Regulation No 1/2003.

109. Similarly, in cartel proceedings, the principle that action must be taken within a reasonable period may also be applicable long before notification of the statement of objections, which is similar to a formal accusation. In this regard, the question whether, and if so when, *formal charges* can be said to exist *prior to* notification of the statement of objections can be left unanswered. The situation of the undertakings

60 — See, in this regard, Article 15(4) of Regulation No 17.

61 — *PVC II* (cited in footnote 56), paragraph 182.

62 — French: ‘[L]a période à prendre en considération ... débute dès qu’une personne se trouve officiellement inculpée ou lorsque les actes effectués par les autorités de poursuite en raison des soupçons qui pèsent contre elle ont des répercussions importantes sur sa situation’; English: ‘[T]he period to be taken into consideration ... begins at the time when formal charges are brought against a person or when that person has otherwise been substantially affected by actions taken by the prosecuting authorities as a result of a suspicion against him’; see judgment of the European Court of Human Rights in *Pedersen and Baadsgaard v. Denmark* [GC], judgment of 17 December 2004, no. 49017/99, § 44; see, to the same effect, *inter alia*, the judgments of the European Court of Human Rights in *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, § 110, in *Corigliano v. Italy*, judgment of 10 December 1982, Series A no. 57, § 34, and the case-law cited in footnote 53.

concerned may already be 'substantially affected' at the stage of the preliminary investigation by the Commission, both by its investigations pursuant to Article 14 of Regulation No 17 and by its requests for information pursuant to Article 11 of Regulation No 17.⁶³

will end and what the outcome of those proceedings will be. Therefore, they are under increased pressure. In that situation, the principle that proceedings must be concluded within a reasonable period affords them an increased measure of protection which goes beyond that provided by the limitation of actions.⁶⁴

110. After all, such investigative measures usually create the impression amongst the persons concerned that the Commission suspects them of having infringed Article 81 EC or Article 82 EC. This is particularly true where the Commission, as in this case, indicates that it has received a complaint from a third party and that complaint was such as to prompt initial suspicions serious enough to warrant the launch of an investigation. In such circumstances, a request for information addressed to the undertaking concerned is itself comparable to the initial questioning of a suspect, and an investigation of the undertaking concerned comparable to a search of the suspect's premises.

112. Accordingly, the *relevant period* for determining whether cartel proceedings before the Commission are exceptionally long begins not with notification of the statement of objections but with the first investigative measure by the Commission which substantially affected the situation of the undertakings concerned.⁶⁵

111. Such investigative measures themselves will usually prompt the persons concerned to make strenuous efforts to prepare their defence and, in particular, to seek legal counsel. If necessary, reserves for the payment of any fines must also be set up and account taken of the possible reactions of business partners and the public. Moreover, from that point onwards, the parties concerned are faced with the uncertainty of not knowing when the proceedings against them

113. However, for the purposes of *assessing the duration* of the administrative procedure, a distinction must be drawn between two successive stages: a *first stage* which begins

64 — With regard to limitation periods in cartel proceedings, see, to date, Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) and, for future cases, Article 25 of Regulation No 1/2003.

65 — *PVC II* (cited in footnote 56), paragraph 182. Advocate General Mischo takes a different view in his Opinion in Case C-250/99 *P. Degussa v Commission* [2002] ECR I-8375, joined, for the purposes of judgment, with *PVC II*, point 40 et seq., where he opposes the idea that account should be taken of the period prior to notification of the statement of objections.

63 — *PVC II* (cited in footnote 56), paragraph 182.

with the Commission's exercising the investigative powers conferred upon it and covers the period up to notification of the statement of objections; and a *second stage* which covers the period from notification of the statement of objections to adoption of the final decision.⁶⁶

114. As is clear from the judgment in *PVC II*,⁶⁷ the principle that action must be taken within a reasonable period applies at both stages of the procedure. However, each of those two stages has its own internal logic: the stage prior to notification of the statement of objections, which begins with the exercise of investigative powers, must enable the Commission, after investigation, to adopt a position on the course which the procedure is to follow, whilst the stage after must enable the Commission, after the hearing of the parties concerned, to reach a final decision on the alleged infringement. That difference in the objectives pursued in turn affects the assessment of whether the length of the relevant stage of the procedure was reasonable, which always requires careful consideration of all the circumstances specific to each particular case.⁶⁸

115. With regard to the first stage of the procedure, that assessment must take proper account of the fact that, when conducting its preliminary investigations, the Commission requires sufficient time to be able to carry

out a useful examination of a suspected infringement of Article 81 EC or Article 82 EC. Otherwise there would be a danger that the Commission's role as the authority responsible for enforcing competition rules laid down in the Treaty would be weakened in the long term. Also, the Commission must be able to give certain cases pending before it priority over others;⁶⁹ that applies above all, but not only, at times when the competent Commission services are operating beyond full capacity.

116. As far as the second stage of the procedure is concerned, the assessment must take into account that the Commission's investigations have usually been completed by the time the statement of objections is notified, it remaining only for the Commission to make its decision on the basis of the findings obtained from the hearing of the undertakings concerned. At this stage, the Commission has already taken the procedure so far that it would henceforth be unfair to keep the outcome of that procedure from the undertakings concerned for longer than is absolutely necessary. The criteria which must subsequently be applied when assessing the duration of the procedure are correspondingly stricter.

66 — *PVC II* (cited in footnote 56), paragraphs 181 to 183.

67 — *PVC II* (cited in footnote 56), paragraphs 182 to 184.

68 — With regard to the applicable criteria, see *PVC II* (cited in footnote 56), paragraphs 187 and 188, and *Baustahlgewebe v Commission* (cited in footnote 16), paragraph 29 in particular.

69 — To this effect, see also Case T-24/90 *Automec v Commission* [1992] ECR II-2223, paragraph 77, and Case C-119/97 P *Ifex and Others v Commission* [1999] ECR I-1341, paragraph 88.

117. In this case, it is undisputed that the two stages of the administrative procedure before the Commission identified by the Court of First Instance⁷⁰ — that prior to notification of the statement of objections, on the one hand, and that between the hearing of the parties and the contested decision, on the other — were both excessively long.

118. The only point in dispute is whether the Court of First Instance was able to find, without erring in law, that the excessive duration of the administrative procedure both before and after notification of the statement of objections did not necessarily lead to annulment (first plea in law) or a further reduction of the fine (seventh plea in law).

2. The first plea in law: excessively long proceedings and annulment

119. Under the first plea in law, the FEG disagrees with the Commission and the interveners supporting it on the question whether the contested decision should have been annulled on account of the excessive duration of parts of the administrative procedure.

70 — See, in this regard, point 95 of this Opinion.

(a) Annulment only where the ability of the undertaking concerned to defend itself has been adversely affected

120. The starting point for considering this issue should be that any unreasonable delay in the proceedings by the Commission constitutes an infringement of a procedural right of the undertakings concerned which is protected as a fundamental right. Moreover, the assumption of such an infringement is not dependent on proof of some form of damage.⁷¹

121. However, not every procedural defect necessarily has the same consequences.⁷² Indeed, the *annulment* of a Commission decision on the ground of infringement of the procedural rights of the parties con-

71 — See, for example, *PVC II* (cited in footnote 56), paragraphs 191 to 200, and *Baustahlgewebe v Commission* (cited in footnote 16), paragraphs 26 to 48, in each of which the Court had regard in its assessment exclusively to the reasonableness of the duration of the procedure. From the case-law of the European Court of Human Rights, see, for example, the judgment in *Corigliano v. Italy* (cited in footnote 62), § 31.

72 — The European Court of Human Rights (in *Schouten and Meldrum v. the Netherlands* judgment of 9 December 1994, Series A no. 304, § 75) also recognises in principle that the appropriate sanction for an infringement of the principle that proceedings must be concluded within a reasonable period must be sought within the context of the relevant legal system; French '... il appartient en principe aux juridictions nationales de juger ce que doit être, en vertu de leur système juridique, la sanction appropriée pour une violation, imputable à l'une des parties, de l'exigence d'un, "délai raisonnable..."; English '... it is in principle for the national courts to decide what the appropriate sanction should be under their legal system for a breach attributable to one of the parties of the "reasonable time" requirement ...'.

cerned is only required at all if, had it not been for that infringement, the proceedings could have led to a different result.^{73, 74}

given a ruling expressly to that effect in *cartel* proceedings,⁷⁷ this view can none the less be inferred from its decisions in similar cases, where it has already established such a connection between the principle that action must be taken within a reasonable period and the rights of the defence.⁷⁸

122. In matters of competition law, it is settled case-law that an infringement of a procedural right always affects the outcome of the proceedings if that infringement has impeded the defence of the undertakings concerned.⁷⁵

123. The annulment of a Commission decision on the ground of the excessive duration of proceedings is therefore likewise possible only where the undertakings concerned have been able to show that the excessive duration of the proceedings adversely affected their defence.⁷⁶ Although the Court has not yet

124. *A contrario*, the annulment of a Commission decision is *not required by law*, even if the proceedings are excessively long, where it has not been substantively established that the ability of the undertakings concerned to defend themselves has been adversely affected and there is therefore no indication that the excessive duration of the proceedings could have affected the content of the Commission's decision.⁷⁹ However, there is always scope in such cases, if requested, for a

73 — Such a different result may, for example, consist in the establishment of less serious infringements, a lesser fine or the discontinuation of the proceedings.

74 — See, *inter alia*, Case 30/78 *Distillers Company v Commission* [1980] ECR 2229, paragraph 26, on consultation with the advisory committee; Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 31, concerning infringement of the right to be heard; Joined Cases C-465/02 and C-466/02 *Germany and Denmark v Commission* [2005] ECR I-9115, paragraphs 36 to 40, concerning the rules governing languages in a regulatory committee; and *PVC II* (cited in footnote 56), paragraphs 315 to 328, concerning the right of access to the file. See in addition, with regard to the choice of the correct legal basis and the procedures for adopting legislation, Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 52, and my Opinion in Case C-94/03 *Commission v Council* [2006] ECR I-I, point 53.

75 — See not least — as regards infringements of the right of access to the file — Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, paragraphs 77 and 82, and *PVC II* (cited in footnote 56), paragraphs 315 to 317 and 321 to 323.

76 — See to the same effect — as regards infringements of the right of access to the file — for example, *PVC II* (cited in footnote 56), paragraphs 318 and 324, and the *Cement* judgment (cited in footnote 13), paragraphs 73 to 75 and 131.

77 — See, however, the Opinion of Advocate General Mischo in Case C-250/99 P *Degussa v Commission* (cited in footnote 65), points 76, 80 and 83.

78 — See, in this regard, Case C-501/00 *Spain v Commission* [2004] ECR I-6717, paragraphs 52, 57 and 58, concerning a State aid case under the ECSC Treaty, and also on the actions for failure to fulfil obligations Case C-207/97 *Commission v Belgium* [1999] ECR I-275, paragraphs 25 to 27, and Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461, paragraphs 15 and 16.

79 — To this effect, see also *Baustahlgewebe v Commission* (cited in footnote 16), paragraph 49, in which the Court of Justice concludes that a judgment of the Court of First Instance does not have to be set aside, despite the excessive duration of the proceedings at first instance, if there is no indication that the length of the proceedings affected their outcome in any way. See also the Opinion of Advocate General Mischo in Case C-250/99 P *Degussa v Commission* (cited in footnote 65), points 75 to 78 and 84 to 85.

reduction in the fine on grounds of fairness⁸⁰ or the award of appropriate compensation.⁸¹

125. For that reason, the FEG's submission to the effect that the contested decision should have been annulled automatically, on the sole ground that the proceedings were excessively long, thus irrespective of whether or not its ability to defend itself was adversely affected, is wrong.

(b) Has the ability of the undertaking concerned to defend itself been adversely affected in this case?

126. However, it remains to be examined whether, in this case, the Court of First Instance was able to assume without erring in law that the FEG's ability to defend itself had not been adversely affected. In that connection, the FEG argues, on the one hand, that the Court of First Instance left out of account the period prior to notification of the statement of objections and, on the other, that the Court of First Instance failed to take into account the specific difficulties encountered by an undertaking in preparing its defence.

80 — See, to this effect, *Baustahlgewebe v Commission* (cited in footnote 16), paragraphs 48 and 141 to 143. See also points 136 to 152 of this Opinion.

81 — See also, to this effect, the Opinion of Advocate General Mischo in Case C-250/99 P *Degussa v Commission* (cited in footnote 65), point 79. With regard to the possibility of bringing an action for damages, see the judgment of the Court of First Instance in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, paragraph 122, upheld by the judgment of the Court of Justice in *PVC II* (cited in footnote 56), paragraphs 173 to 178.

127. In its judgment under appeal, the Court of First Instance rightly assumes that, in cartel proceedings, the undertakings concerned are able to defend themselves against the Commission's allegations only *after* notification of the statement of objections. It is only at that (second) stage of the procedure, when the Commission has concluded its investigations and the administrative procedure becomes adversarial, that the rights of the defence take effect at all.⁸² In particular, it is only then that the undertakings concerned have the opportunity to access the file and likewise only then that they are able to express their views on the Commission's statement of objections. On the other hand, the first stage of the procedure is devoted to the Commission's investigations and accordingly makes no provision for the rights of defence of the undertakings concerned. If in that first stage of the procedure the Commission approaches the undertakings concerned, for example with a request for information, that is purely an investigative measure, not an element of the hearing. The grant of access to the file is likewise not provided for at that stage of the procedure, for obvious reasons, as it could seriously jeopardise the success of the investigations and have the effect of delaying the procedure rather than expediting it.

128. Therefore, although the *rights* of defence of the undertakings concerned undoubtedly take effect only *after* notification of the statement of objections, that is to say exclusively in the *second* stage of the procedure, the first stage of the administrative procedure nevertheless affects the

82 — See, to this effect, the settled case-law of the Court, not least *Hercules Chemicals v Commission* (cited in footnote 75), paragraph 75, and *PVC II* (cited in footnote 56), paragraphs 315 and 316.

ability of the undertakings concerned to defend themselves.

detract from the rights of defence of the undertakings concerned.⁸⁵

129. The longer the period between the first investigative measures and notification of the statement of objections, the more likely it is that any exculpatory evidence against the allegations raised in the statement of objections will henceforth be difficult to obtain. It may be perfectly possible to maintain relevant information in books and files in order to be prepared for any administrative or legal proceedings.⁸³ As the FEG has rightly indicated, however, the passage of time — whether before or after notification of the statement of objections — may make it more difficult to call defence witnesses, in particular because of the natural changes in managerial and other staff in undertakings. The Court of First Instance does not give this matter sufficient consideration in the judgment under appeal.⁸⁴

130. The excessive duration of the first stage of the procedure may in itself affect the subsequent ability of the undertakings concerned to defend themselves and, ultimately, undermine their rights of defence when these become effective in the second stage of the procedure. The Court of First Instance fails to take this into account when it finds that the excessive duration of the first stage of the procedure is ‘not in itself such’ as to

131. The Court of First Instance therefore erred in law when, in paragraphs 86 to 93 of the judgment under appeal, it confined the scope of its examination to ‘whether the rights of the defence were affected by the [excessive] duration of that [last] phase of the procedure’.⁸⁶ The Court of First Instance should have also examined whether the excessive duration of the first stage of the procedure, prior to notification of the statement of objections, could have adversely affected the subsequent ability of the undertakings concerned to defend themselves and, in particular, whether the FEG produced conclusive evidence of adverse effects.

132. Also, to adopt such an approach is not by any means to bring forward the point at which the rights of the defence are exercised. The hearing of the undertakings concerned and their right of access to the file are and will continue to be confined to the second stage of the procedure, in other words the period *after* notification of the statement of objections. However, this does not rule out the possibility that any adverse effect on the *ability* of the undertaking concerned to defend itself, and therefore any infringement of its *rights* of defence, may already have been caused by excessively long preliminary investigations or indeed by a lengthy period of inaction on the part of the Commission during the first stage of the procedure.

83 — See, to this effect, paragraph 87 of the judgment under appeal.

84 — The question of staff turnover had already been addressed by the FEG in the proceedings at first instance (Case T-5/00), in paragraph 46 of its application and in paragraph 49 of its reply. However, the Court of First Instance does not make any reference to this in its judgment under appeal, not even indirectly in paragraphs 86 to 93 of that judgment.

85 — Paragraphs 78 and 79 of the judgment under appeal.

86 — Paragraph 86 of the judgment under appeal; see also paragraph 93 of the judgment under appeal with regard to the extent of the investigation.

133. As the judgment under appeal does not contain any findings in this regard, it must be set aside and the case — as final judgment cannot be given — referred back to the Court of First Instance for judgment, in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice.

3. The seventh plea in law: reduction of the fine

134. Since, in accordance with the foregoing conclusions, the first plea in law itself warrants that the judgment under appeal should be set aside in its entirety, hereinafter I will comment on the question of a possible reduction of the fine, as defined in the seventh plea in law, only in the alternative.

135. By this plea in law, the FEG complains that, in the exercise of its unlimited jurisdiction (Article 229 EC and Article 17 of Regulation No 17), the Court of First Instance has committed a *manifest error*. In particular, the Court of First Instance failed to take into account that the responsibility for the excessive duration of the proceedings is attributable solely to the Commission and is not, as the Commission first assumed,⁸⁷ shared between itself and the undertakings concerned.

87 — Recital 152 in the preamble to the contested decision.

136. It is settled case-law that, in appeal proceedings, it is not for the Court of Justice to substitute, on grounds of fairness, its own assessment of the amount of a fine for that of the Court of First Instance, where the Court of First Instance exercised its unlimited jurisdiction to make that decision.⁸⁸ However, the Court of Justice may examine whether the Court of First Instance made a *manifest error* or failed to have regard to the principles of proportionality and equality.⁸⁹ Therefore, in so far as the FEG complains that the Court of First Instance made a manifest error when exercising its jurisdiction to review the amount of the fine, the seventh plea in law is admissible.

137. In practice, it must be assumed, first, that a *manifest error* of that kind has been made if the Court of First Instance fails to take into account the extent of its jurisdiction under Article 229 EC in conjunction with Article 17 of Regulation No 17. Second, a manifest error also exists if, prior to its decision on the amount of the fine, the Court of First Instance does not fully consider all the facts and arguments which are material to its decision on the amount of the fine in the case in question.⁹⁰

88 — Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 245; see also Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, paragraph 34, Case C-291/98 P *Sarrío v Commission* [2000] ECR I-9991, paragraph 73, *Baustahlgewebe v Commission* (cited in footnote 16), paragraph 129, and *PVC II* (cited in footnote 56), paragraph 614.

89 — *Cement* judgment (cited in footnote 13), paragraph 365.

90 — See, to the same effect, *Dansk Rørindustri and Others v Commission* (cited in footnote 89), paragraphs 244 and 303, and *Baustahlgewebe v Commission* (cited in footnote 16), paragraph 128.

138. First of all, with regard to the *extent of the powers of the Court of First Instance* under Article 229 EC, it must be borne in mind that its unlimited jurisdiction to review fines is not subject to the same criteria as the annulment of the contested decision, for instance. In particular, its unlimited jurisdiction to review fines is not merely a review as to the legality of the Commission's decision. In exercising that jurisdiction, it may also consider questions of expediency, appropriateness and fairness. Consideration must be given particularly to procedural defects such as a breach of the principle that action must be taken within a reasonable period, for example, which — as I have already mentioned⁹¹ — constitute an infringement of a fundamental right even if they have not affected the content of the Commission's decision and therefore do not lead to its annulment.

139. In this case, the Court of First Instance rightly acknowledged this and held that it was able to grant a further reduction of the fine imposed solely on the basis of the excessive duration of the administrative procedure for which the Commission was responsible.⁹² In this regard, the Court of First Instance has therefore not committed a manifest error.

140. However, the situation is different with regard to the obligation of the Court of First Instance to give full *consideration to all the facts and arguments material to the decision*.

141. In the context of the Court's unlimited jurisdiction to review fines, the facts material to the decision in this case included, in particular, the Commission's responsibility for the excessive duration of *two* stages of the administrative procedure, thus its responsibility not only for exceeding the period normally needed between the hearing of the parties and the contested decision, but also for a period of inaction of over three years *prior* to notification of the statement of objections in the preliminary investigation stage.

142. Although, at the beginning of the judgment under appeal, the Court of First Instance finds that the Commission was responsible for the excessive duration of *both* stages of the administrative procedure,⁹³ later, when exercising its unlimited jurisdiction to review fines, it considers only the Commission's responsibility for the excessive duration of *one* of the two stages, namely the period between the hearing of the parties and the adoption of the contested decision. This is particularly evident in paragraph 436 of the judgment under appeal, where the Court of First Instance begins to consider the amount of the fine. In that paragraph, reference is made only to paragraph 85 of the judgment under appeal, the passage concerning the Commission's responsibility for the excessive duration of the proceedings *after* notification of the statement of objections. However, no reference is made to paragraph 77 of the judgment under appeal, which sets out the Commission's responsibility for the excessive duration of the proceedings *prior* to notification of the statement of objections.

91 — See points 120 to 124 of this Opinion.

92 — See paragraph 436 of the judgment under appeal.

93 — See paragraphs 77 and 85 of the judgment under appeal.

143. Since the Court of First Instance therefore failed, in the context of a possible reduction on its part of the fine imposed, to give consideration also to the excessive duration of the proceedings *prior to* notification of the statement of objections, it has committed a manifest error of law in exercising its unlimited jurisdiction under Article 229 EC in conjunction with Article 17 of Regulation No 17.

144. Therefore, even if the judgment under appeal — contrary to the view expressed here⁹⁴ — were not set aside in its entirety on the sole basis of the first plea in law, it would in any event have to be set aside on the basis of the seventh plea in law, in so far as the Court of First Instance rejects the FEG's request for a reduction of the fine imposed on it. Furthermore, in that event, the state of the proceedings would permit the Court of Justice to give final judgment itself on the matter, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice. In particular, the Court of Justice would be able to give final judgment itself on the reduction of the fine imposed by the Commission.⁹⁵

145. In this case, the Commission itself applied a reduction of EUR 100 000 when calculating the amount of the fine in the contested decision. However, in so doing, it did not distinguish between the various procedural irregularities mentioned in the decision, so it is not clear how much of that

EUR 100 000 relates specifically to the excessive duration of the proceedings. Nor did it distinguish between the two stages of the administrative procedure. It likewise did not assume that it was solely responsible for the excessive duration of the proceedings in both stages of the procedure,⁹⁶ as the Court of First Instance has since held. In the light of the foregoing, the infringement of the FEG's rights of defence does not seem to have been taken sufficiently into account by the reduction which the Commission itself applied when calculating the fine.

146. An additional reduction in the fine would therefore be justified. As a starting point, this might be set at EUR 50 000, the reduction which the Court of Justice itself applied in its judgment in *Baustahlgewebe v Commission*.⁹⁷ In that case, the fine originally imposed by the Commission was of a similar amount to that imposed on the FEG.

147. Furthermore, in this case, special significance should be attached to the fact that, according to the findings of the Court of First Instance, the Commission is responsible for a period of inaction of over three years. For that reason, it would seem appropriate to reduce the fine by the aforementioned amount of EUR 50 000 for every full year of that inaction in the stage of the procedure *prior to* notification of the statement of objections, therefore by EUR

94 — See, in this regard, my comments on the first plea in law in points 119 to 133 of this Opinion.

95 — As was the case, for example, in the *Cement* judgment (cited in footnote 13), paragraphs 384 and 385.

96 — Recitals 151 to 153 in the preamble to the contested decision.

97 — Cited in footnote 16, in particular paragraph 141.

150 000 in total. Furthermore, the excessive duration of the stage of the procedure *after* notification of the statement of objections should also be taken into account by a further EUR 50 000. That would put at a total of EUR 200 000 the amount by which the Court of Justice could reduce the fine — which currently stands at EUR 4 400 000.

of the seventh plea in law,⁹⁹ in so far as, in that judgment, the FEG's request for a reduction in the fine imposed on it is rejected. In that event, the Court of Justice should reduce the fine and also dismiss the remainder of the appeal.

VI — Costs

D — *Interim conclusions on the first and seventh pleas in law*

148. In accordance with the solution proposed here in relation to the first plea in law,⁹⁸ the judgment under appeal must be set aside in its entirety and the case referred back to the Court of First Instance.

149. However, if the Court of Justice were to come to the conclusion — contrary to the view expressed here — that the first plea in law is unfounded, it should in any event set aside the judgment under appeal on the basis

150. Pursuant to the first paragraph of Article 122 of the Rules of Procedure, the Court of Justice must make a decision as to costs only where the appeal is unfounded or where the appeal is well founded and the Court itself must give final judgment in the case.

151. However, since the solution proposed here in relation to the first plea in law requires that the whole case be referred back to the Court of First Instance, costs should be reserved.¹⁰⁰

⁹⁸ — Points 119 to 133 of this Opinion.

⁹⁹ — See, in this regard, points 134 to 147 of this Opinion.

¹⁰⁰ — See in this regard, for example, Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraph 82; Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others v Uffex and Others* [2003] ECR I-6993, paragraph 45; and Case C-111/02 P *Parliament v Reynolds* [2004] ECR I-5475, paragraph 3 of the operative part.

VII — Conclusion

152. In the light of the foregoing considerations, I propose that the Court should:

- (1) set aside the judgment of the Court of First Instance of the European Communities of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission*;
- (2) refer the case back to the Court of First Instance;
- (3) reserve costs.