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

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* Language of the case: Dutch.

In Case C-105/04 P,

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

Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied, established in The Hague (Netherlands), represented by E. Pijnacker Hordijk and M. De Grave, advocaten,

appellant,

the other parties to the proceedings being:

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

applicant at first instance,

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

defendant at first instance,

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

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

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

interveners at first instance,

THE COURT (First Chamber),

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

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

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

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

gives the following

Judgment

1 By its appeal, the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (Netherlands Federation for Wholesale Trade in Electrotechnical Products, 'the FEG') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761 ('the judgment under appeal') or, at least, to have that judgment set aside in so far as

it concerns Case T-5/00, whereby the Court of First Instance dismissed its action for annulment of Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty (Case IV/33.884 — Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie) (OJ 2000 L 39, p. 1; 'the contested decision').

Facts

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

3 That complaint was directed against three associations of undertakings active on the Netherlands electrotechnical market. These were, in addition to the FEG, the Nederlandse Vereniging van Alleenvertegenwoordigers op Elektrotechnish Gebied (Netherlands association of Exclusive Representatives in the Electrotechnical Sector, hereinafter 'NAVEG') and the Unie van de Elektrotechnische Ondernemers (Union of Electrotechnical undertakings, hereinafter 'UNETO').

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 By application lodged at the Court of First Instance on the same date (T-6/00), TU brought an action having the same object as the FEG's action.

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

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

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

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

— set aside the judgment under appeal, or at least set it aside in so far as it concerns Case T-5/00 and, adjudicating afresh, annul the contested decision in whole or in part or, at least, order a substantial reduction in the fine imposed on the FEG;

— in the alternative, set aside the judgment under appeal or, at least, set it aside in so far as it concerns Case T-5/00, and refer the case back to the Court of First Instance;

— order the Commission to pay the costs of both sets of proceedings.

15 The Commission contends that the Court should:

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

— order the FEG to pay the costs.

Pleas in law put forward in the appeal

16 In support of its appeal, the FEG puts forward seven pleas in law, alleging breach of:

— the 'reasonable time' principle, in that the Court of First Instance held that the excessive length of the administrative procedure did not require annulment of the contested decision;

— the principle of the presumption of innocence and the obligation to state reasons, in that the Court of First Instance did not accept as exculpatory evidence certain documents drawn up after the warning letter had been sent;

— Article 81(1) EC and also the obligation to state reasons, in so far as the Court of First Instance deemed plausible the evidence adduced by the Commission concerning the duration of the alleged collective exclusive dealing arrangement;

— Article 81(1) EC and also the obligation to state reasons, in that the Court of First Instance did not consider the FEG's arguments relating to the pricing agreements or reproduced those arguments incorrectly;

— the obligation to state reasons as regards the imputability to the FEG of the alleged widening of the collective exclusive dealing arrangement to suppliers other than members of NAVEG;

— Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87), or the principle of proportionality in setting the fines and the obligation to state reasons, in that the Court of First Instance rejected the FEG's and TU's arguments concerning the duration of the infringements;

— Article 15(2) of Regulation No 17 or the principle of proportionality in setting the fines and the obligation to state reasons, in that the Court of First Instance held that the FEG and TU had adduced no evidence to justify a reduction in the fine, in spite of the excessive duration of the administrative procedure.

The appeal

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

Arguments of the parties

17 The FEG maintains that, under a general principle of Community law, the Commission is required to act within a reasonable time when adopting its decisions. The Court of First Instance failed to observe that principle when it concluded, at paragraph 94 of the judgment under appeal, that all the arguments alleging breach of the 'reasonable time' principle must be rejected and that the excessive duration of the administrative procedure did not require annulment of the contested decision.

18 The FEG claims that, according to a consistent body of case-law, a distinction must be drawn between the investigation phase and the period between the notification of the statement of objections and the adoption of the Commission's decision.

19 As regards the investigation phase, the Court of First Instance was wrong to state, at paragraph 79 of the judgment under appeal, that the prolongation of that stage of the administrative procedure was not in itself capable of adversely affecting the rights of the defence, since in a procedure relating to Community competition policy the persons concerned are not the subject of any formal accusation until they receive the statement of objections.

20 Furthermore, the FEG disputes the Court of First Instance's interpretation of the case-law of the European Court of Human Rights on the starting-point of the reasonable time referred to in Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, which, according to the Court of First Instance, 'runs from the time at which a person is charged' (paragraph 79 of the judgment under appeal).

21 The FEG infers from that case-law that, contrary to the findings of the Court of First Instance, the reasonable time began to run either in June 1991, when the Commission sent it the first request for information and informed it of the content of CEF's complaint, which was attached to and formed the basis of that request, or at the latest on 16 September 1991, the date of the Commission's warning letter.

22 The FEG further maintains that it follows from paragraph 87 of the judgment under appeal that the Court of First Instance did not take account of the nature of the difficulties caused by the excessive duration of the procedure. It claims that it is impossible, in the circumstances of such a long procedure, to contact the persons

concerned in order to obtain further information about certain points in the minutes and other documents relating to the meetings of the management boards of the undertakings concerned, given the significant rotation of the members of the management and the staff of those boards. Contrary to what the Court of First Instance wrongly suggests at paragraph 87, there is no question of the loss of written evidence.

23 The FEG observes, moreover, that since the majority of the facts occurred so far in the past that none of the persons directly concerned remembers them in sufficient detail, it was therefore extremely difficult, indeed impossible, for the FEG to defend itself effectively.

24 Last, the FEG maintains that the Court of First Instance was wrong to ignore completely FEG's interest in a rapid outcome of the procedure, as its survival was directly threatened by the dispute. Since the adoption of the contested decision, the FEG was unable to carry out the slightest activity and its membership fell from 60 to 19.

25 The Commission claims that the first plea in law rests on a misreading of paragraph 79 of the judgment under appeal, which must be read in conjunction with paragraphs 77 and 78, which it follows.

26 In the Commission's submission, the Court of First Instance held at paragraph 77 of the judgment under appeal that the first phase of the administrative procedure was excessively long. Thus, the Court of First Instance took account of the first phase of the administrative procedure when assessing the reasonableness or unreasonableness of the period that lapsed between the first steps in the procedure and the adoption of the contested decision.

27 The Commission contends that, in considering that both the first and the second phases of the administrative procedure had taken an excessive time and in subsequently examining whether the fact that a reasonable time had thus been exceeded had affected the FEG's rights of defence, the Court of First Instance proceeded in accordance with the case-law of the Court of Justice to the effect that the unreasonable length of the various phases of the investigation does not automatically entail a breach of the 'reasonable time' principle. It is also necessary that the undertakings concerned demonstrate that that unreasonable period adversely affected the rights of the defence (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 173 to 178).

28 In the present case, the Commission submits that the FEG has not adduced convincing evidence of its assertion that the excessive duration of the administrative procedure affected the rights of the defence. The Commission relies on paragraphs 87 to 92 of the judgment under appeal to demonstrate that the Court of First Instance, when examining the question as to whether the unreasonable length of the administrative procedure which it had established had, in the present case, affected the FEG's rights of defence, applied its analysis to both the first and the second phases of that procedure. The Court of First Instance rejected, one by one, the circumstances on which the FEG relied in order to demonstrate that there had been a breach of the rights of the defence and did so on the basis of either accurate findings of law or of findings of fact, which cannot be re-examined on appeal.

29 As regards the criticism that the Court of First Instance did not take account of the problems that the FEG encountered in gathering exculpatory evidence owing to the excessive length of the administrative procedure, the Commission refers to paragraph 87 of the judgment under appeal, where the Court of First Instance observes that, under the general duty of care, undertakings are required to ensure that they keep in their books or files information relating to their activities, a duty which applies *a fortiori* from the time when an undertaking receives a request for information or a warning letter.

30 As regards the FEG's interest in a rapid outcome to the proceedings, the Commission refers to paragraph 80 of the judgment under appeal, where the Court of First Instance expressly confirmed that when it has received a statement of objections, an undertaking has a specific interest in that stage of the procedure being conducted with particular diligence by the Commission, although its rights of defence are not affected. The Commission asserts that it is in the light of such an element that the Court of First Instance proceeded to consider whether the fact that the reasonable time of the procedure had been exceeded had harmed the FEG's defence.

31 The Commission concludes that the first plea is manifestly inadmissible in so far as it seeks to call in question the Court of First Instance's factual assessment of whether the fact that the reasonable time had been exceeded had hindered the FEG in the preparation of its defence and that it is manifestly unfounded in that it rests on a misreading of the judgment under appeal.

32 CEF also claims, in its response to the notification of the appeal, that the FEG's first plea in law rests on a misreading of the judgment under appeal. In assessing the reasonableness of the duration of the administrative procedure, the Court of First Instance properly examined the period beginning on the date of the request for information, that is to say, 25 July 1991.

33 As regards the reasonable time and the breach of the rights of the defence, CEF refers to paragraph 49 of the judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417 to support its contention that the Court of First Instance did not apply an incorrect legal concept when it considered that although the first stage of the administrative procedure was excessively long, there was no breach of the 'reasonable time' principle in the absence of proof of a breach of the rights of the defence.

34 In any event, CEF submits that the present plea relates to findings of fact by the Court of First Instance which are not amenable to review by the Court of Justice. The first plea must therefore be rejected as inadmissible or, in any event, as unfounded.

Findings of the Court

35 Compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature ensures (Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraphs 36 and 37, and also *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 167 to 171).

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

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

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

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

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

40 As regards the first phase, the Court of First Instance found, at paragraph 76 of the judgment under appeal, that a considerable period had elapsed between the warning letter sent to the FEG on 16 September 1991 and the inspections carried out on 8 December 1994. The Court of First Instance accepted that such a lapse of time was excessive and was the consequence of inaction attributable to the Commission.

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

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

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

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

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

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

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

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

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

49 The excessive duration of the first phase of the administrative procedure may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence in the second phase of the procedure. In effect, as the Advocate General observes at point 129 of her Opinion, the more time that elapses between a measure of investigation such as, in the present case, the sending of the warning letter and the notification of the statement of objections, the more unlikely it becomes that exculpatory evidence relating to the infringements set out in the statement of objections can be obtained, owing in particular to the changes that may have come about in the composition of

the managing boards of the undertakings concerned and to the movements affecting their other staff. In its analysis of the reasonable time principle, the Court of First Instance did not have sufficient regard to that aspect of observance of the principle.

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

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

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

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

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

55 In its action before the Court of First Instance, the FEG maintains that the breach of the 'reasonable time' principle entailed a breach of the rights of the defence. It claims that, owing to the lapse of time, it found it increasingly difficult to obtain information relating to the Commission's objections. The great majority of the persons involved in the FEG's management during the period covered by the Commission's investigation have for a number of years no longer sat on its management boards and some former managers have since retired or have been posted abroad and can no longer be contacted for the purpose of obtaining detailed information.

56 In that regard, the Court observes that the arguments which the FEG puts forward in support of its claim that its rights of defence were breached are abstract and imprecise. In order to demonstrate that there has been a breach of those rights, including on account of the excessive duration of the investigation phase, it was for the FEG to establish that on the date of notification of the statement of objections, that is to say, 3 July 1996, its opportunities to refute the Commission's objections were limited for reasons arising from the fact that the first phase of the administrative procedure had taken an unreasonably long time.

57 In the present case, in its action before the Court of First Instance, the FEG failed to specify the persons who had worked in that association and whose departure prevented it from obtaining further information about the events to which the Commission's accusations related.

58 Nor does the FEG indicate either the date on which those persons left or the nature and the scope of the information or details which were necessary for its defence, or the circumstances which made it impossible to obtain the testimony of those persons, whose absence is alleged to have limited the effective exercise of the rights of the defence.

59 That general line of argument is not capable of establishing that there was in fact a breach of the rights of the defence, the existence of which must be examined by reference to the specific circumstances of each particular case.

60 It follows from all of the foregoing that the FEG's arguments relating to the breach of the rights of the defence are not supported by convincing evidence capable of demonstrating that such a breach may have resulted from the excessive duration of the phase of the administrative procedure preceding notification of the statement of objections and that on the date of notification the FEG's opportunities to defend itself were already thereby compromised.

61 Thus, the plea in law raised by the FEG in support of its action before the Court of First Instance, and alleging a breach of the 'reasonable time' principle, is unfounded and must, accordingly, be rejected.

62 Consequently, the FEG's action before the Court of First Instance, in so far as it is based on that plea in law, must itself be dismissed.

Second plea, alleging failure to consider the exculpatory evidence postdating the warning letter

Arguments of the parties

63 The FEG criticises what it alleges to be the internal inconsistency in the findings of the Court of First Instance, in that the period preceding notification of the statement of objections was not taken into account for the purpose of evaluating the reasonableness of the duration of the administrative procedure, since, according to the Court of First Instance, the FEG was implicated only after notification of the statement of objections, whereas exculpatory evidence relating to the same period was automatically excluded, which tends to establish that it was as of the first phase of the administrative procedure that the FEG's conduct was condemned.

64 It follows, in particular, from paragraphs 196 and 208 of the judgment under appeal that the Court of First Instance accorded no value to certain exculpatory evidence postdating the first requests for information, in fact letters from Spaanderman Licht, a member undertaking of NAVEG, dated 22 May and 14 August 1991 which cast doubt on the Commission's findings relating to the existence of a collective exclusive dealing arrangement and which are capable of invalidating the Commission's objections in respect of the FEG.

65 The FEG maintains that the fact that the Court of First Instance rejected that exculpatory evidence postdating the initiation of the procedure, without any explanation other than the date on which that evidence was adduced, constitutes a serious defect in the reasoning on which the judgment under appeal is based and fails to have regard to the principle of the presumption of innocence.

66 The Commission claims, primarily, that this plea is inadmissible, since the FEG seeks to submit again to the Court, in the context of the appeal, the Court of First Instance's factual assessment of the probative value of the evidence in the file.

67 In the alternative, the Commission contends that the FEG's second plea is unfounded. At paragraphs 208 and 196, respectively, of the judgment under appeal, the Court of First Instance stated that the letters were not convincing and in each case provided sufficient reasons for reaching that conclusion.

Findings of the Court

— Preliminary observations

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

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

70 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance has accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone

to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (*Baustahlgewebe* v *Commission*, paragraph 24, and *General Motors* v *Commission*, paragraph 52).

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

72 As regards the obligation to state reasons, it is settled case-law that the Court of First Instance is not thereby required to provide an account that follows exhaustively and point by point all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 372).

— Examination of the second plea

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

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

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

76 As regards, in particular, the letter of 14 August 1991, the Court of First Instance, at paragraph 196, assessed its probative value by weighing up the terms of the letter against the context in which it had been drawn up. First, it observed that the letter had been sent to NAVEG in response to a question put by NAVEG two days earlier. It was therefore NAVEG who took the initiative to question Spaanderman Licht as to the latter's motives for not supplying CEF. Second, the Court of First Instance stated that that letter postdated the requests for information sent by the Commission to the FEG and TU on 25 July 1991 and therefore carried no conviction.

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

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

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

80 Furthermore, the probative value, which it is for the Court of First Instance alone to assess, of the documents submitted to it as evidence does not necessarily depend on the stage of the administrative procedure during which they were drawn up. As the Advocate General observes at point 28 of her Opinion, that probative value must be evaluated in the light of all the circumstances of the case. It follows from paragraphs 196 and 208 of the judgment under appeal that the fact that the Commission had already begun its investigation is not the only determining factor on which the Court of First Instance rejected, inter alia, Spaanderman Licht's letters of 22 May and 14 August 1991 as incapable of calling in question the evidence adduced by the Commission concerning the implementation of the gentlemen's agreement. Accordingly, paragraphs 196 and 208 cannot be interpreted as meaning that no probative value can by nature be attributed to a document draw up when the Commission's investigation is already under way.

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

Third plea, relating to the Court of First Instance's assessment of the evidence adduced by the Commission concerning the duration of the collective exclusive dealing arrangement

Arguments of the parties

82 By its third plea, the FEG criticises the Court of First Instance's assessment of the evidence on which the Commission based its findings in respect of the principal

infringement of Article 81(1) EC of which it is accused, namely a collective exclusive dealing arrangement which, between 11 March 1986 and 25 February 1994, is alleged to have governed relations between the FEG and NAVEG. In the FEG's submission, that evidence is so flimsy and indirect that it could not in any way be characterised as legal and convincing evidence of a continuous infringement.

83 The FEG refers, in particular, to paragraph 141 of the judgment under appeal, where the Court of First Instance held that the Commission had based its assessment 'on an overall evaluation of all the relevant evidence and [indicia]'. In its submission, that constitutes an inadequate legal basis for the presentation of evidence and what must be adduced is not 'indicia' but legal and convincing evidence of the infringement found and of its duration.

84 The FEG further criticises the Court of First Instance for not having taken account of the fact that the Commission, in its reasoning, did not adduce the slightest evidence of such an exclusive arrangement for the periods 12 March 1986 to 28 February 1989 and 18 November 1991 to 25 February 1994.

85 The FEG criticises paragraph 411 of the judgment under appeal, where the Court of First Instance held, in regard to the appellant, that 'the Commission produced evidence of the existence of a continuous infringement over the period from 1986 to 1994'. The sole justification, deriving from paragraph 406 of the judgment, is that the Court of First Instance considered, in regard to the infringements of which TU was accused, that '[b]y their nature, [they] are of a continuous nature'. The FEG criticises that reasoning on the ground that it does not satisfy the obligation to state reasons.

86 The Commission contends that the third plea is inadmissible in so far as the appellant thereby requests the Court to reconsider the pleas and arguments already analysed and rejected by the Court of First Instance.

87 In the alternative, the Commission maintains that the plea is unfounded. As regards the FEG's claim that the Court of First Instance employed a legally incorrect criterion in relying on 'indicia', the Commission contends that the adequacy of such a criterion was confirmed by the Court of Justice at paragraph 57 of the judgment in *Aalborg Portland and Others* v *Commission*.

88 As regards the alleged absence of proof of the existence of a collective exclusive dealing arrangement during certain periods, the Commission disputes that reading of the judgment under appeal and states that the Court of First Instance declared that the infringement must be characterised as a 'continuous infringement' (see paragraphs 90, 406 and 411 of the judgment).

89 Contrary to the FEG's contention, the Commission submits that in establishing the duration of the collective exclusive dealing arrangement the Court of First Instance did not rely exclusively on the 'continuous' nature of the infringement. It refers to paragraphs 192 and 408 of the judgment under appeal, where the Court of First Instance described the specific indicia which had led the Commission to determine the duration of the infringement.

Findings of the Court

90 In its third plea, the FEG disputes, in essence, the legal criteria on which the Court of First Instance relied when assessing the evidence adduced by the Commission in support of its finding as to the duration of an infringement of Article 81(1) EC. The FEG further submits that the judgment under appeal does not contain an adequate statement of reasons as regards the 'continuous' nature of the collective exclusive dealing arrangement. From that aspect, the third plea is concerned with questions of law which may be submitted to the Court in an appeal and it must therefore be considered admissible.

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

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

93 In the present appeal, the FEG disputes the appropriateness of the reference to the 'indicia' as evidence of the existence of a collective exclusive dealing arrangement.

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

95 As the Advocate General observes at point 38 of her Opinion, such indicia and coincidences may provide information not just about the mere existence of anti-competitive practices or agreements, but also about the duration of continuous anti-competitive practices or the period of application of anti-competitive agreements.

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

97 In the context of its third plea, the FEG also criticises the Court of First Instance for having ignored the absence of evidence of a collective exclusive dealing arrangement during certain specific periods.

98 In that regard, it must be stated that at paragraph 411 of the judgment under appeal the Court of First Instance held that the Commission had adduced evidence of the existence of a continuous infringement over the period from 1986 to 1994. The fact that such evidence was not produced for certain specific periods does not preclude the infringement from being regarded as established during a longer overall period than those periods provided that such a finding is supported by objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement.

99 The finding by the Court of First Instance of the existence of a 'continuous infringement' is also criticised by the FEG, which contends that the finding of such an infringement is based solely on the fact, referred to at paragraph 406 of the judgment under appeal, that the Court of First Instance considered, in respect of the infringements of which TU was accused, that '[b]y their nature, [they] are of a continuous nature'. The FEG criticises that reasoning in that it does not satisfy the obligation to state reasons, as the mere reference to the 'nature' of the infringements cannot constitute a sufficient specific ground.

100 That argument clearly fails to take account of paragraph 411 of the judgment under appeal, where the Court of First Instance stated that the Commission had adduced evidence of the existence of a continuous infringement over the period from 1986 to 1994. The Court of First Instance referred, in that regard, to the reasoning which it had developed in the preceding paragraphs of the judgment, in particular in paragraph 408, where it explained in detail the basis of the duration of the infringement. Paragraph 408 reads as follows:

'As regards the infringement referred to in Article 1 of the contested decision, the Commission was not able to determine precisely the date on which the collective exclusive dealing arrangement was entered into. Nevertheless, it produced evidence of the existence of the arrangement as from the meeting of 11 March 1986, at which the boards of the FEG and NAVEG referred to the gentlemen's agreement. The Commission also relied on certain [indicia] post-dating that meeting on the basis of which it considered that the gentlemen's agreement was continuing to be applied by NAVEG members (see contested decision, recitals 47 to 49). The Commission also referred to certain [indicia] indicating that the NAVEG members had followed the recommendations of their association, in implementation of the gentlemen's agreement (contested decision, recitals 50 to 52). The last of those [indicia] is the account of an internal meeting of the Hemmink company of 25 February 1994, at which that NAVEG member stated that it had refused to supply a wholesaler not belonging to the FEG. ...'

101 In the light of the foregoing, the Court must reject as unfounded the third plea put forward by the FEG in support of its appeal, relating to an alleged error of law and an alleged failure to state reasons as regards the Court of First Instance's appraisal in respect of the duration of the collective exclusive dealing arrangement as found by the Commission in the contested decision.

Fourth plea, relating to the Court of First Instance's assessment of the FEG's arguments concerning the concerted practices on pricing

102 By its fourth plea, the FEG claims that, as regards a number of aspects of the infringement of which it is accused, the Court of First Instance omitted to examine the essential part of the arguments which it put forward or gave a manifestly inaccurate account of them, thus failing to fulfil its obligation to state reasons. This plea consists of five parts.

First part of the fourth plea, relating to the characterisation of the concerted practices on pricing as constituting a single and continuous infringement

— Arguments of the parties

103 The FEG characterises the Court of First Instance's finding, at paragraphs 403 to 412 of the judgment under appeal, that the various agreements on pricing constituted a single and continuous infringement as incomprehensible and incompatible with the obligation to state reasons.

104 The FEG claims that, according to settled case-law, in order for the existence of a single infringement to be found, it must be established that the different actions complained of, owing to their 'identical object', form part of an 'overall plan' (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 258).

105 However, the present case involved a number of very heterogeneous decisions and practices, with quite different objectives, and the Commission cannot merely infer from those decisions and practices that there was an overall plan, but must demonstrate that those practices are connected from a material aspect. The Court of First Instance ought to have ascertained whether the Commission had indeed demonstrated that there was such a connection between them.

106 The FEG denies that there was such an 'overall plan' and maintains that the conclusions reached by the Court of First Instance display such lacunae that they are incompatible with the obligation to state reasons.

107 In that regard, the Commission contends, primarily, that the FEG is seeking by this plea to obtain a re-examination by the Court of Justice of the factual assessment made by the Court of First Instance of the evidence of the existence of an 'overall plan'. The Commission submits that this part of the fourth plea is therefore inadmissible.

108 In the alternative, the Commission maintains that the first part of the fourth plea is unfounded. At paragraph 342 of the judgment under appeal, the Court of First Instance clearly considered, and stated its reasons for doing so, that both the infringements found, namely the collective exclusive dealing arrangement and the agreements on prices, formed part of an 'overall plan' owing to the fact that they pursued the same anti-competitive object. In the Commission's submission, what applies to the two infringements must also necessarily apply to their main components.

— Findings of the Court

109 The first part of the FEG's fourth plea is directed against the legal criteria on which the Court of First Instance relied in order to characterise the various practices

relating to price-fixing as constituting a single and continuous infringement and against the reasons set out on that point in the judgment under appeal. It is therefore admissible.

110 An infringement of Article 81(1) EC may be the consequence not only of an isolated act but also of a series of acts or indeed of continuous conduct. That interpretation cannot be challenged on the ground that one or more elements of that series of acts or of that continuous conduct might also constitute in themselves, and taken in isolation, an infringement of that provision. Where the various actions form part of an 'overall plan', owing to their identical object, which distorts competition within the common market, the Commission is entitled to impute liability for those actions according to participation in the infringement considered as a whole (see *Aalborg Portland and Others* v *Commission*, paragraph 258).

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

112 In particular, at paragraph 342 of the judgment under appeal, the Court of First Instance found that the collective exclusive dealing arrangement and the price-fixing practices pursued the same anti-competitive object, which consisted in maintaining prices at supra-competitive levels, first by reducing the competitiveness of the undertakings which sought to operate on the market for the wholesale distribution of electrotechnical fittings in the Netherlands, and thereby to compete with the members of the FEG, without being affiliated to that association of undertakings, and, second, by partially coordinating their pricing policy.

113 As the Advocate General observes at point 47 of her Opinion, it also follows from that finding that each of the infringements *per se*, that is to say the collective exclusive dealing arrangement and the concerted practices on pricing, sought to achieve that single object.

114 Read in the light of the finding made by the Court of First Instance at paragraph 342 of the judgment under appeal, paragraphs 403 to 412 of that judgment therefore do not disclose any error of law or any lack of reasoning in that judgment.

115 Consequently, the first part of the fourth plea must be rejected as unfounded.

Second part of the fourth plea, relating to the standard discounts on sales of electrotechnical fittings to schools

— Arguments of the parties

116 By this part of the fourth plea, the FEG criticises the Court of First Instance for having considered at paragraph 412 of the judgment under appeal that the standard discounts granted on sales of electrotechnical fittings to schools constituted evidence of 'continuing concertation on prices after 1991'.

117 The FEG maintains that this was a unique case, however, in which, at the request of UNETO, a specific recommendation, which concerned only deliveries to wholesalers relating to a wholly insignificant quantity, had been made to the members of that association, and for which there was a special social reason and special social justification. The case concerned special, very high, discounts for educational material purchased by public education establishments whose pupils form the target group of the installation undertakings. Such discounts therefore responded to a request for special support having a social purpose.

118 The FEG criticises the Court of First Instance for having ignored those arguments when it held, at paragraph 324 of the judgment under appeal, that the allegedly social object of that collusion could not be taken into consideration for the purposes of Article 81(1) EC. Thus, the Court of First Instance infringed that provision, since it did not consider whether the special discounts scheme satisfied all the conditions for its application, in particular the condition that there must be an effect on intra-Community trade.

119 Furthermore, the FEG maintains that the reasoning employed by the Court of First Instance in that regard is insufficient.

120 The Commission claims, primarily, that by this part of the fourth plea the FEG is seeking to call in question the factual assessment made by the Court of First Instance of the anti-competitive object of the agreement on discounts granted to schools and is therefore inadmissible.

121 In the alternative, the Commission contends that this part of the fourth plea is unfounded. At paragraph 324 of the judgment under appeal, the Court of First Instance correctly analysed the FEG's arguments, which are set out at paragraph 311 of the judgment. Furthermore, the fact that, as the FEG maintains, the agreement on discounts was a 'unique case' is irrelevant. Conduct having a manifestly anti-competitive object and affecting the great majority of the electrotechnical wholesale trade in the Netherlands does not escape the prohibition laid down in Article 81(1) EC on the ground that it related to a 'unique case'.

— Findings of the Court

122 This part of the fourth plea is admissible in so far as it concerns, first, the legal criteria underlying the characterisation of the standard discount granted for sales of

electrotechnical equipment to schools as evidence that the concerted practices on prices were pursued after 1991 and, second, the alleged insufficiency of reasoning in the judgment under appeal on that issue.

123 At paragraph 317 of the judgment under appeal, the Court of First Instance stated that TU and the FEG did not deny that discussions had taken place on the discounts, prices, margins and turnover of FEG members, but maintained, in essence, that those discussions were not contrary to Article 81(1) EC, in so far as they had had no impact on the market, as they had not been implemented or produced appreciable effects.

124 The Court of First Instance rejected those arguments. At paragraph 324 of the judgment under appeal, it held as follows:

'As regards the standard discount for sales of electrotechnical fittings to schools (contested decision, recital 83), it is common ground that the FEG, TU and other members of that association agreed upon a uniform discount rate of 35%. Such concurrent intentions manifestly pursue the aim of restricting the freedom of FEG members of determine commercial policy. As regards the allegedly social [object] of such collusion, it cannot be taken into account for the purposes of Article 81(1) EC.'

125 That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market (*Aalborg Portland and Others* v *Commission*, paragraph 261).

126 Since it was established by the Court of First Instance that the collusion on the standard discounts granted to schools had an anti-competitive object, neither the unique nature nor the social object of those discounts could protect the agreement relating to them from the application of Article 81(1) EC.

127 In the light of the foregoing, the FEG's argument that the judgment under appeal contained inadequate reasoning on that point must be rejected.

128 The second part of the fourth plea must therefore be rejected.

Third part of the fourth plea, relating to the practices of the wire and cable product committee and the other alleged cases of information exchange

— Arguments of the parties

129 This part of the fourth plea is directed against paragraphs 317 to 323 of the judgment under appeal, where the Court of First Instance examined the infringement resulting from the practices of the wire and cable product committee.

130 The FEG maintains that it follows from the Court of First Instance's examination of that infringement that it did not establish that practices constituting effective restriction of competition had taken place within the framework of that committee, but that it none the less considered, at paragraph 323 of the judgment under appeal, that the Commission had been correct to describe those practices as '[indicia] of practices whose [object] was to restrict competition within the meaning of Article 81(1) EC'.

131 The FEG criticises that finding on the ground that it is based on an incorrect criterion. It maintains that the Commission cannot merely identify certain indicia but must actually establish that those restrictive practices did in fact take place. The appellant believes that it has demonstrated in a properly-reasoned and detailed manner that no actual practice satisfying the objectives restrictive of competition identified by the Commission was implemented and therefore that the conditions on which the existence of concerted practices within the meaning of Article 81(1) EC may be established are not validly satisfied.

132 The Commission contends, in that regard, that this part of the fourth plea fails to take account of paragraphs 321 and 323 of the judgment under appeal, where the Court of First Instance considered that the information-exchange system in question was a further indicium of a body of practices designed to restrict price competition. In the Commission's submission, it is settled case-law that decisions and agreements whose aim is to restrict competition are prohibited by Article 81(1) EC, without there being any need to take their actual effects into consideration (*Aalborg Portland and Others* v *Commission*, paragraph 261).

133 The Commission further submits that the Court's case-law establishes that the prohibition in Article 81(1) EC applies to concerted practices although no effect or conduct restrictive of competition is demonstrated: the mere conduct on the market is sufficient (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 122 to 124).

— Findings of the Court

134 Like the preceding parts of the fourth plea, the third part concerns the Court of First Instance's appraisal in relation to the FEG's arguments that the concerted practices on prices and the discounts granted to schools, the existence of which was revealed by the Commission, were not contrary to Article 81(1) EC, since they had no effects

on the market, as they were not implemented and did not have any appreciable effects. From that perspective, this part of the fourth plea relates to a question of law and must therefore be declared admissible.

135 It is settled case-law that the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 57).

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

137 Likewise, a concerted practice falls within Article 81(1) EC even where there are no anti-competitive effects on the market.

138 First of all, it follows from the very wording of that provision that, as in the case of agreements between undertakings and decisions of associations of undertakings, concerted practices are prohibited, independently of any effect, where they have an anti-competitive object.

139 Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 165).

140 It follows from the judgment under appeal that it was on those precise principles that the Court of First Instance relied when evaluating the concerted practices on prices and the discounts granted to schools which were established by the Commission in the contested decision.

141 In the context of that evaluation, the Court of First Instance observed, at paragraph 321 of the judgment under appeal, that the Commission was right to take the view that the object of the information exchange system at issue was to influence the market. The Court of First Instance inferred that, accordingly, the Commission had been entitled to regard it as a further indicium of the existence of practices designed to limit price competition among FEG members.

142 Last, at paragraph 322 of the judgment under appeal, concerning the wire and cable product committee, the Court of First Instance recalled that, according to the contested decision, its object was to 'endeavour to keep the market calm and maintain prices'. The Court of First Instance considered that that was manifestly an object prohibited by Article 81(1) EC, since it was intended to substitute for the undertakings' individual decisions the results of their collusion on prices.

143 As the anti-competitive object of the exchange of information on prices had been established, the Court of First Instance was therefore not required to consider their actual effects on the market.

144 The third part of the fourth plea must therefore be rejected as unfounded.

Fourth part of the fourth plea, relating to the binding decisions on fixed prices and publications

— Arguments of the parties

145 The FEG submits that as the binding decision on fixed prices had already become a dead letter shortly after being adopted in 1984, the Court of First Instance could not validly establish that the infringement associated with that decision lasted until the date on which it was formally withdrawn, that is to say, until 23 November 1993.

146 Furthermore, the FEG claims that it has not been validly established that the binding decisions on fixed prices and publications were applied. It maintains that there can be a concerted practice within the meaning of Article 81(1) EC only where such a practice has actually been put into effect on the market. None the less, the Court of First Instance did not establish the existence of that practice, but merely stated, at paragraph 291 of the contested decision, that there was no need to ascertain whether the two decisions had actually been implemented since they had as their object the restriction of competition.

147 The FEG further claims that the binding decisions are so different, by their very nature, from the other alleged infringements committed by it in relation to prices that the Court of First Instance breached the obligation to state reasons when it considered that they constituted a single infringement. The Commission ought to

have treated the two binding decisions as autonomous infringements by reference to the prohibition laid down in Article 81(1) EC and the Court of First Instance ought to have examined them by reference to their impact on inter-State trade.

148 In that regard, the Commission claims, primarily, that this part of the fourth plea seeks to challenge a finding of fact made by the Court of First Instance and must therefore be declared inadmissible.

149 In the alternative, the Commission submits that this part of the plea is unfounded. Even if, as the FEG maintains, the binding decision on fixed prices had no practical effect, that would not in any way prevent the Court of First Instance from finding that the decision constituted prohibited conduct which lasted until it was withdrawn, on 23 November 1993.

150 The Commission observes that at paragraph 295 of the judgment under appeal the Court of First Instance held, correctly, that the binding decision on fixed prices was a binding decision by an association of undertakings, within the meaning of Article 81(1) EC, having as its object the restriction of competition. Such decisions are prohibited by Article 81(1) EC and there is no need to examine their actual effects.

151 The Commission further submits that the FEG's criticism of the Court of First Instance's finding that the two binding decisions at issue constituted one and the same infringement is unfounded. In making its assessment, the Court of First Instance based itself on a legally correct criterion, namely the aim of the decisions, which was to restrict competition.

— Findings of the Court

152 The fourth part of the fourth plea must be rejected as inadmissible in so far as it seeks to challenge the Court of First Instance's finding of fact that the binding decision on prices lasted until the date on which it was formally withdrawn. Such a re-examination of the facts and evidence established by the Court of First Instance is outside the jurisdiction of the Court of Justice in an appeal.

153 On the other hand, the merits of this part of the fourth plea must be examined in so far as the appellant thereby seeks to criticise the reasoning of the judgment under appeal concerning the characterisation of the two binding decisions as constituting a 'single infringement' and the alleged error of law made by the Court of First Instance owing to the fact that it did not consider whether the decisions were actually implemented.

154 At paragraph 289 of the judgment under appeal, the Court of First Instance stated that the Commission referred, in Article 2 of the contested decision, to two 'binding decisions' of the FEG, one concerning fixed prices and the other publications. It made clear that under the articles of association of the FEG those decisions were binding on its members and that any infringement of them might result in suspension or expulsion from membership (recital 72 to the contested decision).

155 It follows from paragraph 290 of the judgment under appeal that the FEG and TU maintained before the Court of First Instance that those decisions had been a dead letter until the date on which they were withdrawn, 23 November 1993. Consequently, any effect restrictive of competition was precluded.

156 At paragraph 291 of the judgment, the Court of First Instance stated that it was necessary to verify whether the binding decisions at issue pursued an object restrictive of competition. If they did, any analysis of the effects of those decisions would be superfluous for the purposes of applying Article 81(1) EC.

157 That was in fact the conclusion which the Court of First Instance reached at paragraphs 292 to 300 of the judgment under appeal.

158 Thus, as regards the binding decision on fixed prices, the Court of First Instance found, at paragraph 295, that that decision by an association of undertakings restricted the freedom of its members to fix prices and pursued an object restrictive of competition within the meaning of Article 81(1) EC.

159 As regards the binding decision on publication, the Court of First Instance concluded, at paragraph 300, that that decision sought to restrict the individual conduct of FEG members regarding their commercial advertising policy in order to protect them from the consequences of competition which, essentially, they regarded as highly damaging. The Court of First Instance observed that a decision of that kind by an association of undertakings manifestly pursued an object restrictive of competition within the meaning of Article 81(1) EC.

160 As the anti-competitive object of both binding decisions was established by the Court of First Instance, the latter, contrary to the FEG's submission, could not also be required to demonstrate their actual effects on the market. As observed at paragraph 136 above, there is no need to take account of the actual affects of an

agreement once it appears that its object is to restrict, prevent or distort competition within the common market.

161 As regards the allegation that the reasoning on which the judgment under appeal is based is insufficient in respect of the characterisation of the binding decisions on fixed prices and publication as constituting a 'single infringement', reference should be made to the consistent case-law of the Court on infringement of Article 81(1) EC, as set out at paragraph 110 above.

162 A reading of paragraph 338 of the judgment under appeal reveals, although only by implication, that the existence of an 'overall plan' was indeed established by the Court of First Instance. The Court of First Instance observed that, through a series of practices, agreements and decisions, the members of the FEG and that association, which together enjoyed preponderant economic power on the relevant market, had 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.

163 The differences which, according to the FEG, exist between those binding decisions have no impact on their characterisation as a 'single infringement' since they fall within the framework of a series of practices having the same object, namely to restrict price competition.

164 It follows from all the foregoing that the fourth part of the fourth plea is inadmissible in part and unfounded in part.

Fifth part of the fourth plea, relating to the issue by the FEG of price recommendations to its members

— Arguments of the parties

165 By the fifth and last part of the fourth plea, the FEG criticises the Court of First Instance for having ignored the very limited scope and the unique nature of the price recommendations which it sent to its members for plastic tube products and for having merely confirmed the objective of restricting competition of those recommendations, as identified by the Commission, and for having failed to fulfil its obligation to state reasons when doing so.

166 The FEG also criticises paragraph 333 of the judgment under appeal, where the Court of First Instance rejected its objections to the Commission's findings concerning the use of similar gross price lists by a number of its important members, maintaining that the Commission had characterised those practices not as separate infringements of competition law but as effects of the practices found. The FEG claims that the ground on which the Court of First Instance rejected its objections cannot be reconciled with the fact that the Court then devoted detailed explanation to the restriction of competition on the market for electrotechnical fittings in the Netherlands before concluding, at paragraph 339 of the judgment, that '[t]he Commission [had] thus demonstrated, to the requisite legal standard, that those practices were contrary to Article 81 EC'.

167 The FEG finds it incomprehensible that the Court of First Instance should adopt the position, expressed at paragraph 337 of the judgment under appeal, that the FEG and TU had not offered sufficient sound evidence to overturn the Commission's assertion that the prices charged by wholesalers in the Netherlands were higher than those charged in the other Member States. It was for the Commission to prove the existence of such higher prices, but it adduced no evidence of such prices. The Court

of First Instance should not have been satisfied with the reasoning in paragraph 337 but ought to have required that the Commission substantiate its 'indicia' and 'suggestions' by firm evidence of the existence of coherent concerted practices on the part of the FEG which sought to restrict competition.

168 In conclusion, the FEG contends that the reasoning set out in the judgment under appeal in connection with the FEG's alleged infringements in relation to prices contain such serious lacunae that the judgment must be set aside, or at least the part devoted to those infringements. In addition, at various points, the Court of First Instance infringed Article 81(1) EC by characterising an agreement as a concerted practice without having established that the agreement had in fact given rise to such a practice.

169 The Commission contends that this part of the fourth plea is inadmissible in so far as it seeks to challenge the findings of fact made by the Court of First Instance on the basis of the available evidence.

170 In the alternative, the Commission refers to paragraphs 327 and 328 of the judgment under appeal, where the Court of First Instance, stating its reasons for doing so, rejected the FEG's and TU's argument that the conduct complained of did not have an object restrictive of competition.

171 Nor does the Commission find any contradiction between paragraph 333 and paragraphs 334 to 339 of the judgment under appeal, contrary to the FEG's assertion.

172 First of all, according to the Commission, the Court of First Instance did indeed find, at paragraph 333, that the FEG had misread the contested decision, because the

decision referred to the similarities observed between the catalogues of the main wholesalers to illustrate the limited degree of competition prevailing on the relevant market and, at paragraph 334, that the way in which the price agreements restricted competition had been demonstrated to the requisite legal standard and that it was therefore superfluous to examine their effects on the market.

173 Next, at paragraphs 335 to 338, the Court of First Instance examined TU's attempt to explain the striking similarities between the catalogues. Then, at paragraphs 338 and 339, it set out the general conclusion of that part of the judgment devoted to the objections relating to the legal characterisation of the facts, holding that, 'through a series of practices, agreements and decisions, the members of the FEG and that association, which enjoy a preponderant economic power in the relevant market, 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 price and advertising' and that the Commission '[had] thus demonstrated, to the requisite legal standard, that those practices were contrary to Article 81 EC'.

174 Last, as regards the FEG's criticism of paragraph 337 of the judgment under appeal, the Commission contends that the appellant is thereby seeking in reality to challenge a finding of fact made by the Court of First Instance. In any event, the Commission maintains that paragraph 337 must be read as an extension of paragraph 334 of the judgment, where the Court of First Instance found that the pricing practices had as their object the restriction of competition and that it was therefore superfluous to examine their effects on the market.

175 The Commission concludes that this part of the fourth plea is inadmissible or, at the very least, unfounded, as is the plea in its entirety.

— Findings of the Court

176 The fifth part of the fourth plea must be held admissible in so far as it refers, primarily, to the legal characterisation of the recommendations on prices which the FEG sent to its members, in that they constitute an indicium of the existence of restrictions of competition, and also to the allegedly defective reasoning of the judgment under appeal in that regard.

177 At paragraph 326 of the judgment under appeal, the Court of First Instance made the following findings:

'As regards the issue of price recommendations by the FEG to its members, it is common ground that TU assisted the FEG in connection with the conversion into recommended gross prices of the recommended net prices charged by suppliers of certain plastic products. It is also common ground that the FEG regularly sent its members the most recent price-lists for such products. [The FEG and TU] have not contested that, in the case of PVC tubes, the FEG sent its members, following price changes decided on by manufacturers, updated lists of prices, also mentioning the percentage reductions or increases which it recommended its members to apply (contested decision, recital 85). Finally, [the FEG and TU] have not contested the truth [or] the Commission's interpretation in recital 87 to the contested decision of the report of the FEG regional meeting of 2 March 1989. It is clear from that document that the FEG, following an increase in the price of plastic tubes, had advised its members to observe the recommended prices.'

178 At paragraph 328 of the judgment under appeal, the Court of First Instance rejected the FEG's and TU's denial of the fact that the price-conversion effort pursued an object restrictive of competition. It held that the FEG and TU had been able to exercise an influence on price formation through the members of the FEG, by exchanging and distributing information on prices and discounts for certain plastic

electrotechnical materials. The Court of First Instance concluded that the Commission had therefore been correct to take those elements to be indicia of the existence of restrictions of competition.

179 In that regard, it is sufficient to state that the Court of First Instance merely applied the consistent case-law of the Court of Justice to the effect that it is unnecessary to consider the specific effects of an agreement when it is clear that it has as its object the restriction, prevention or distortion of competition.

180 The Court must also reject the FEG's allegation that there is a contradiction between the findings made by the Court of First Instance at paragraphs 333 and 339, respectively, of the judgment under appeal, as its argument rests on an incorrect reading of those paragraphs. It follows from paragraph 339 of the judgment, read with paragraph 338, that it sets out the general conclusion of the part of the judgment which characterises the concerted practices on price-fixing as contrary to Article 81 EC. That finding does not therefore refer to the similarities between prices and discounts, which, as the wording of paragraph 333 clearly states, were referred to by way of an example intended to characterise the effects of the practices in question on the market and not as an infringement distinct from those referred to in the operative part of the contested decision.

181 As regards the FEG's criticism of paragraph 337 of the judgment under appeal, it must be held that the Court of First Instance did not unduly reverse the burden of proof. As the Commission found, at recital 119 to the contested decision, that the lack of price competition between FEG members was also apparent from the price level on the Netherlands wholesale market and that there was a variety of evidence that the level of prices for electrotechnical fittings was higher in the Netherlands than in the other Member States, it was for the FEG to adduce evidence to counter such findings.

182 As the judgment under appeal contains sufficient reasons in that regard, the fifth part of the fourth plea must be rejected as unfounded and, accordingly, the fourth plea must be rejected in its entirety.

Fifth plea, relating to the imputation to the FEG of the extension of the collective exclusive dealing arrangement

Arguments of the parties

183 The FEG criticises the Court of First Instance for having misinterpreted Community law when it held, at paragraphs 231, 236 and 393 of the judgment under appeal, without having sufficient indicia capable of establishing its direct involvement, that the Commission could validly rely on the acts of individual members of the FEG to impute the infringement found to the FEG. In its submission, the Court of First Instance failed to have regard to the fact that the FEG had not played a role of its own, distinct from that of its members, in implementing the practices complained of.

184 The FEG contends that, in order to be able to take account of the participation of an association of undertakings together with that of certain of its members in one and the same infringement, the Commission must demonstrate that the action of the association can be distinguished from that of its members.

185 The FEG refers to paragraph 227 of the judgment under appeal, read with paragraph 226, where the Court of First Instance acknowledged that the Commission had not mentioned indicia of the FEG's direct involvement in the incidents relating to the extension of the collective exclusive dealing arrangement other than the internal memorandum of 12 September 1990 from one of its members. In the FEG's submission, an internal memorandum of that kind, which was drawn up without the FEG's knowledge, cannot serve to demonstrate that it played its own role, distinct from that of its members, in those incidents.

186 As regards what the Court of First Instance characterised, at paragraphs 230 and 392 of the judgment under appeal, as joint action by 26 members of the FEG, the FEG contends that the Commission did not demonstrate that it had expressly or tacitly expressed its consent in respect of the content of that action. The mere fact that the undertakings involved were members of the FEG does not suffice to impute to the latter responsibility for such an action. Nor did the Court of First Instance examine whether or not the FEG had participated in implementing measures connected with the joint action taken by its members.

187 The FEG also disputes the Court of First Instance's assertion, at paragraph 392 of the judgment under appeal, that the 26 FEG members who participated in the joint action were acting in the general interest of the other members of that association; it contends that such an assertion is incomprehensible, in so far as it is not sufficient to be capable of imputing that action to the FEG.

188 The FEG also maintains that the Court of First Instance misapplied the case-law when it held, at paragraph 391 of the judgment under appeal, that the mere fact that a limited number of representatives of the 26 FEG members held management posts within the FEG allowed the concerted practices to be imputed to it. That circumstance cannot constitute an indicium that the FEG played its own role, distinct from that of its members, in respect of such practices.

189 The Commission contends, primarily, that this plea is inadmissible in that it seeks to challenge the finding of fact made by the Court of First Instance.

190 In the alternative, it submits that this plea rests on a misreading of the judgment under appeal and that it is incorrect to take the view that the Court of First Instance based the imputation of the concerted practices to the FEG solely on the acts of the latter's individual members.

191 The Commission maintains that the Court of First Instance found, at paragraph 236 of the judgment under appeal, that the FEG and TU played a personal and distinct role in the infringement. In order to be able to establish the joint participation by an association and its members in the same infringement, it is sufficient for the Commission to establish on the part of that association the existence of conduct distinct from that of its members. In the Commission's contention, that was the precise approach taken by the Court of First Instance.

192 The Commission further claims that the FEG disregards the fact that, according to the Court of First Instance, the prohibited conduct in question formed part of a single infringement (see paragraphs 391 and 406 of the judgment under appeal). In the Commission's submission, it is therefore sufficient to demonstrate that the FEG contributed to achieving the objectives of the collective exclusive dealing arrangement which it had been instrumental in setting up and was or ought to have been aware of the attempts made by the other undertakings which participated in the infringement to extend that arrangement to undertakings which were not members of NAVEG. At paragraphs 391 to 393 of the judgment, the Court of First Instance found that the Commission had applied the appropriate criterion in that regard.

193 The Commission therefore proposes that this plea be rejected as inadmissible or, at least, as unfounded.

Findings of the Court

194 In so far as, in the context of its fifth plea, the FEG is challenging the legal criteria on the basis of which the Court of First Instance arrived at the conclusion that the extension of the collective exclusive dealing arrangement could validly be imputed to the FEG and also the reasoning of the judgment under appeal in that regard, the fifth plea is admissible.

195 As stated at paragraph 213 of the judgment under appeal, in the contested decision the Commission considered that the FEG and TU had attempted to extend the scope of the gentlemen's agreement to suppliers who were not represented by agents or importers within the NAVEG membership. It relied on various examples of pressure brought to bear on suppliers such as Draka Polva, Holec, ABB and Klöcker Moeller (see recitals 53 to 66 and 104 to 106 to the contested decision). The Commission also stated that the FEG had sought to extend the collective exclusive dealing arrangement to the firm Philips, a supplier of electrotechnical equipment to the general public.

196 At paragraph 236 of the judgment under appeal, the Court of First Instance concluded that none of the arguments which it had examined was such as to call in question the substantive accuracy of the facts referred to in the contested decision as evidence of the pressure brought to bear by the FEG and TU on certain suppliers who were not connected with NAVEG. It observed that, in those circumstances, the Commission had been correct to find, on the basis of objective and consistent indicia, first, that the FEG had sought to extend the scope of the gentlemen's agreement to suppliers who were not linked with NAVEG and, second, that TU had participated in several actions designed to implement that objective.

197 In the present case, it is common ground that the Court of First Instance examined the distinct role played by the FEG in the extension of the gentlemen's agreement. After examining the wording of the minutes of the board of the FEG of 29 January 1991 and the TU internal memorandum of 12 September 1990, the Court of First Instance observed, at paragraph 226 of the judgment under appeal, that those words constituted an indicium of the existence of an agreement between the members of the FEG and of the latter's direct involvement in finalising the response envisaged following CEF's entry to the Netherlands market.

198 The reference to the criterion of the FEG's direct involvement in its members' efforts to secure the extension of the collective exclusive dealing arrangement to

outside suppliers is also to be found at paragraph 231 of the judgment under appeal. At paragraphs 227 to 230 of the judgment, the Court of First Instance examined a certain number of consistent indicia which revealed that the members of the FEG had sought, individually or together, to obtain from suppliers outside NAVEG commitments for the benefit of all the members of the FEG, so that those suppliers were entitled to take the view that those actions were undertaking under the aegis of the FEG or with its consent.

199 On the basis of those elements, the Court of First Instance concluded, at paragraph 231 of the judgment under appeal, that it was clear from the joint action of certain members of the FEG — including several of its executives on the board — that they were acting not individually but on behalf of the members of the association as a whole, although without acting directly in the latter's name. The Court of First Instance held that the Commission was entitled to deduce from those actions that the FEG had manifested its intention to extend the collective exclusive dealing arrangement to suppliers outside NAVEG.

200 As the Advocate General observes at point 85 of her Opinion, the Court of First Instance did not by any means treat the conduct of the FEG and that of its member undertakings, in particular TU, as being one and the same, but undertook a separate assessment of that association's participation in the anti-competitive conduct.

201 In those circumstances, the Court of First Instance was entitled to adopt the Commission's findings concerning the FEG's participation in the extension of the collective exclusive dealing arrangement. Nor can any lack of reasoning be established in that regard. The fifth plea put forward by the FEG in support of its appeal must therefore be rejected as unfounded.

Sixth plea, relating to the determination of the duration of the infringements imputed to the FEG by the Commission

Arguments of the parties

202 The FEG criticises the judgment under appeal in so far as the Court of First Instance rejected its and TU's arguments concerning the determination of the duration of the infringement found by the Commission. The Court of First Instance thus infringed Article 15(2) of Regulation No 17 and also the general principles of Community law on the reasons on which judicial decisions are based and on proportionality as regards the amount of fines.

203 The analysis carried out by the Court of First Instance wrongly failed to distinguish between the various infringements concerned, in spite of their heterogeneous nature.

204 The FEG finds it incomprehensible that the Court of First Instance, at paragraph 406 of the judgment under appeal, should describe the infringements referred to in that paragraph as 'continuous'. It maintains that the Court of First Instance was wrong not to take account, when determining the duration of those infringements, of the fact that there was no 'overall plan' in the present case.

205 The Commission states, primarily, that the sixth plea concerns a finding of fact by the Court of First Instance and is therefore inadmissible.

206 In the alternative, the Commission contends that this plea is based on a misreading of the judgment under appeal. At paragraph 342 of the judgment, the Court of First Instance expressly established the common purpose and the coherence of the two

infringements of which the FEG is accused, namely the collective exclusive dealing arrangement and the concerted practices on price-fixing.

207 The Commission therefore proposes that the sixth plea should be rejected as inadmissible or, at the very least, as unfounded.

Findings of the Court

208 The terms of the sixth plea in the appeal reveal that, in the context of this plea, the FEG is merely reproducing the same arguments as those which it has already put forward in the context of its third plea, relating to the Court of First Instance's assessment of the evidence adduced by the Commission concerning the duration of the collective exclusive dealing arrangement, and also in the context of the first part of the fourth plea, relating to the characterisation of the concerted practices on prices as constituting a single and continuous infringement. Accordingly, it is sufficient to refer to the findings of the Court in respect of the third plea and the first part of the fourth plea, which were rejected at paragraphs 101 and 115, respectively, of this judgment.

Seventh plea, relating to the application for a reduction in the amount of the fine

Arguments of the parties

209 By this plea, the FEG challenges paragraphs 436 to 438 of the judgment under appeal, where it was held that the excessive duration of the administrative procedure must not lead to a substantial reduction in its fine.

210 The FEG contends that, in holding, at paragraph 438, that it and TU had adduced no evidence to show why the amount of the fine imposed on the FEG should be further reduced, the Court of First Instance misapplied Article 15(2) of Regulation No 17 or, at the very least, the general principles of Community law on the reasoning of judicial decisions and on proportionality in setting fines.

211 The FEG criticises the Court of First Instance for having established, at paragraphs 85 and 436 of the judgment under appeal, that the Commission was responsible for the excessive duration of the procedure but for having failed to take that duration into account in order to justify a further reduction in the amount of the fine.

212 In that regard, the Commission claims that this plea is manifestly inadmissible in so far as it is not for the Court to substitute its own assessment for that of the Court of First Instance where the latter adjudicates on the amount of the fines imposed on undertakings for infringements of Community law (see *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 614). Furthermore, by this plea, the FEG is challenging the finding of fact by the Court of First Instance that breach of the 'reasonable time' principle did not affect the FEG's capacity to defend itself.

213 The Commission further contends that the Court of First Instance examined whether the particular circumstances of the case warranted a reduction in the fine imposed on the FEG and held, in that regard, that there was no reason to grant such a reduction (paragraphs 436 to 438 of the judgment under appeal).

214 The Commission therefore submits that the seventh plea is manifestly inadmissible or, at the very least, unfounded.

215 In the observations which it submitted in response to the notification of the appeal, which it received in its capacity as intervener at first instance, CEF also claims that the seventh plea is not admissible since it relates, in this case, to findings of fact by the Court of First Instance which cannot be re-examined in the context of the present appeal.

216 In the alternative, CEF submits that the seventh plea is unfounded.

Findings of the Court

217 It must be borne in mind that the Court of First Instance alone has jurisdiction to examine how in each particular case the Commission appraised the gravity of

unlawful conduct. On appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 81 EC and Article 15 of Regulation No 17 and, second, to ascertain whether the Court of First Instance responded to the requisite legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, in particular, *Baustahlgewebe* v *Commission*, paragraph 128).

218 As is apparent from recitals 152 and 153 to the contested decision, cited at paragraph 9 above, the Commission, in reducing the amount of the fines, already took into consideration the excessive duration, which is imputable to it, of the administrative procedure.

219 At paragraph 438 of the judgment, the Court of First Instance stated that 'the Commission reduced the fine on its own initiative. The possibility of granting such a reduction falls within the scope of the Commission's powers. The applicants have produced no evidence to show why the Court, in the exercise of its unlimited jurisdiction, should consider granting a further reduction of the amount of the fine. Consequently, there is no reason to grant the applicants' request in that regard'.

220 As that assertion contains no error of law, the seventh plea must be rejected as unfounded.

Costs

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

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

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

future possibilities of the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied to defend its interests;

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

3. **Dismisses the action brought by the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied before the Court of First Instance, in so far as it is based in part on the plea alleging breach of the 'reasonable time' principle;**

4. **Orders the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied to pay the costs of these proceedings. The costs relating to the proceedings at first instance which gave rise to the judgment of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* remain payable by the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied, in accordance with the procedure laid down in paragraph 2 of the operative part of that judgment.**

[Signatures]