II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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 (FEG and TU)

(notified under document number C(1999) 3439)

(Only the Dutch text is authentic)

(2000/117/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Articles 3 and 15(2) thereof,

Having regard to the complaint lodged on 19 March 1991 by City Electrical Factors Holdings Limited and its Dutch subsidiary City Electrical Factors BV,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Regulation No 17 read in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 [3],

After consulting the advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. **FACTS**

A. COMPLAINT

(1) On 19 March 1991, City Electrical Factors (CEF UK), a United Kingdom wholesale distributor of electrotechnical fittings, together with its Dutch subsidiary, City Electrical Factors BV (CEF), lodged a complaint with the Commission under Articles 81 and 82 (ex Articles 85 and 86) of the Treaty. The complaint is directed against three Dutch associations in the electrotechnical fittings sector, namely the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (FEG), the Nederlandse Vereniging van Alleen Vertegenwoordigers op Elektrotechnisch Gebied (NAVEG) and the Unie van Elektrotechnische Ondernemers (UNETO), together with the members of those associations.

(2) According to the complainants, these three associations and their members have concluded reciprocal collective exclusive dealing agreements at all levels of the distribution chain for electrotechnical fittings in the Netherlands. The complainants allege that, unless they join the FEG, it is virtually impossible for wholesale distributors of electrotechnical fittings to enter the Dutch market, since manufacturers and their agents/importers supply only FEG members and since fitting contractors purchase only from FEG members. Although the complaint concerns the whole distribution chain, it focuses primarily on the Dutch wholesale market and in particular on the FEG, which is alleged to play a crucial role in the agreements.

(3) By letter dated 22 October 1991, CEF extended its complaint. This now covered alleged agreements between the FEG and its members with regard to prices and discounts as well as alleged agreements under which CEF was excluded from taking part in certain projects. As from January 1992, CEF also complained about vertical price-fixing agreements between some manufacturers of electrotechnical fittings and FEG wholesalers.

B. PARTIES

1. **FEG**

(4) The FEG was established in 1918 as an association incorporated under Dutch law. Its object under its articles of association is to protect the common interests of stockkeeping wholesalers of electrotechnical products, by promoting 'orderly market relations in the broadest sense of the term' and by concluding cooperation agreements with other bodies or organisations involved in the wholesale distribution of electrotechnical products ([4]).

(5) Stockkeeping wholesalers of electrotechnical products who can show that, in the three years prior to their application, they had an annual turnover in electrotechnical fittings of at least NLG 5 million (EUR 2,26 million) may be admitted to membership ([5]). Until 23 June 1994, only turnover achieved in the Netherlands was taken into account ([6]).

(6) In 1994 the then 52 members of the FEG had a joint turnover of some NLG 2,35 billion (some EUR 1,06 billion), of which 83% (some EUR 0,88 billion) is derived from electrotechnical fittings and 17% (some EUR 0,18 billion) from electrotechnical consumer products, such as audio and video equipment. For the period 1986 to 1994 the relevant data are as follows ([7]):

	FEG members	Combined turnover		Proportion fittings (%)
		(NLG billion)	(EUR billion)	
1986	68	1,70	0,77	n.a.
1987	66	1,80	0,81	n.a.
1988	62	1,83	0,83	n.a.
1989	62	1,99	0,90	73
1990	59	2,14	0,96	73
1991	54	2,35	1,06	75
1992	49	2,42	1,09	79
1993	56	2,30	1,04	80
1994	52	2,35	1,06	83

(7) In 1985 the FEG set up various product committees for electrotechnical fittings, namely the Wire & Cable, Light, Technical, Fittings (as from mid-1993 'Switching to Beauty'), Plastic Tubes and Distribution Boxes committees. The latter two committees were dissolved in 1993 ([8]).

(8) Within these product committees which, pursuant to Article 13 of the articles of association, are chaired by FEG board members, discussions regularly take place with manufacturers/suppliers of electrotechnical fittings. The product committees date from the time when 'market regulating agreements' were made. The introduction to the manual issued to the product committees states: 'In order to obtain an accurate picture of what is taking place on the market, it is of crucial importance to be apprised of turnover and margins. Without knowledge of these, it is impracticable to do anything to influence the market' ([9]).

2. **Technische Unie**

(9) Technische Unie (TU) is the largest wholesale distributor of electrotechnical fittings in the Netherlands and thus at the same time the largest FEG member. TU has a national network of 26 sales offices with a turnover in 1993 of between NLG 400 million and NLG 500 million (EUR 182 to 226 million).

C. COMPLAINANT

(10) CEF UK, which was established in the United Kingdom in 1951, is a wholesaler of electrotechnical fittings with over 500 branches and subsidiaries in the Community (United Kingdom, Ireland, France, Germany and Italy) and in the United States of America. CEF UK has a total turnover of some GBP 333 million (some EUR 478 million) (1989/1990) and is thus, according to its own statement, the largest electrotechnical fittings wholesaler in the United Kingdom.

(11) In May 1989, CEF UK decided to enter the dutch market and established a subsidiary, CEF, in Rotterdam. CEF announced its intention of opening about 60 branches, which would make it one of the largest wholesalers of electrotechnical fittings in the Netherlands. It can be stated that, in the meantime, by 1997 CEF had eight branches in the Netherlands.

D. MARKET

1. **Relevant product market**

(12) The complaint relates to electrotechnical fittings. This covers a group of products which are used in particular in industry, the utilities and housebuilding and can be subdivided into various product groups, such as fittings (e.g. wire and cable, PVC tubes, cable support systems), technical material (e.g. PLC switches, relays, solenoid switches and protective circuit switches), lighting (e.g. light sources, brackets and emergency lighting) and other equipment (e.g. safety systems and telephony) ([10]). Wholesalers, however, do not stick to a uniform classification of electrotechnical fittings, which means that in practice other classifications too are used ([11]).

(13) At first sight, several market definitions are possible in the present case. Application of a narrow market definition means that a large number of product markets can be differentiated which each contain one particular electrotechnical fitting. Seen from the customer angle, each of these electrotechnical fittings fulfils a specific function, satisfies a specific demand and is not interchangeable, or only very slightly, with other electrotechnical fittings.

(14) If, however, a broader market definition is assumed, a limited number of product markets may be distinguished, each of which contains a differentiated group of electrotechnical fittings, such as fittings, technical equipment and lighting (see recital 12). Seen from the customer angle, the products which fall under such a product market are not substitutable or are only so to a slight extent. Seen from the supply side, though, there is a possibility of substitution. Many manufacturers are able to manufacture, or are already manufacturing, all or a large proportion of the products which fall within a particular product group. In the lighting product group, for instance, this is the case with Philips.

(15) The broadest market that can be distinguished concerns the market at wholesale level. In this market, competition takes place between individual wholesalers selling a wide range of products covered by the concept of electrotechnical fittings. Despite the fact that they are not all necessarily substitutable, whether seen from the customer angle or the supply side, there are good arguments for concluding that all of these products are part of one single market. In order to arrive at this conclusion, it is necessary to have regard to the specific function(s) which wholesaling fulfils for a large number of its customers, such as fitters and the electrotechnical retail trade. This function consists, *inter alia*, in stocking a wide range of electrotechnical fittings. To carry out a project, fitters for example often need a large quantity of different products and, for various reasons, prefer to buy those products from a wholesaler rather than a supplier who only concentrates on one product or product group. This simplifies their purchasing policy and is more suitable from a logistical and financial viewpoint. Accordingly, competition takes place in particular between individual wholesalers ([12]). To be sure, wholesalers also experience competition from direct suppliers, but this is more limited in scope ([13]).

(16) In the light, *inter alia*, of the Commission's established practice, the last definition of the relevant product market would seem the most appropriate ([14]). However, whichever market definition is chosen, it only has a limited influence on this case, since FEG members, as will be seen below, have a strong to very strong position on each of the different markets.

2. **Relevant geographic market**

(17) In the present case, the relevant geographic market is national or even regional in character. This is a consequence of the specific character of the wholesale market. A feature of the wholesale market is that customers require rapid delivery, usually within 24 hours, from their suppliers. Such a service can, as a rule, only be given if the supplier in the Member State concerned or in the relevant region has its own sales organisation, or if it can supply its products through the national wholesale system.

(18) The description of the geographic market as national or regional is also due in part to the fact that European harmonisation rules (*inter alia*, the Low Voltage Directive (73/23/EEC)) have not led to the standardisation of all electrotechnical fittings. A number of products are outside the scope of the Directive or are excluded from it ([15]). However, even in those cases where standardisation has led to uniform products, it may be that there are different national geographic markets, e.g. because customers choose products which carry a recognised national quality mark rather than similar products which carry a foreign quality mark.

3. **Distribution channel**

3.1 *Manufacturers/agents/importers*

(19) According to the FEG, some 30% of electrotechnical fittings on the Dutch market are of foreign origin, mainly from Germany and Belgium ([16]). TU even estimates this percentage at 52% ([17]). Such fittings are distributed on the Dutch market mainly by agents, importers and subsidiaries. Such agents/importers are to a large extent amalgamated in NAVEG, an association incorporated under Dutch law and established in 1929 ([18]).

(20) NAVEG's object under its articles of association is to protect the interests of agents and importers/sole representatives in the electrotechnical fittings sector, *inter alia*, by holding meetings to discuss common interests and by cooperating with associations which pursue similar objectives and interests, both horizontally and vertically.

(21) The 30 or so NAVEG members represent some 400 — mainly foreign — manufacturers of electrotechnical fittings on the Dutch market, for the most part on an exclusive basis. The products concerned are mostly higher-quality ones from reputed producers ([19]). The NAVEG members had a total turnover of some NLG 185,5 million (EUR 84 million) in 1993 ([20]).

(22) In general it can be assumed that for nearly all the product groups the market is dominated by a limited number of manufacturers. The main suppliers are set out in the Annex.

(23) The total annual turnover on the Dutch supply market for electrotechnical fittings is estimated at between NLG 3 and 4 billion (EUR 1,36 and 1,82 billion) in the period 1992 to 1994. Fittings for use by large fitting contractors and purchasing groups are often supplied direct by manufacturers or their agents/importers, without the involvement of wholesalers. The rest, about half according to the FEG's estimate, is distributed via wholesalers ([21]). NAVEG members generally prefer to supply their products through the wholesale trade ([22]). According to an FEG estimate, their share of the total supply market is at most 10% ([23]). The market share works out at 20%, however, if it is assumed that the relevant market consists of the market for electrotechnical fittings at wholesale level, in which case therefore supplies by suppliers and their agents/importers can be disregarded.

3.2 *Wholesalers*

(24) As can be seen from recital 23, the total turnover on the Dutch wholesale market for electrotechnical fittings in 1992 to 1994 must be put at between NLG 1,5 and 2 billion (EUR 0,68 and 0,91 billion). The major part of this is accounted for by the members of the FEG, whose total market share amounts to about 96% ([24]). If direct supplies by suppliers/manufacturers are included, the market share would be about 50%. The market share of the five largest FEG members (TU, Bernard, Conelgro, Brinkman & Germeraad, and Wolff) amounts to some 62%, while the top 10 FEG members account for some 80% of the wholesale market. Of all the FEG members, TU has by far the largest market share.

(25) As already mentioned in recital 15, wholesaling fulfils various functions. From the total supply of products, it puts together a broad, representative range of thousands of products originating from many suppliers. All these are kept in stock or can be delivered to the customer within 24 hours. Other functions performed by wholesaling concern the provision of technical information, the making of technical calculations and the supply of financing ([25]).

(26) When composing its range, the wholesaler will in general try not just to offer as large a selection of products as possible. It will also pay attention to the proper composition. In any event, the range must include switches and socket outlets — products which are essential to any electrical installation. Similarly important products are electricity cables, PVC tubes, trunking, lighting and protective circuit switches. These products are part of virtually any electrical installation ([26]). The average range of a wholesaler in electrotechnical fittings is made up as follows: lighting 22%, cable 18%, fittings and switches 9%, distribution boxes 7%, industrial switching equipment 9%, trunking and support systems 5%, other fittings 19% and miscellaneous 11% ([27]).

(27) As far as distribution through the wholesale trade is concerned, most manufacturers claim not to apply any specific selective or exclusive distribution policy ([28]). However, some manufacturers appear to operate a network of 'preferential distributors'. Examples include the following:

— Draka Kabel, the largest manufacturer of wire and cable products in the Netherlands, has concluded special discount and compensation agreements with a number of wholesalers, known as 'Draka partners'. Such wholesalers are all FEG members ([29]).

— Van Geel Systems, the leading manufacturer of, amongst other things, cable support systems in the Netherlands, distributes its products 'on an exclusive basis' via 12 selected 'Van Geel wholesalers', all FEG members, with which a customer agreement has been concluded in which Van Geel undertakes to supply its products solely via Van Geel wholesalers (Article 1a). Any extension in the distribution network takes place only after the matter has been discussed (Article 4) ([30]).

— Gira, a German supplier of electrotechnical switches, distributes its products on the Dutch market exclusively via the largest FEG member, TU. Gira does not supply its products direct to fitting contractors.

— Merlin Gerin, which manufactures switches as well as other products, distributes via 'official Merlin-Gerin distributors', which are all FEG members except for one (not a wholesaler). Merlin Gerin and its main distributor, TU, have concluded an agreement that the wholesale network, and the number of direct customers, may be extended only with the agreement of TU ([31]).

— Peha, a German manufacturer of switches, distributes its products in the Netherlands (through its agent Hofte) via some 30 wholesalers affiliated to the FEG ([32]).

3.3 *Fitting contractors*

(28) The wholesale trade's outlets are of various kinds. They consist principally of fitting contractors and, to a lesser extent, the retail trade, DIY stores, builders' merchants, cash-and-carry stores, industrial firms which carry out their own installation, (semi-) government agencies and hospitals. FEG members were covered by a special rule to the effect that, up to November 1993, they could not in principle supply end-users and purchasing groups. As a result of the 'Binding decision of the FEG concerning supplies to individuals and purchasing groups', which was withdrawn on the aforementioned date, direct sales and supplies by the wholesale trade to individuals and purchasing groups are regarded as an inappropriate exercise of wholesale functions: they conflict with the pursuit of good market relations and are therefore prohibited. According to the explanation given, the purpose of the arrangement was to ensure that FEG members had sound gross profit margins ([33]).

(29) There are about 3 800 fitting contractors operating on the Dutch electrotechnical fittings market. Most of them, some 3 500, are members of UNETO, an association set up in 1964 under Dutch law with the object of promoting the interests of electrotechnical fitting contractors and retailers selling electrotechnical consumer products. In all, 75% of fitting contractors are small firms, 20% medium-sized firms and 5% large firms ([34]).

(30) The main sales markets for fitters are industry (about 55%), utilities (about 33%) and housebuilding (about 12%). Total turnover on the Dutch fittings market in 1991 is about NLG 8 billion (EUR 3,6 billion) ([35]).

E. PROCEEDINGS

(31) On 16 September 1991, the Directorate-General for Competition wrote to the FEG making known its objections to the pressure brought to bear on suppliers not to supply CEF, the concerted practices regarding prices and discounts and the turnover criterion applied for admission to FEG membership ([36]). In 1991 to 1996, various requests for information pursuant to Article 11 of Regulation No 17 were sent to the FEG, NAVEG, UNETO, some of their members and various manufacturers. Inspections were carried out on 8 and 9 December 1994 at various (associations of) firms which were suspected of involvement in the agreements ([37]). On 3 July 1996 the Commission issued objections addressed to the FEG and seven of its members, namely Bernard, Brinkman & Germeraad, Conelgro, Schiefelbusch, Schotman, TU and Wolff. A hearing was held on 19 November 1997. From the investigation concerning the written answers to the statement of objections and the oral explanations given during the hearing it is clear that, with regard to six of the seven FEG members who received statements of objection, individual participation could not be established with the required degree of certainty, or that their individual participation, where this could be established, was of a limited nature. For these reasons, it was decided to continue the proceedings only against the FEG and TU.

(32) As regards the proceedings initiated in this case, it should be noted that during the investigation CEF sent the Commission some tape recordings and transcriptions of telephone conversations it had had with certain companies. These tape recordings and transcriptions were made secretly and without the agreement of the firms concerned. The Commission acknowledges that it should have returned the tape recordings and transcriptions immediately to CEF for these reasons. This was only done some time later, however. The Commission wishes to emphasise that the tape recordings and transcriptions did not play any part in the proceedings in this case and have not influenced the content of the decision in any way.

F. RELATION BETWEEN FEG MEMBERSHIP AND SUPPLIES

(33) From the moment that CEF entered the Dutch wholesale market in 1989, it experienced difficulties in obtaining electrotechnical fittings for the Dutch market. According to CEF, this was because it was not a member of the FEG. In particular, the suppliers of electrotechnical fittings who belong to NAVEG (agents/importers for largely foreign manufacturers), together with a number of suppliers who are not NAVEG members (largely Dutch manufacturers), appear to supply only wholesalers who are FEG members.

(34) For wholesalers who are not FEG members, purchasing electrotechnical fittings direct from abroad is not, *inter alia*, for the reasons given in recital 18, a simple alternative. In addition, according to CEF, many foreign suppliers hesitate to jeopardise their good relations with the FEG in the Netherlands by supplying products abroad which are intended for the Dutch market. Lastly, transport costs may make the direct purchase of products abroad unattractive.

(35) At all events, until November 1993 the possibility for CEF and other non-FEG members to obtain products indirectly in the Netherlands via other wholesalers was small. The reasons for this are to be found in a recommendation from the FEG to its members — who form the bulk of the wholesale market — to interpret the ban on supplying to individuals (see recital 28) to include, in all cases, 'colleagues who are non-FEG members' ([38]). Obviously, there are no objections to FEG members supplying other FEG members. Moreover, it should be pointed out that in those cases where FEG members, contrary to the recommendation issued by the FEG, are prepared to supply, the conditions are usually less attractive since an extra link in the chain is required.

(36) This situation explains why CEF applied for membership of the FEG in 1990. It was refused membership, however, because it did not fulfil one of the admission criteria, namely an annual turnover on the Dutch market for electrotechnical fittings of NLG 5 million (EUR 2,26 million) in the three years prior to its application ([39]). CEF UK's turnover of some EUR 478 million was not taken into account.

(37) The parties point out that any firm entering a new (geographic) market has start-up problems and that certain suppliers may be hesitant or reluctant to begin relations with a newcomer to the market. This is not implausible. The point here, however, is that extra obstacles are being created by the FEG which make access to the Dutch wholesale market more difficult. The fact that CEF in the meantime has opened eight branches on the Dutch market does not alter the fact that through the agency of the FEG the market penetration of newcomers such as CEF is retarded and discouraged. This is of course directly reflected in the financial results of the companies concerned. In this respect it was pointed out by CEF at the hearing that since its entry onto the Dutch market the company's results were disappointing in 1989 and subsequent years ([40]).

(38) Only after the Commission had carried out inspections at the end of 1994 did the situation on the Dutch wholesale market for electrotechnical fittings, according to CEF, become something like normal and did suppliers appear willing to an increasing extent to supply non-FEG members ([41]). The effects of this on CEF's turnover trend are perceptible.

1. **FEG-NAVEG**

1.1 *Background*

(39) Various documents in the Commission's possession show that the refusals to supply non-FEG members are not unilateral in character but are the result of a collective exclusive dealing arrangement, based on a gentlemen's agreement between the FEG and NAVEG and on concerted practices between individual suppliers and, on the one hand, the FEG and, on the other, its members. A feature of this exclusive dealing arrangement is that the participating NAVEG members and suppliers are exclusively authorised to supply to wholesalers who are FEG members.

(40) The reason why the collective exclusive dealing arrangement is based on a gentleman's agreement and not on a formal written agreement is historical and is

founded in competition law. Close links have existed for a long time between the FEG and NAVEG. Between 1928 and 1959 both associations were party to a collective exclusive dealing arrangement based on a formal written agreement. In addition to the said associations, a second Dutch wholesale association, BOGETA, was party to the agreement.

(41) The agreement was known as the 'Agenten-Grossiers-Contract' (AGC). It contained two clauses which are of interest to this investigation. Article 1 of the AGC provided for a reciprocal collective exclusive dealing arrangement. Under this, NAVEG members were exclusively allowed to supply wholesalers who were members of the FEG or of BOGETA. The FEG and the BOGETA members were in turn obliged to purchase contract products exclusively from NAVEG members ([42]). Article 2 extended the effect of the collective exclusive dealing arrangement. In this Article, the three parties mentioned above undertook to try to extend the collective exclusive dealing arrangement provided for in Article 1 to manufacturers and agents who were not NAVEG members ([43]).

(42) Neither the FEG nor its members deny that in the past there was a collective exclusive dealing arrangement based on a formal agreement ([44]). In the FEG's strategic plan for 1993, there is an implicit reference to this arrangement: 'only FEG members to be supplied was the watchword' ([45]). Given that the arrangement restricted competition, the then Dutch Minister for Economic Affairs, on 11 December 1957, declared the AGC to be non-binding because it conflicted with the public interest.

(43) The declaration, however, did not result in the collective exclusive dealing arrangement being terminated in practice. Very soon after the declaration, the boards of the FEG, NAVEG and BOGETA agreed to discuss the new situation. As stated in the minutes of a BOGETA meeting on 24 January 1958, the parties declared that they would continue on the same footing. However, for obvious reasons, the collective exclusive dealing arrangement was no longer based on a formal agreement but on a gentleman's agreement instead ([46]):

'That which was expected has happened. Once it became clear in talks with Minister Zijlstra, that the AGC would sooner or later become inoperative, the boards of the FEG, NAVEG and BOGETA agreed to determine a course of action to be followed if the AGC should indeed be declared inoperative. Actually, little will change, instead of the AGC there will be a gentleman's agreement between manufacturers, agents and recognised wholesalers. The Agenten-Grossiers-Contract becomes an Agenten-Grossiers-Contact. It was generally agreed that the old state of affairs was good and worked satisfactorily'.

1.2 *FEG-NAVEG 1986 to 1994*

(44) The above facts explain why the Commission, in the period to which this part of its investigation relates, i.e. 1986 to 1994, cannot show that there was a formal written agreement but has only found evidence of the existence of a gentleman's agreement.

(45) The content of the collective exclusive dealing arrangement has changed somewhat over the years. The AGC was a mutual arrangement. This is no longer the case. Under the present collective exclusive dealing arrangement, FEG members are in principle free to purchase products also from firms which are not party to the arrangement.

(46) Although the evidence of the existence of the gentleman's agreement consists of all the documents discussed below and the connections between them, the following documents in particular are indicative:

— the report of the general assembly of NAVEG members held on 24 April 1989, in which reference is made to meetings between the FEG board (at that time consisting of representatives of Brinkman & Germeraad, TU, Waagmeester, Bliek, Schiefelbusch, Schuurman and Wolff) and the NAVEG board. The FEG asked NAVEG to advise its members to stop supplies in the event of withdrawal from the FEG. It was found that there is no obligation for NAVEG members to supply FEG members, but that 'supply is based on a gentleman's agreement, it being understood that supply to non-FEG members may be a hindrance' ([47]);

— the NAVEG report on the meeting between the FEG board (at that time consisting of representatives of Brinkman & Germeraad, TU, Waagmeester, Bliek, Schiefelbusch, Schuurman and Wolff) and NAVEG on 28 February 1989, according to which, in response to the question put by an FEG board member (the representative of the FEG-member Schuurman) 'what would NAVEG do if an existing

FEG wholesaler terminated its membership?', NAVEG answered: 'the recommendation would be not to supply'. The FEG report on the meeting states the same ([48]);

— the report of the NAVEG general assembly of 28 April 1986, which refers to the agreement between the FEG board and the NAVEG board of 11 March 1986: 'Given the agreements between both associations, the supplies to the firms Nedeximpo, Dego, van de Meerakker and Hagro are undesirable' ([49]). None of the said firms was an FEG member at the time.

(47) The FEG and NAVEG are unequal in strength. With a members' market share of about 96 % and a turnover in electrotechnical fittings of about EUR 0,8 billion, the FEG is in practice the stronger of the two parties. NAVEG members, given their preference for being supplied by wholesalers, are very largely dependent on the FEG for their turnover. Although many suppliers who are represented by NAVEG members have a strong market position — the market is usually dominated by only a limited number of firms — the resulting economic power is not enough to counterbalance that of the FEG members collectively. These facts also explain the readiness of NAVEG and its members to cooperate in the gentleman's agreement, and at the same time the economic importance to them of so doing. This is confirmed by the following examples:

— a letter which NAVEG member Hofte sent on 23 August 1991 to Paul Hochköpper & Co, a manufacturer of Peha switches, with reference to the request for information which the Commission sent to Hofte on 25 July 1991:

'[…] NAVEG has of course a somewhat more difficult position, since, although it does not have any official connection with the FEG, it does more or less have a notional one. However, our position in Brussels is: "In your documents you state that the FEG members account for 98 % of the market. It is therefore impossible for us as a NAVEG agent not to take account of the FEG's wishes, since that is virtually our entire turnover. If therefore you have problems in this respect, we can only refer you to the FEG"' ([50]);

TU argues that there should be no more links at all between the FEG and NAVEG and quotes the following passage from the letter ([51]): 'So far as we can judge at present, what will happen is that UNETO will cease to be a "suspect", and there will probably be an investigation into the legal aspects of the links between the FEG and NAVEG — thank God, we have not really had any links of that sort with the FEG; ultimately only the FEG will possibly find itself in a somewhat difficult position, but that doesn't really concern us'. This passage can, however, also be interpreted differently, i.e. as confirmation of the fact that collective exclusive dealing is no longer based on a formal written agreement but, instead, on an 'association of ideas';

— the report of the NAVEG general assembly of 9 May 1988: 'Since most of the turnover of member agents is generated with FEG members the importance of proper cooperation is very great' ([52]);

(48) For the collective exclusive dealing arrangement to function, it is important that the parties should hold discussions from time to time and should exchange information. The documents which the Commission found during its inspection show that these discussions between the FEG and NAVEG did indeed take place. During the discussions, the FEG revealed the names of wholesalers who were no longer FEG members ([53]). In certain cases, the FEG, even explicitly, urged NAVEG to inform NAVEG members about the changes in the FEG membership file. NAVEG itself also inquired about the FEG membership of certain wholesalers. This information was made available by NAVEG in order to fulfil its obligations under the gentleman's agreement. In addition, NAVEG made suggestions to the FEG concerning the admission of new FEG members. The reason for this is also clear. The more wholesalers that are members of the FEG, the greater the sales possibilities for NAVEG members under the gentleman's agreement.

(49) TU argues that no significance should be attached to the abovementioned exchange of membership data, since this information would be used only for the organisation of trade fairs or for setting up sectoral ordering and information systems ([54]). The information may also be used for these purposes, but it is more plausible that it was exchanged with a view to preventing supplies to non-FEG members in accordance with the gentleman's agreement. The following examples are illustrative of this:

— a letter form NAVEG to the secretary of the FEG of 27 September 1989 inquiring about CEF's application for FEG membership. NAVEG points out that: 'Various foreign factories, which are

represented by our members, supply this organisation in other countries and wish to do so in the Netherlands as well. However, so long as City is not admitted to the FEG, the board recommends that its members should of course not supply the company'. That commercial risks also attach to such a recommendation is clear from the following passage: 'In the past, various members acted vis-à-vis Nedeximpo in accordance with a similar recommendation, but now Nedeximpo has become a member of the FEG they are faced with the fact that they are no longer accepted as suppliers' ([55]);

— according to the report of the discussions between the FEG and NAVEG on 28 February 1989, it was agreed that NAVEG would give the FEG the addresses of the wholesalers which NAVEG thinks should become FEG members ([56]).

(50) NAVEG members appear to apply the 'recommendations' issued by the association in practice. For instance, Hateha, a NAVEG member that represents large manufacturers such as Mennekes and Jung on the Dutch market, informed CEF explicitly that it only supplies through wholesalers who are FEG members and that therefore supplies to CEF were refused ([57]). The observation of the parties that Hateha uses the FEG membership criterion to establish the solvency of the firm concerned is not convincing, especially since there are other more accurate methods of ascertaining the financial health of a firm: FEG membership by itself does not provide an absolute guarantee in this respect. Lastly, the managing director of Hateha at the time was also secretary of NAVEG, and NAVEG was established at the same address as Hateha. Furthermore, in the 1980s Hateha had already informed another FEG member, Frigé, that it could not be supplied because it was not a member of the FEG ([58]).

(51) Another NAVEG member, Hemmink, representing, *inter alia*, Wiska and Pflitsch, also refused — after discussions with among others the FEG, FEG member Schiefelbusch and other NAVEG members — to supply a non-FEG member (Van de Meerakker) direct. The managing director of Hemmink was at that time also secretary of NAVEG, and NAVEG was established at the same address as Hemmink ([59]). The argument put forward by the parties that this was a simple unilateral act by Hemmink which has no relation with a possible gentleman's agreement between the FEG and NAVEG takes no account of the context in which it occurred ([60]). The managing director of Hemmink was, as secretary of NAVEG, indubitably aware of NAVEG's recommendations to its members to supply only FEG members. The abovementioned behaviour, i.e. inquiring whether a wholesaler is an FEG member before deciding whether to supply it, fits in with this policy.

(52) Obviously, NAVEG members were not supposed in so many words to reveal to the potential customer the reason for refusing to supply it. The following passage from the abovementioned letter from NAVEG member Hofte to Paul Hochköpper & Co is illustrative in this respect.

With regard to the complaint lodged by CEF with the Commission, Hofte observes that: 'Besides, it has also of course sent documents, including some, unfortunately, from NAVEG agents who have acted without thinking, which state that the firm cannot be supplied because it is not a member of the FEG' ([61]).

2. **FEG — other suppliers**

(53) Various documents in the Commission's possession indicate that the FEG has sought to extend the gentleman's agreement to suppliers which are not represented in NAVEG via agents or importers. This conduct is consistent with Article 2 of the non-binding 1957 'AGC' (see recital 41). Moreover, it is hard to indicate exactly how many suppliers which are not represented in NAVEG are involved in the collective exclusive dealing arrangement given the primarily informal nature of the cooperation. From the draft letter cited in recital 62, it is also plain that FEG members are themselves convinced that there are many such suppliers. From the documents which the Commission obtained during the inspection, it is clear that the suppliers concerned are important within their product segment (e.g. Draka Polva, Holec, Hager, Klöckner Moeller and ABB). The following examples are indicative in this context.

(54) In the report of an internal TU meeting of 12 September 1990, it is indicated that Draka Polva wanted to supply products to CEF at a specified price. The report indicates that the FEG could not agree to this: 'The FEG has reacted to this since this proposal runs counter to the agreement between the members and the FEG' ([62]). FEG member TU had itself complained about the Draka Polva supplies to CEF in a letter of 16 July 1990, in which it states that 'we regard your decision as a threat to the stockkeeping wholesale trade and therefore regard your involvement as undesirable' ([63]). The intervention of the FEG and TU was apparently

successful because the report of the TU meeting of 9 October 1990 stated that: 'Following talks which Draka Polva had with Mr van der Meijden, they withdrew their announced intention of supplying CEF' ([64]) Moreover, it is quite obvious what TU's policy towards CEF was. It was again described in plain and simple terms in the report of an internal TU meeting of 13 December 1989: 'it may be concluded that efforts should be made to prevent TU manufacturers from supplying CEF' ([65]).

(55) The FEG's intention to extend the exclusive dealing arrangement to suppliers not represented in NAVEG was not limited solely to electrotechnical products but also included consumer electronics ([66]). The following example, whereby a FEG board member (representative of Bliek) made an urgent appeal to the Philips wholesalers committee to abide by the 'agreements entered into', illustrates this:

'You know that I recently became a member of the FEG board. My main purpose in so doing is to promote the interests of equipment wholesalers. You cannot now leave me in the lurch. All Philips wholesalers should at least be (or remain) members of the FEG.' […] 'If we as Philips wholesalers are all members of the umbrella organisation which the FEG is, we will, together with a number of non-Philips wholesalers which are FEG members, account for the bulk of the wholesale market. Only then can we jointly take decisions which will perhaps give our suppliers food for thought' ([67]).

(56) Not only the FEG itself but also its members approached suppliers in connection with supplies to non-members. A number of suppliers have indicated that they were so approached. For example, Hager, a manufacturer of distribution boxes, states in its reply of 19 May 1993 ([68]) to a request from the Commission for information that: 'Hager-Nederland has, as a new business, been approached various times in the last two years with criticism concerning our distribution policy, and virtually all FEG members have taken a critical stance vis-à-vis non-members.' This critical stance resulted from the fact that Hager also supplied non-members and may be seen as an attempt by FEG members to extend the existing exclusive dealing arrangement to new participants. The following passage from Hager's answer seems to confirm this: 'Given that, when Hager was set up, CEF was a "hot item" on the market, virtually all FEG members expect Hager to take a critical stance regarding supplies to CEF.' The parties point out that no FEG member ever threatened Hager with reprisals. However, this does not detract from the fact that pressure was exerted on Hager to refrain from supplying CEF and thereby participate in the exclusive dealing arrangement ([69]).

(57) Of the FEG's members, TU has been most active in approaching individual suppliers. Other examples exist in addition to the incident relating to Draka Polva described at recital 54. For example, TU and Holec, the main manufacturers of distribution boxes in the Netherlands, held talks on 2 July 1991 at which both parties apparently agreed, as far as the report of these talks would indicate, that only FEG wholesalers were eligible for supplies ([70]). TU claims that this remark was solely attributable to Holec ([71]). However, this does not seem to be the case given that the report suggests that the decision not to supply non-members is the outcome of negotiations between Holec and TU. In addition, it is unclear what interest Holec would have in taking such a decision unilaterally.

(58) ABB, a manufacturer of technical equipment, was also pressured by TU to stop supplying CEF. A TU report suggests that ABB defended itself against TU by stating that it had supplied 'only one lot — what is known as a dead transaction — to CEF'. As a mitigating circumstance, ABB also pointed out the difficult position in which it found itself in view of its relationship with CEF's parent company in the United Kingdom. Ultimately, the economic importance of good relations with TU won the day, as evidenced by what is stated in the TU report: 'if ABB is approached again, CEF will be supplied at the fitting-contractor price' ([72]).

(59) This shows above all that ABB considered a complete halt to supplies to CEF, as requested by TU, to be too risky. Consequently, a solution was sought whereby ABB continued to show readiness to supply CEF, but the products offered ('a dead transaction') or the terms on which they were supplied were such as to make the transaction extremely unattractive to CEF. The argument put forward by the parties that TU's approach to ABB was the result of the fact that it had to make much more effort than CEF to obtain certain discounts from ABB is not convincing given that differences in the efforts to be made have not been demonstrated and that TU's request that all supplies to CEF be halted was in any case a disproportionate reaction and would lead to new inequality ([73]).

2.1 *Klöckner Moeller*

(60) The situation regarding Klöckner Moeller (KM), the leading manufacturer of protective circuit switches in

the Netherlands, deserves to be dealt with separately. As emerges from the following, KM was placed under considerable pressure by a number of FEG members.

(61) The reason for this was the discovery by members of the purchasing group CEGRO (made up of six FEG members — Brinkman & Germeraad, Conelgro, Elgro, Oscar Keip, Rolff and Schiefelbusch) that CEF had KM products in its package. In a letter of 11 June 1990, KM was asked for an explanation. KM replied by letter of 16 July 1990 that it did not supply CEF's branch in the Netherlands and that CEF Netherlands might have obtained KM products via CEF's branches in the United Kingdom, Germany or France, which were important KM customers ([74]). Evidently this did not reassure CEGRO, since in a letter dated 23 May 1991 to FEG member Bernard it suggested that it should 'once again send a joint letter to the management of KM' ([75]). A draft, drawn up by TU and sent to other FEG members for information, was attached ([76]).

(62) This letter brings two points to the fore: the fact that KM was one of the first large suppliers to have supplied a non-member — which indicates that the majority of large suppliers apparently refused to supply non-members in accordance with the gentleman's agreement — and the fact that supplies to price-cutter CEF might place the profits of FEG members under pressure, which is seen as a threat to their common interests. The last point is directly linked to the FEG price agreements discussed below (recitals 71 to 87), which are designed to create a stable price level with a 'sound' margin for FEG members. The following passages from the letter illustrate these two points:

'We are concerned to learn of your decision to enter into business relations in the Netherlands with the firm CEF. Our concern stems, on the one hand, from the fact that you are one of the first large suppliers in the electrotechnical sector to distribute to a non-FEG member. […]

As far as we are aware, CEF applies the same marketing formula in the Netherlands as in the United Kingdom and Germany. The essence of this formula is to offer very competitive prices and/or conditions. […]

By now entering into a direct relationship with CEF, your products fall within the discount formula applied. The inevitable consequence will be that prices and, therefore, margins will come under increasing pressure'.

(63) The letter ends with an attempt to put a stop to all supplies to CEF. In order to give force to this argument, reprisals are also threatened:

'[…] It will be clear to you from the above that we regard any business relationship on your part with CEF as a threat to the existing group of Klöckner Moeller wholesalers and the FEG wholesale trade in general. We therefore urge you most strongly to reconsider your decision, which means no supplies from your warehouse *to* CEF or carrying-out of orders *on their behalf*. Should you feel that you must continue any relationship, regardless of the terms, the individual Klöckner Moeller wholesalers will consider the position of the KM package within the various ranges. It will then have to be considered to what extent your range should continue to be given active commercial consideration' ([77]).

(64) A different interpretation of this draft letter was given by the parties. according to them, this was a reaction by KM wholesalers to the fact that CEF had obtained a certain discount from KM to which it was not entitled according to the KM discounting rules in force ([78]). This, it is claimed, was seen by other KM wholesalers as discrimination and was the explanation for the letter. This argument is, however, unacceptable given that this point was not raised at all in the letter. If this were the real reason for the letter, more would have been achieved by asking KM to apply its discounting rule correctly rather than asking it to stop supplying altogether. It would also appear from the draft that the FEG members were not in the least interested in the discounting rule being correctly applied. The letter indeed states that any supply to CEF would, 'whatever the terms', be reason enough to stop buying KM's products.

(65) A somewhat amended version of the letter, dated 24 May 1991, reveals that the letter was to be signed by 26 wholesalers, all members of the FEG ([79]). It was evidently decided on legal advice not to send the letter; instead, a visit by a delegation of FEG wholesalers to KM took place on 27 June 1991. The delegation was made up of the following FEG members: TU, Bernard, Kasdorp and Imagro (a purchasing group made up of eight FEG members, namely Bolderhey, Alauma, Electro, Metaal, Ehrbecker, De Koning Elektrotechniek, Polimex, Vibo Electro and Waagmeester). The size and composition of this delegation — TU and Bernard are by far the largest members of the FEG and were, in 1991, both represented together with Waagmeester, on the FEG

board (TU's representative was, at that time, FEG chairman) ([80]) — and the fact that it had already been indicated in the draft letter that supplies to CEF were seen as threatening by FEG wholesalers in general, confirm the conclusion that the visit can be attributed not only to the FEG members concerned but to the FEG as a whole.

(66) According to CEF, during this visit the FEG representatives presented a petition accompanied by the threat that KM products would no longer be bought if KM continued to supply CEF. The parties have denied the existence of any such petition, but not that the visit itself took place ([81]). The visit was apparently successful, since the answer given by Klöckner Moeller on 2 September 1993 to a request for information presented on 27 April 1993 states that all the wholesalers which are supplied by Klöckner Moeller are members of the FEG ([82]).

3. **FEG and its largest member, TU, as central players**

(67) The FEG plays a key role in the refusals to supply non-members. By combining a strict admission policy with an exclusive dealing arrangement designed to deprive non-members of their supply sources, the FEG undermines the position of non-members and is able to maintain and strengthen its own dominant position on the wholesale market. On the basis of the exclusive dealing arrangement, the FEG maintained the necessary contacts with NAVEG and ensured that the information necessary for the arrangement to function was exchanged between the two organisations. There can be no doubt about the purpose of the FEG's efforts. It is clearly described in the report of a regional FEG meeting held on 28 August 1995:

'competitors must be prevented from being given a leg-up. It has therefore been decided that no one will cooperate in doing so' ([83]).

(68) It is also striking that the individual FEG wholesalers do not regard each other as competitors. This impression is confirmed by the fact, as indicated in recital 35, that supplies between FEG members are permitted while supplies to non-member wholesalers are advised against ([84]).

(69) Alongside the FEG, TU, its largest and leading member, plays a role in the exclusive dealing arrangement which is so important that it should be examined individually. This is not surprising since the FEG's and TU's interests run more or less in parallel. During the period 1989 to 1995, TU was continuously represented on the FEG board and indeed provided the chairman in 1990 to 1991 ([85]). In addition, TU has always been strongly represented in the FEG product committees ([86]). As a result of its participation over many years on the FEG board and in various product committees, TU has had considerable influence over the FEG's policy. In this connection, reference can be made to the fact that TU's representative on the FEG board has been involved in the various talks between the FEG and NAVEG on the details of the exclusive dealing arrangement ([87]).

(70) TU has also exerted pressure in its own right on various suppliers in an attempt to persuade them not to supply non-members ([88]). It was able to do so by virtue of the size of its market share. Other indications of TU's active role are its draft letter to KM and its participation in the FEG delegation which visited KM.

G. PRICE AGREEMENTS BETWEEN FEG MEMBERS

(71) It is clear that the FEG and its members have sought by various means to influence the pricing policy of FEG members, specifically in two FEG decisions, the price guidelines distributed by the FEG, and the consultations on prices and discounts between FEG members.

1. **Binding FEG decisions**

(72) Pursuant to Article 7 of its articles of association, the FEG issued a number of binding decisions in the 1980s regarding the prices to be charged by members. New FEG members have been required to sign both decisions when joining the FEG ([89]). Any infringement of these decisions may, pursuant to Article 5 of the articles of association, result in suspension or expulsion from membership.

1.1. *Binding Decision on Fixed Prices*

(73) Under the Binding Decision on fixed prices of 2 November 1984, FEG members are required to pass on

to their customers any price increases implemented by the supplier after they have ordered specified quantities of products. To this end, a system has been developed which is laid down in the decision. The decision reads as follows ([90]):

'1. Where a price adjustment becomes effective, any materials ordered and not yet supplied may, within three months of the price adjustment, be supplied at the price effective on the date of the order.

2. Once the three month period referred to in Article 1 has expired, the price adjustments of materials ordered but not yet supplied shall, in the subsequent half year, be passed on at a maximum amount to be determined, except in a crisis situation.

3. The maximum amount referred to in Article 2 shall be determined every half year by the FEG after consulting UNETO on the basis of price adjustments in the past two years broken down by switching and distribution devices, lighting, cabling, small switchgear and other equipment.

4. By derogation from Articles 1, 2 and 3, fixed prices for only three months shall be indicated for wire and cable, with the usual increase/decrease clause.

5. Where the fitter is entitled under a risk arrangement to pass on price adjustments which exceed the maximum amount referred to in Article 2, the wholesaler may also pass on his price adjustments up to the maximum amount permitted for the fitter.'

(74) The decision is intended as an arrangement for spreading the risk of price rises which may arise in the course of long-term construction projects between wholesalers and fitters ([91]).

(75) The decision is, as its name would suggest, binding and provides for a fine of NLG 10 000 (EUR 4 531) in the event of infringement. After nine years, the decision was repealed at the general assembly of members on 23 November 1993 ([92]).

1.2. *Binding Decision on Publications*

(76) In the Binding Decision on publications of 2 August 1978, the FEG prohibits its members from selling electrotechnical fittings at specially reduced or loss-leader prices. The FEG also confirms in general terms its reluctance to see price competition. The decision reads as follows:

'The members of the FEG, considering:

that it is of great importance that the stockkeeping wholesale trade in electrotechnical products correctly performs its function within society, *inter alia*, through proper market conduct; that, in so doing, it promotes the interests of its customers,

declare:

— that it is undesirable to create, encourage or permit a sharp drop in prices, market dislocation, loss of profits and unbridled internecine competition,

— that, in particular, the distribution to fitting contractors of publications containing articles from the range of electrotechnical installation documents at loss-leader or specially reduced prices is undesirable,

hereby decide:

pursuant to Article 16 of the FEG's articles of association:

1. that such publications shall not be permitted;

2. that the task of monitoring compliance with this decision shall be conferred on the secretary;

3. that any information and/or more detailed interpretations addressed in writing to the members by or on behalf of the board shall be deemed to form an integral part of this decision' ([93]).

(77) The FEG secretary is responsible for monitoring compliance with the decision. Infringements of the decision are in practice apparently also monitored by the FEG members themselves and reported to the FEG secretary, who then calls to account the member who has committed the infringement ([94]).

(78) Illustration of this is provided by Wolff's reaction of 6 April 1990 to the FEG's reprimand concerning the application of specially reduced prices to the effect that 'the publication of such prices will not occur again' ([95]).

The Binding Decision on publications was finally repealed after 15 years at the FEG general assembly of 23 November 1993.

2. **Discussion between FEG members on prices and discounts**

(79) Discussions regularly took place between FEG members on the prices and discounts to be applied, often at regional FEG meetings or the meetings of the FEG product committees.

(80) For the members of the FEG Wire and Cable product committee, there could be little doubt as to the committee's purpose. In the report of its meeting of 16 May 1990, the chairman indicates its aim to be 'to endeavour to keep the market calm and maintain prices. In order to achieve this objective, it is necessary to exchange thoughts with one another regularly' ([96]).

(81) The consensus among FEG members did not relate solely to the level of prices but also to the discounts which FEG members granted to their customers. The parties claim that any such consensus would in fact be impossible. They refer in this respect to a report of the meeting of the FEG Wire and Cable product committee of 6 December 1989, in which the chairman comments that the market was too complicated for good rules to be established concerning discounts ([97]). However, shortly after this remark, the same report goes on to state that ([98]) 'after a brief discussion, it was decided that, at the next meeting, all members of the product committee would bring a list of prices charged in the month preceding the next meeting […] These would be the prices actually paid by the customer. On the basis of these prices, it would be examined whether there was any point in establishing rules on discounts'. This was evidently the case, given that the report of the regional FEG meeting of 14 February 1990 states that 'the Wire and Cable committee is working on the establishment of rules concerning discounts' ([99]). The parties' claim that there was no consensus or agreement on the part of the FEG or its members to take action in the area of discounts is therefore not convincing ([100]).

(82) Further attempts were made at FEG meetings to influence the prices and discounting policy of FEG members by other means. In the report of the regional meeting of 14 February 1990, the chairman is reported as having called on FEG members to be more restrained about granting discounts to the good customers of fellow wholesalers. Reference is made in the same report to an agreement reached at the previous meeting under which the FEG wholesalers would inform each other if it were found that other wholesalers were granting larger discounts on a given transaction than they were ([101]).

(83) The following is an example of a discount agreement actually reached in connection with the FEG:

The report on the FEG board meeting (then consisting of representatives from Brinkman & Germeraad, Vibo, TU, Waagmeester, Heco-Frans Hamers, Bernard, Schuurman and Alcoo) held on 30 November 1993 states:

'On 13 October a letter had been sent to members concerning uniform conditions to be applied to fittings to be supplied by wholesalers to BVO schools. Members were asked if they were prepared to give a standard discount of 35% on fittings excluding PLCs' ([102]) .

(84) If agreements on discounts were not complied with, the FEG would intervene: The report on the regional FEG meeting held on 28 May 1991 (attended by representatives of Bernard, Claessen, Hategro, Helms, Kasdorp, De Koning, Polimex, Schiefelbusch, Schotman Electro, Schuurman, Slabbers, TU, Vibo Electro and Wolff) indicates that some wholesalers were giving discounts to final consumers. 'The meeting denounced this. The secretary would contact the relevant wholesalers' ([103]). The parties claim that the FEG only wanted to act because the supplies in question were to private individuals ([104]). However, the above quotation does not seem to suggest this. It was not supplies which were under discussion but rather discounts.

3. **Sending of price recommendations by the FEG to its members**

(85) Alongside discussions at FEG meetings, other methods were used to influence the prices charged by FEG members. With regard to the pricing of certain electrotechnical fittings, such as junction, central and built-in boxes, the FEG and its largest member TU themselves took the lead. The FEG regularly sends lists of the most recent gross and net prices for these products as calculated by TU ([105]). For PVC tubes, the FEG sends its members price lists indicating new gross prices every time prices rise or fall. These lists also

indicate the percentages by which it recommends its members to increase or reduce their net prices. By way of example, reference can be made to a letter sent by the FEG to its members on 21 December 1988:

'Manufacturers recently informed you that they needed to increase the prices of PVC smooth tubes, Hostalit-z tubes and flexible tubes with effect from 1 January of the coming year. In connection with this price increase, we hereby recommend that you adjust your prices and amend the net prices you charge. […] If net terms (so-called "purchase clinchers") are offered, we recommend that you increase them by the following amounts […]' ([106]).

(86) In this context, gross prices should be understood to mean the recommended price to the final consumer which the manufacturer considers can be charged by the fitter to his customer (the final user) ([107]). This price is used in negotiations between the manufacturer and wholesalers to calculate the wholesale purchasing price. The wholesale purchasing price is reached by reducing the gross price by a certain percentage. The gross price is also used to determine the price charged by wholesalers to their customers (fitters). The wholesale selling price is also reached by reducing the gross price by a certain percentage, although the latter is smaller than is the case for the wholesale purchasing price. Finally, the fitter uses the gross price to determine the price he charges to the client. The actual (net) price is therefore determined at each stage of the vertical chain by reducing the gross price by a percentage discount applied to that level.

(87) Although the parties maintain that these prices are only recommended prices, it must be pointed out that any reference to their recommended statutes is absent from the correspondence concerned ([108]). At all events, this is a case where it is clear that the 'recommended' prices were not entirely optional. Shortly after the abovementioned letter of 21 December 1988 was sent, the following statement appears in the report of the regional FEG meeting of 2 March 1989 ([109]). 'the price increases for plastic tubes (December 1988) have caused disquiet on the market. The meeting took the view that if everyone stuck to the recommended prices, this could lead to improved profits'.

4. **Identical price lists**

(88) The larger FEG members, such as TU, Bernard and Wolff, produce price catalogues for their customers on the basis of information obtained from their suppliers. These catalogues indicate their gross prices and standard discounts. According to CEF, the smaller wholesalers which cannot afford to produce their own price catalogue frequently make use of these catalogues ([110]). A comparison of TU's, Bernard's and Wolff's catalogues shows that they are very similar. Not only the gross prices indicated but also the discounts are identical for a large number of products. The catalogues are also published in the same month, and price adjustments are introduced virtually at the same time ([111]).

(89) TU acknowledges that FEG members Wolff, Bernard and TU publish identical price catalogues at the same time as each other ([112]). According to the parties, this is not surprising given that these catalogues do not indicate net prices but only gross prices. These are merely intended as reference prices and are dictated by suppliers ([113]).

(90) This assertion is not complete, however, since the price catalogues do not only indicate identical gross prices but also identical discounts. This is not denied by TU. It claims, however, that the standard discounts indicated in the catalogues are nothing more than a fall-back for the eventuality that no individual discounting agreement exists between the wholesalers and its customer ([114]). This applies, so TU claims, particularly at the start of a commercial relationship or in the case of small purchases for which there would be no point in agreeing special terms because this would push up the costs of the transaction ([115]). In other cases, different discounts are applied, as agreed between TU and its individual customer. When determining the applicable discount, account is taken, *inter alia*, of the quantity of product purchased per transaction and the total quantity purchased over a year.

5. **Awareness**

(91) The FEG and, at all events, some of its members are, moreover, thoroughly aware that price agreements are an infringement of competition law. For example, a notice entitled 'Law on Economic Competition' of 30 August 1993, which the FEG secretary sent to the FEG board members (then consisting of representatives of TU, Bernard, Brinkman & Germeraad, Vibo, Waagmeester, Heco-Frans Hamers, Schuurman and Alcoo), gives a description of the new cartel rules in the Netherlands based on Articles 85 and 86 (now Articles 81 and 82) of the Treaty and goes on to state:

'As far as the FEG is concerned, this means that, in my view, the establishment of recommended prices for junction, switching and built-in boxes is prohibited, and possibly the Binding Decision on fixed prices, the Binding Decision on publications and the rules on costs of cutting' ([116]).

6. **Role of the FEG and its largest member, TU**

(92) It is clear from the above that the FEG plays a central role in the price agreements. On the basis of the Binding Decision on fixed prices and the Binding Decision on publications, and by issuing price guidelines, it has sought to hamper the free formation of prices. Moreover, the FEG has made it possible for price and discount agreements to be concluded between its members by serving as a forum for that purpose.

(93) Alongside the FEG, TU, its largest and most important member, has played a prominent role in the price agreements. For many years, TU was represented on the FEG board and therefore knew about or indeed actively participated in the abovementioned FEG policy. It also supplied the FEG with price information on the basis of which the FEG was able to inform its members of changes to the gross and net prices of certain products. Specifically, this meant that TU, on behalf of the whole sector, converted the information supplied by the manufacturer about amended net prices into uniform gross prices and then passed on this information to the FEG ([117]). TU was the only one at the time to have the necessary computer capacity to perform these calculations.

II. **LEGAL ASSESSMENT**

A. ARTICLE 81(1)

1. **Agreements between undertakings and/or decisions by associations of undertakings**

(94) The FEG is an association under Dutch law. Its members are undertakings dealing in the wholesale trade in electrotechnical fittings (see Article 3 of the articles of association). The FEG is therefore an association of undertakings within the meaning of Article 81(1), and its members are undertakings within the meaning of that Article.

(95) The FEG's articles of association, which are the FEG's basic rules of operation and govern the legal relationships between the FEG and its members, are an agreement within the meaning of Article 81(1). The FEG's by-laws and the FEG's binding decisions, adopted in accordance with Articles 16 and 7 of the articles of association, are decisions by an association of undertakings within the meaning of Article 81(1).

(96) Under Article 15(a) of the FEG's articles of association, members must comply with the provisions of the articles of association, the by-laws and the decisions taken by the board of directors and the assemblies. Conduct in breach of these rules may lead, *inter alia*, to the imposition of fines or expulsion (Article 5 of the articles of association).

(97) NAVEG is also an association under Dutch law. Its members are undertakings operating as agents, importers or sole distributors dealing in electrotechnical fittings (see Article 5(1) of the articles of association) ([118]). NAVEG is therefore an association of undertakings within the meaning of Article 81(1), and its members are undertakings within the meaning of that Article.

(98) NAVEG's articles of association, which are its basic rules of operation and govern the legal relationships between NAVEG and its members, are an agreement within the meaning of Article 81(1). NAVEG's decisions and regulations, adopted in accordance with Article 14(4) and (5) or Article 24 of the articles of association, are decisions by an association of undertakings within the meaning of Article 81(1).

(99) Under Article 7(2) of NAVEG's articles of association, members must serve the interests of the association and conduct themselves in accordance with the association's articles, regulations and decisions. Conduct in breach of these rules may lead, *inter alia*, to expulsion (Article 6(1)(d) of the articles of association).

(100) The instructions which NAVEG issues to its members to refrain from making supplies to non-members of the FEG are also decisions within the meaning of Article 81(1) ([119]). Although NAVEG members are in principle free not to comply with these instructions, the facts described in recitals 48, 49 and 50 suggest that this rarely occurs in practice. This is partly explained by the control exercised by NAVEG and by its members over each other. In addition, NAVEG members also have a commercial interest in complying with the instructions they receive because they depend for most of their turnover on FEG members. Finally, any divergent conduct is deterred by the knowledge that it could be relatively easily discovered by FEG members, in which case NAVEG members lay themselves open to the possibility of penalties.

(101) The collective exclusive dealing arrangement consists of two parts. The gentleman's agreement between the FEG and NAVEG on not supplying non-members of the FEG should be considered to constitute an agreement within the meaning of Article 81(1). The agreements between individual suppliers of electrotechnical fittings and the

FEG and its individual members on not supplying non-members of the FEG should be regarded as concerted practices within the meaning of Article 81(1).

(102) The discussions between the FEG and its members and between the members themselves concerning prices and discounts and the sending of price recommendations by the FEG to its members should be regarded as concerted practices within the meaning of Article 81(1).

2. **Restriction of competition**

2.1. *Collective exclusive dealing*

(103) From the facts described in recitals 44 to 52, it is clear that in the period from 28 April 1986 to 25 February 1994 there was a collective exclusive dealing arrangement in operation on the Dutch market in electrotechnical fittings, which consisted in a gentleman's agreement. Under this arrangement NAVEG assured the FEG that it would advise its members to supply only to wholesalers who were members of the FEG. This collective exclusive dealing was not reciprocal since members of the FEG were under no obligation to buy only from NAVEG members.

(104) The FEG and its members, especially TU, sought to broaden the application of the collective exclusive dealing arrangement. Between 29 August 1989 and 2 September 1993 at any rate, individual suppliers who were not represented in NAVEG by agents or by importers or sole distributors were put under pressure not to supply non-members of the FEG. It is apparent from the facts set out in recitals 53 to 66 that FEG and its members succeeded in this attempt, as a substantial number of suppliers acted in accordance with the collective exclusive dealing arrangement.

(105) The collective exclusive dealing arrangement as described in recitals 103 and 104 has as its object or effect the restriction of competition within the common market within the meaning of Article 81(1) ([120]). The arrangement restricts the freedom of suppliers to determine themselves which wholesalers they wish to supply. The result is that both the suppliers and the wholesalers who do not belong to the FEG are placed at a disadvantage.

(106) There are only a limited number of suppliers or suppliers' representatives to whom non-members of the FEG can address themselves. NAVEG members have an estimated share of the market in supply to the wholesale trade of about 20 %. The joint market share of the individual suppliers who also take part in the collective exclusive dealing arrangement is difficult to estimate; but, as will be seen from the table in the Annex, the suppliers whom the FEG and its members, TU in particular, put under pressure not to supply to non-FEG members were (almost) all major suppliers in their product group (see references to Draka Polva, Hager, Holec, Klöckner Moeller and ABB in recitals 53 to 66). The letter drafted by TU to be sent to Klöckner Moeller is also indicative: it points out that Klöckner Moeller is one of the first large suppliers of electrotechnical goods to supply to a non-member of the FEG ([121]). This suggests that a substantial number of suppliers are involved in the collective exclusive dealing arrangement.

(107) The refusals to supply make it very difficult for wholesalers who are not members of the FEG to assemble a range that is sufficiently broad and includes the products essential to every wholesaler in electrotechnical fittings, that is to say the products needed in order to put in an electric system ([122]). Given that the market in most individual categories of electrotechnical fittings is dominated by a limited number of manufacturers, it will be clear that refusal to supply by any of them will immediately lead to stock difficulties for non-members of the FEG.

(108) The FEG's strict admissions policy makes access to the market even more difficult for newcomers. Although the FEG is of the opinion that the admission criteria set by it are objective in character, and that the turnover criterion which it applies, at NLG 5 million (EUR 2,26 million) on the Dutch market, is extremely low ([123]), it is evident that various FEG members did not themselves at that time meet the turnover requirement ([124]). According to the FEG, the turnover criterion ensures that the firm has 'proved itself' on the market. But precisely as a result of the collective exclusive dealing arrangement it is extremely difficult for newcomers to 'prove themselves' on the market, and to achieve the turnover that would entitle them to FEG membership. Moreover, firms which have acquired a reputation as electrotechnical fittings wholesalers in another Member State have in fact already proved that they can operate as such. Up to 23 June 1994, however, only the turnover generated on the Dutch market was taken into account. This made it considerably more difficult for existing foreign wholesalers to extend their field of operations to the Dutch wholesale market.

(109) Furthermore, the turnover requirement was clearly not the only criterion applied by the FEG in turning down applications for membership. In practice, the 'interest of the association' criterion is also cited as grounds for refusal ([125]). Even though it is stipulated that only 'objective, fair and non-discriminatory norms' may be applied in this respect, this criterion offers the FEG board, which pursuant to Article 3(3) of the articles of association has to decide unanimously on the admission of new members, such wide discretionary powers that it is not possible to verify whether members have not in practice been refused admission on non-objective grounds ([126]). In practice, it may be seen that applications for membership are submitted to the FEG members, which are able to block the membership of unwelcome competitors ([127]). In this way the effects of the collective exclusive dealing arrangement are strengthened.

(110) In view of the above, and in particular of the total turnover in electrotechnical fittings at wholesale level in the Netherlands (between EUR 0,68 and 0,91 billion in 1992 to 1994), the market share held by the FEG and its members (96 %), and the estimated market shares of the suppliers, agents and sole dealers taking part in the collective exclusive dealing arrangement (over 20 %), these restrictions of competition are appreciable.

2.2. *Horizontal price agreements*

(111) The collective exclusive dealing arrangement is supplemented by practices concerted between FEG members and between the FEG and its members, and by two FEG decisions that affect the prices and discounts offered by FEG members. All these decisions and concerted practices are aimed at establishing an artificial price stability serving mainly to ensure that the margins of the FEG members do not come under pressure. The intentions of the FEG and its members are clear. Reference can be made to various documents in which this intention is expressed:

— The articles of association of the FEG: it is here stated that the object of the FEG is to protect the common interests of stockkeeping wholesalers of electrotechnical products, among other things by promoting 'orderly market relations in the broadest sense of the term' ([128]).

— The manual that the FEG issued to the FEG product committees: this manual states that 'In order to obtain an accurate picture of what is taking place in the market […] it is of crucial importance to be apprised of turnover and margins. Without knowledge of these, it is impracticable to do anything to influence the market' ([129]).

— The minutes of the meeting of the FEG Wire and Cable product committee on 16 May 1990: 'the objective of the product committee is to endeavour to keep the market calm and maintain prices' ([130]).

— The FEG's Binding Decision on publications: the recitals to this decision state that 'it is undesirable to cause, promote or permit a sharp drop in prices, market dislocation, loss of profits and unbridled internecine competition' ([131]).

— The draft letter drafted by TU, which was to be sent to Klöckner Moeller and to be signed by 26 FEG members: 'by now entering into a direct relationship with CEF, your products fall within the discount formula applied. The inevitable consequence will be that prices and, therefore, margins will come under increasing pressure' ([132]).

(112) The FEG and its members sought to achieve the objectives referred to in recital 111 by applying several instruments largely at the same time, each of which was intended, and did in fact help, to influence FEG members' pricing strategy and to restrict price competition between them. The instruments were the Binding Decision on fixed prices, the Binding Decision on publications, the discussions between FEG members on prices and discounts and the sending of price recommendations by the FEG to its members.

(113) Under the Binding Decision on fixed prices, which was in force from 2 November 1984 to 23 November 1993, FEG members were not to decide independently whether and to what extent they wished to pass on to their customers any increases in their suppliers' prices that took place after the date of the order. The margins by which the price was to be increased in such cases, and the times when the increases were to be carried out, were determined by the FEG. Failure to comply with the decision could lead to expulsion from the association and the imposition of fines. This is a decision by an association of undertakings in respect of prices to be charged. Such decisions restrict competition within the meaning of Article 81(1) by their very nature ([133]). The parties contend that the decision was intended to prevent increases in suppliers' prices after the fitter had ordered the goods from the wholesaler from being entirely for the account and at the risk of

the wholesale trade ([134]). It is not clear why in order to do this a decision had to be adopted requiring all FEG members to react in more or less the same way. The decision in any event deprived the individual FEG member of the possibility of refraining from passing on a particular price increase in order to secure a competitive advantage over its competitors.

(114) On the basis of another decision, the Binding Decision on publications, which was in force from 2 August 1978 to 23 November 1993, the FEG forbade its members to offer loss-leader or specially reduced prices in advertising and the like. Failure to comply with the decision could lead to expulsion. This too is a decision by an association of undertakings in respect of the prices to be applied. By its very nature the decision restricts competition within the meaning of Article 81(1) ([135]). It deprives FEG members of the possibility of winning customers from competitors by more attractive pricing. In general the decision forms part of the FEG policy aimed at reducing the danger that FEG members might find themselves in a price war with one another, which would put pressure on the level of prices and on wholesale margins. It will be seen from recitals 77 and 78 that this decision was in fact applied in practice.

(115) As has been explained in recitals 79 to 84, discussions regularly took place between FEG members regarding prices and discounts to be applied, at the regular FEG meetings, the FEG product committee meetings and the regional FEG meetings. In any event, the discussions took place in the period between 6 December 1989 and 30 November 1993. These meetings provided a forum in which the FEG members could discuss a wide range of subjects related to prices and discounts. Among the points discussed were the setting of rates of discount (see recital 83), compliance with FEG price guidelines (recital 87), complaints against other members who were not applying certain agreements in respect of prices and discounts (recital 82), and steps to introduce uniform rules for the discounts to be allowed (recital 81). These discussions in any event had the effect that it was quite clear to FEG members that they should avoid any intense price competition between themselves, in view of the negative impact that might have on the level of prices and on wholesalers' margins. The discussions therefore helped to influence the pricing of electrotechnical fittings on the Dutch wholesale market, and restricted competition within the meaning of Article 81(1) ([136]).

(116) Between 21 December 1988 and 24 April 1994, the FEG sent its members price lists showing net and gross prices — at least for the products referred to in recital 85. The parties contend that these were merely advisory. As has been seen in recital 87, pressure was brought to bear on the FEG members to comply with these guidelines, which casts doubt on their voluntary character. By sending the price lists, the FEG sought to ensure that FEG members would react in a uniform fashion to increases or reductions in their suppliers' prices. This reduced the danger that price increases or reductions might be seized upon by individual FEG members in order to secure a competitive advantage over other FEG members by refraining from passing on an increase or reduction to their customers, or by passing it on only in part. Conduct of that sort would have disturbed the calm which the FEG wanted to see on the market, and might have stirred up price competition between FEG members.

(117) The joint application of the above instruments had the effect that in practice there was only limited price competition between FEG members. An example is provided by the price catalogues issued by the larger FEG wholesalers. Their catalogues were very similar. In many cases both the gross prices and the discounts shown in the price catalogues of FEG members TU, Bernard and Wolff were identical. The catalogues were published in the same month, and price changes were made at virtually the same time. The parties take the view that no importance should be attached to the similarity between these price catalogues, because in some cases the discounts actually applied were not the standard ones indicated in the price catalogues. But they have conceded that this was not the case with every transaction. In practice, higher discounts might be given, for example where the customer was buying larger quantities, or where there was a long-standing relationship with the particular customer. This means that two situations have to be distinguished. In some cases the gross prices and standard discounts shown in the price catalogues were applied as they stood, and in those cases the similarity between the price catalogues indicates a lack of price competition between the issuers of the catalogues. In other cases the standard discounts were departed from, and the standard discount operated as a minimum discount. In any event, there was no competition here between the issuers of the catalogues in respect of the size of the minimum discount ([137]).

(118) In practice the smaller wholesalers, who have not got the resources to draw up a catalogue of their own, use the catalogues issued by TU, Bernard or Wolff as a guideline for their own pricing, so that the observations made here regarding the lack of price competition apply not only to those three wholesalers but have a more general relevance too.

(119) The lack of price competition between FEG members is also apparent from the price level on the Dutch wholesale market. There is a variety of evidence that the level of prices for electrotechnical fittings is higher in the Netherlands than in the other Member States. In the TU report 'Market Research on Electrotechnical Fittings', which dates from 1994, it is observed that parallel imports, especially from Belgium and Germany, seem to be on the increase ([138]). Commenting on a price comparison it carried out, the FEG Lighting product committee says that 'Dutch prices are certainly not the lowest in Europe' ([139]). Another illustration is provided by the brochure issued by Hokamo Import BV: it links the price level to the fact that the Dutch market is known to be a 'protected market':

'Hokamo Import BV is playing a pioneering role with respect to the pricing of electrical cable in the Netherlands. As well as supplying the traditional Ymvk and Ymvk-as cables, we dared to introduce the Nyy and Nycwy, German quality cables that are up to 40% cheaper. And that was on a protected market. At European level this means that the Dutch fitter can compete better in terms of price and quality' ([140]).

(120) Together, the practices described in recitals 113 to 116 enable the FEG and its members, in line with the FEG's efforts described in recital 111, to concert the pricing of its members and to stabilise or increase the market prices of their products. The prices of electrotechnical fittings on the dutch wholesale market are consequently held at an artificial level. According to the Commission's established practice and the case-law of the Court of Justice and of the Court of First Instance, agreements or concerted practices in respect of prices or discounts to be applied restrict competition within the meaning of Article 81(1) by their very nature ([141]).

(121) In view of the total turnover in electrotechnical fittings in the Netherlands (between EUR 0,68 and EUR 0,91 billion in the period 1992 to 1994) and the market share held by the FEG and its members (96%), these restrictions of competition are appreciable.

2.3. *The relationship between the collective exclusive dealing arrangement and the horizontal price agreements*

(122) There is a direct relation between the collective exclusive dealing arrangement and the price agreements within the FEG. As has been explained in recital 111, the price agreements are aimed at establishing an artificially stable price level with 'healthy margins' for the wholesale trade. This can succeed only if the wholesalers observe a measure of price discipline. The FEG has therefore brought various forms of pressure to bear on its members to avoid any intense price competition. This meant that intense price competition was to be feared only from wholesalers outside the FEG. The collective exclusive dealing arrangement prevented deliveries to these potential 'price cutters', thus reducing the danger that the artificial price level might come under pressure. In this way the collective exclusive dealing arrangement helped to underpin the price agreements.

3. **Effect on trade between Member States**

(123) As has been explained in recital 19, a large proportion of electrotechnical fittings sold on the Dutch market is imported from other Member States (30 to 52%), primarily from Belgium and Germany. NAVEG members alone, for example, represent more than 400 mainly foreign manufacturers on the Dutch market. It is clear, therefore, that electrotechnical fittings by their nature lend themselves to international trading, certainly now that Europe-wide harmonisation has taken place (see recital 18).

3.1. *Collective exclusive dealing arrangement*

(124) The collective exclusive dealing arrangement restricts the access of foreign wholesalers in electrotechnical fittings, such as CEF, to the Dutch wholesale market. It also restricts the possibilities open to manufacturers from other Member States. Given the combined market share of the FEG members, the collective exclusive dealing arrangement means that such outsiders have difficulty in selling their goods on the Dutch market through distribution channels not approved by the FEG ([142]).

(125) There is therefore an effect on trade between Member States. In view of the total turnover in electrotechnical fittings (between EUR 0,68 and 0,91 billion in 1992 to 1994) and the FEG's market share (96%), this effect is appreciable.

3.2. *Horizontal price agreements*

(126) The practices affecting prices may also influence trade between Member States. In this connection, reference is

made to the fact mentioned in recital 123 that a considerable proportion of the electrotechnical fittings on the Dutch market are imported from other Member States. In view of the total turnover in the electrotechnical fittings trade (between EUR 0,68 and 0,91 billion in 1992 to 1994) and the FEG's market share (96%), this effect is appreciable.

B. ARTICLE 81(3)

1. **Collective exclusive dealing arrangement**

(127) The collective exclusive dealing arrangement has not been notified to the Commission. Even if it were to be notified, it does not satisfy the tests of Article 81(3), which apply cumulatively. It does not improve the production or distribution of electrotechnical fittings, since the system of collective exclusive dealing has the object of shielding the market for the benefit of the wholesalers concerned. Non-member wholesalers are appreciably restricted as regards their sources of supply, and sales through distribution channels other than the FEG and its members are restricted or prevented.

2. **Horizontal price agreements**

(128) The price agreements have not been notified to the Commission either. There is no indication at all that the collection of concerted practices and decisions described in recitals 111 to 121 contributes to improvements in the areas referred to in Article 81(3). On the other hand, it has been established that they serve to reduce price competition considerably.

C. ARTICLE 3 OF REGULATION No 17

(129) Article 3(1) of Regulation No 17 states that where the Commission finds that there is infringement of Article 81 it may by decision require the undertakings concerned to bring such infringement to an end. The evidence in the Commission's file indicates that the infringements relate to a period which runs to at least 1994. It cannot be concluded, however, that they also continue after that date, in the same or in an amended form. As regards the collective exclusive dealing arrangement, the complainants found that after 1994 suppliers were increasingly ready to supply non-FEG members, but this is not enough in itself to conclude that the arrangement as a whole has ceased to exist ([143]). In the case of the price agreements, too, there is no absolute certainty that they have been terminated. The withdrawal of the two binding FEG decisions is an indication of this, it is true, but is not a reliable guide as far as the other price-influencing instruments are concerned.

D. ARTICLE 15(2) OF REGULATION No 17

(130) Under Article 15(2)(a) of Regulation No 17, the Commission may by decision impose on undertakings or associations of undertakings fines of from EUR 1 000 to EUR 1 000 000, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81. In fixing the amount of the fine, the Commission is to have regard to all relevant circumstances, and especially the gravity and duration of the infringement.

1. **Intention or negligence**

(131) The Court of Justice and the Court of First Instance have consistently held that it is not necessary for an undertaking to have been aware that it was infringing the prohibition laid down by Article 81 for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market, and actually or potentially affected trade between Member States ([144]).

(132) The Commission takes the view that neither the FEG nor TU could have been unaware that their conduct had the object of restricting competition within the common market.

(133) Arrangements such as the present collective exclusive dealing arrangement, which are designed to disadvantage competitors who are not party to the arrangement by depriving them of their sources of supply, are invariably regarded as suspect from the point of view of competition law.

(134) The same applies as regards the horizontal price agreements. Direct contact between competitors on questions of pricing and discounts and interference by trade associations in the pricing policy of their members are also regarded as suspect from the point of view of competition law.

(135) To sum up, an objective assessment of the facts of the case leads to the conclusion that the infringement was committed intentionally or at least negligently.

2. **Gravity of the infringement**

(136) The infringements in this case have the following characteristics.

(137) By means of the collective exclusive dealing arrangement, in combination with a restrictive admission policy, the intention was to make it difficult for foreign wholesalers to enter the Dutch market in electrotechnical fittings. The arrangement was also designed to restrict both domestic and foreign suppliers of electrotechnical fittings in their choice of distribution channels. Lastly, attention can also be drawn to the supporting role which the arrangement played in the horizontal price agreements.

(138) With the horizontal price agreements concluded in the FEG framework, it was intended to restrict competition by coordinating pricing policy at horizontal level. The aim was to create or maintain a stable price level with a sufficiently large margin for wholesalers.

(139) The abovementioned infringements took place on a market which was dominated by the FEG members, who had a joint market share of 96 %.

(140) The repercussions of the collective exclusive dealing arrangement on the market cannot be measured precisely. It is certain, however, that the infringement considerably delayed CEF's entry into the Dutch market and made it appreciably more difficult. Although there are indications that the price level for electrotechnical products on the Dutch market was relatively high, it should be pointed out that it is equally impossible to determine precisely the repercussions of the horizontal price agreements. In general, the FEG and its members were not so concerned to fix uniform prices for all electrotechnical products as to keep the degree of price competition which existed under control and within limits, in order not to jeopardise price stability and wholesalers' margins.

(141) As regards the geographical extent of the relevant market, it should be pointed out that this was limited to the Netherlands or to certain regions therein.

(142) In the circumstances, the Commission concludes that the agreements and/or concerted practices concerned in these proceedings constitute a serious infringement of the Community competition rules.

(143) The FEG played a leading role in organising and monitoring compliance with both the collective exclusive dealing arrangement and the price agreements. As a basis for the determination of the amount of the fine to be imposed on the FEG, therefore, the Commission considers it appropriate to fix a sum of EUR 2,5 million for the gravity of the infringement.

(144) TU is the biggest and most powerful member of the FEG. In view of its influence within the FEG and its specific role in the infringements, TU can be held responsible for its share in the restrictions of competition. As a basis for the determination of the amount of the fine to be imposed on TU, therefore, the Commission considers it appropriate to fix a sum of EUR 1,25 million for the gravity of the infringement.

3. **Duration of the infringement**

(145) As far as the collective exclusive dealing arrangement is concerned, the infringement committed by the FEG and TU can be established at least from 11 March 1986, and lasted in any event until 25 February 1994.

(146) As regards the duration of the price agreements, the following observations can be made. The two binding FEG decisions were in force over the periods 1978 to 1993 and 1984 to 1993 respectively. The discussions on prices and discounts began by 6 December 1989 at the latest, and were applied at least until 30 November 1993. The sending of price recommendations by the FEG to its members began at any rate on 21 December 1988 and lasted until at least 24 April 1994.

(147) These infringements therefore lasted eight, fifteen, nine, four and six years respectively. For purposes of Commission policy towards fines, the infringements in this case are classed as infringements of medium to long duration.

(148) The sum set for the gravity of the infringement should accordingly be increased by EUR 2 million in the case of the FEG and by EUR 1 million in the case of TU.

(149) The basic amounts are therefore EUR 4,5 million for the FEG and EUR 2,25 million for TU.

4. **Aggravating and mitigating factors**

(150) In setting the fine the Commission must take account of any aggravating and mitigating factors. It is apparent from the Commission's investigation that there are no such factors in this case.

5. **Procedural irregularities**

(151) In their written answers to the statement of objections and their oral submissions during the hearing in this case, the parties pointed out to the Commission a number of irregularities regarding procedure. These concerned in particular the duration of the proceedings and the presence in the Commission file, already discussed in recital 32, of tape recordings and transcriptions of telephone conversations between CEF and certain firms.

(152) As regards the duration of the proceedings, the following observations should be made. It is part of the established case-law of the Court of Justice and of the Court of First Instance that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy ([145]). 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 to EUR 4,4 million for the FEG and EUR 2,15 million for TU,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

TU has infringed Article 81(1) of the Treaty by taking an active part in the infringements referred to in Articles 1 and 2.

Article 4

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

2. TU shall immediately bring the infringements referred to in Article 3 to an end, if it has not already done so.

Article 5

1. For the infringements referred to in Articles 1 and 2, a fine of EUR 4,4 million is imposed on the FEG.

2. For the infringements referred to in Article 3, a fine of EUR 2,15 million is imposed on TU.

Article 6

The fines referred to in Article 5 shall be paid in euro within three months of the date of notification of this Decision into the following bank account:

Account No 310-0933000-43
in the name of the European Commission at:
Bank Brussel Lambert/Banque Bruxelles Lambert
Europees Agentschap/Agence européenne
Schumanplein/Rond-point Schuman 5
B-1040 Brussel/Bruxelles.

After the expiry of that period, interest shall automatically be payable at the rate applied by the European Central Bank to its repo operations on the first working day of the month in

which this Decision was adopted, plus 3,5 percentage points, that is to say 6%.

Article 7

This Decision is addressed to:

1 De Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (FEG)
Reitseplein 1
5037 AA Tilburg
The Netherlands

2 De Technische Unie BV
Bovenkerkerweg 10-12
1185 XE Amstelveen
The Netherlands

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 26 October 1999.

For the Commission
Mario MONTI
Member of the Commission

NOTES

([1]) OJ 13, 21.2.1962, p. 204/62.

([2]) OJ L 148, 15.6.1999, p. 5.

([3]) OJ 127, 20.8.1963, p. 2268/63. Replaced as from 1 February 1999 by Commission Regulation (EC) No 2842/98, (OJ L 354, 30.12.1998, p. 18).

([4]) Article 2(1) and Article 2(3)(f) and (g) of the FEG's articles of association (file, pp. 2639 and 2640).

([5]) Article 3 of the FEG's articles of association in conjunction with Article 2(2)(e) and (f) of the FEG's by-laws. At the FEG general assembly held on 25 May 1989 the existing turnover requirement of NLG 3,2 million (EUR 1,44 million) was increased to NLG 5 million (EUR 2,26 million) (file, p. 532).

([6]) On 23 June 1994, the general assembly of FEG members decided, obviously as a result of the request for information which the Commission sent to Instalnet BV on 10 June 1994 (Case IV/35.011), that turnover achieved in the rest of the Community would also be taken into account (see report on the general assembly of 23 June 1994, file, p. I-1678, and the letter from the FEG to CEF of 23 June 1994, file, p. 1955).

([7]) FEG figures 1994 (file, p. 2622).

([8]) FEG annual report 1993 (file, pp. 2588 to 2608).

([9]) FEG memo of 3 May 1991 (file, pp. I-5361 and 5362).

([10]) See TU's written answer to the statement of objections, p. 10 (file, p. F-23.203).

([11]) See FEG's written answer to the statement of objections, pp. 10 and 11 (file, pp. F-22.202/3). FEG distinguishes between the following product groups: lighting, cable, fittings and switches, distribution installations, industrial switching equipment, trunking and support systems, other fittings and a miscellaneous group.

([12]) See FEG's written answer to the statement of objections, p. 11 (file, p. F-22.203), where it is stated that wholesalers are in competition primarily with other wholesalers. Other competitors include fitting contractors with trading activities, DIY stores, builders' merchants, and manufacturers who supply direct.

([13]) See an article in the October 1994 issue of 'Installatie journaal' (file, p. I-4634) and an interview with the Secretary of the FEG dated 7 February 1989 (file, p. I-2144).

([14]) See Commission Decision 97/277/EC of 20 November 1996, Kesko/Tuko, (OJ L 110, 26.4.1997, p. 53).

([15]) See the Directives of July 1997 on the application of Council Directive 73/23/EEC (OJ L 77, 26.3.1973, p. 1).

([16]) The FEG's answer of 21 October 1991 to the Commission's request for information of 16 September 1990 (file, p. 808).

([17]) See TU's written answer to the statement of objections, p. 11 (file, p. F-32.204).

([18]) Only Dutch natural or legal persons can be members (Article 3 and Article 5(1) of the NAVEG articles of association). NAVEG has set up various product groups, such as the Wire & Cable, Lighting, Switching Equipment and Other Fittings product groups. Only the Lighting product group is apparently still operating at the moment (file, p. 28).

([19]) NAVEG's answer of 28 August 1991 to a Commission request for information (file, p. 517).

([20]) NAVEG turnover statistics (file, p. I-2767). The calculation of turnover is based on data from only 15 of the 30 NAVEG members. According to the accompanying letter, in the case of turnover statistics, the other members made no data available. In all probability, therefore, the actual turnover of NAVEG members is considerable higher than the amount given.

([21]) The FEG's answer of 13 August 1991 to requests for information presented on 27 June and 25 July 1991 (file, p. 376).

([22]) See NAVEG's answer of 28 August 1991 to requests for information presented on 27 June and 25 July 1991 (file, p. 519) and the report on the talks between the FEG board and NAVEG on 28 February 1989, according to which NAVEG accepts only members who distribute via wholesalers (file, p. 1411).

([23]) See the FEG's written answer to the statement of objections, p. 17 (file, p. F-22.209). The market share attained by NAVEG on the basis of the turnover of NLG 185,5 million is lower and amounts to some 5%. It would seem from footnote 25, however, that this figure is based on incomplete data. The FEG's estimate of the market share of NAVEG members, 10%, is therefore not unrealistic.

([24]) The FEG's answer of 13 August 1991 to the Commission's requests for information of 27 June and 25 July 1991 (file, p. 377), the FEG 'strategic plan' of February 1993 (file, p. I-1965 2000), Bernard's 'strategic framework' report, undated (file, p. I-5278-5282), and the core report 'electrotechnical fittings' of 4 June 1991 (file, pp. I-3480 and I-3522). According to an article in 'Elan' of November 1991, the FEG represents some 60 of the 70 wholesalers in electrical fittings in the Netherlands (file, pp. 981 and 982).

([25]) See the FEG's written answer to the statement of objections, p. 10 (file, p. F-22.202).

([26]) See the letter from CEF's legal adviser dated 16 February 1996 (file, p. 2263).

([27]) See the FEG's written answer to the statement of objections, p. 10 (file, p. F-22.202).

([28]) Answers given by various manufacturers of electrotechnical fittings to the Commission's requests for information presented on 15 October 1991 (file, p. 890 *et seq*.) and on 27 April 1993 (file, p. 1614 *et seq*.).

([29]) Answer given by Draka Kabel on 15 June 1993 to the Commission's request for information presented on 27 April 1993 (file, p. 1614.107).

([30]) Letters from Van Geel to CEF dated 1 May 1990 (file, p. 53) and 28 March 1991 (file, p. 205), and the answers given by Van Geel on 1 November 1991 (file, p. 915) and 23 July 1993 (file, p. 1614.301) to the Commission's request for information presented on 15 October 1991 and 27 April 1993 respectively.

([31]) Letter dated 8 September 1988 from Merlin Gerin to TU and letters dated 21 September 1988 (file, p. I-5162) and 10 December 1990 (file, pp. I-5164 and 5165) from TU to Merlin Gerin, and letter dated 2 May 1990 from Merlin Gerin to CEF (file, pp. 60 and 61).

([32]) Confidential marketing plan for Peha fittings, March 1992 (file, p. I-6094).

([33]) File, p. 2669.

([34]) See the Rabobank 'Figures and Trends' report, 1 July 1992 (annexed to the answer given by Draka Polva on 15 June 1993 to the Commission's request for information presented on 27 April 1993, file, p. 1614.98).

([35]) Draka Polva Report, 9 July 1993 (file, p. I-6342) and the Rabobank report referred to in footnote 34.

([36]) File, p. 741.

([37]) Inspections were held at the FEG, FEG members TU and Bernard, NAVEG, NAVEG members Hofte and Hemmink, and the manufacturer Draka Polva (file, p. I-6481).

([38]) FEG memo 10219/A for the FEG board meeting of 25 June 1991 (file, p. I-229).

([39]) Letters from the FEG dated 15 August 1990 (file, p. 39) and 24 September 1990 (file, p. I-227).

([40]) See file, p. F-29.213.

([41]) Letter from CEF dated 5 April 1995 (file, p. 2146).

([42]) Memorandum from the Ministry of Economic Affairs of 23 February 1959 concerning the 'investigation into the former Agenten-Grossiers-Contract in the electrotechnical sector' (file, p. F-27.259).

([43]) See footnote 42.

([44]) See the FEG's written answer to the statement of objections, p. 29 (file, p. F-22.220) and TU's written answer, p. 28 (file, p. F-23.221).

([45]) See the FEG's answer of 13 August 1991 to the requests for information issued on 27 June and 25 July 1991 (file, p. 378). See also the FEG's strategic plan for 1993 (file, p. I-1965).

([46]) See the Memorandum referred to in footnote 42 (file, p. F-27.265).

([47]) File, p. I-2647.

([48]) File, p. 1377 and p. 1412.

([49]) File, p. 2660.

([50]) File, p. I-5727.

([51]) See TU's written answer to the statement of objections, p. 23 (file, p. F-23.216).

([52]) File, p. I-2652.

([53]) See, for instance, the report of the meeting between the FEG and NAVEG of 28 February 1989 (file, p. 1379a), the report of the discussion between the FEG and NAVEG of 25 October 1991 (file, p. 1379b), a letter from the FEG to NAVEG dated 18 November 1991 (file, p. 2672), and the letter from NAVEG to its members dated 19 June 1992 (file, p. 5790). With regard to CEF's membership of the FEG see, for instance, a letter from the FEG to NAVEG dated 5 October 1989 (file, p. 919) and the minutes of the internal TU meeting of 18 October 1989 (file, p. I-3942).

([54]) See TU's written answer to the statement of objections, p. 21 (file, p. F-23.214).

([55]) File, p. I-2696.

([56]) File, pp. 1379a and 1412.

([57]) Letter from Hateha to CEF dated 24 May 1989 (file, p. 63).

([58]) Letters from Hateha dated 24 May 1989 (file, p. 63) and 12 March 1981 (file, p. I-87).

([59]) Report of an internal Hemmink meeting of 25 February 1994 (file, p. I-6250).

([60]) See the FEG's written answer to the statement of objections, p. 20 (file, p. F-22.212).

([61]) File, p. I-5727.

([62]) File, p. I-4936.

([63]) File, p. I-5172.

([64]) File, p. I-4933.

([65]) File, p. I-4940.

([66]) See the table in recital 6, which indicates that many FEG members realise some of their turnover from the sale of consumer electronics.

([67]) Letter of 29 August 1989 (file, p. I-946).

([68]) File, p. 1614.17.

([69]) See Bernard's written answer to the statement of objections, p. 25 (file, p. F-23.116).

([70]) File, p. I-5134.

([71]) See TU's written answer to the statement of objections, p. 19 (file, p. F-23.212).

([72]) Report of a TU meeting held on 13 March 1991 (file, p. I-4952).

([73]) See TU's written answer to the statement of objections, p. 26 (file, F-23.219).

([74]) File, p. I-5357.

([75]) File, p. I-5358.

([76]) File, p. I-5359.

([77]) File, pp. I-5357 to 5360.

([78]) See TU's written answer to the statement of objections, p. 25 (file, F-23.218).

([79]) Namely: Alcoo BV, Bernard BV, Bolderheij BV, Brinkman & Germeraad BV, Conelgro BV, Cammaert BV, Van Egmond BV, Ehrbecker, Elauma BV, Eltema BV, Electro Metaal BV, Elgro BV, Den Hollander BV, Kasdorp, Oscar Keip BV, De Koning, Polimex, Rolff BV, Schiefelbusch, Schotman Elektro, Schuurman BV, Smelt BV, TU, Vibo, Waagmeester BV and Wolff (file, p. I-287 to 289).

([80]) See Annex 4 to the letter from the FEG's legal adviser dated 15 March 1996 (file, p. 2626).

([81]) See the answers from Kasdorp of 26 August 1991 (file, p. 504), Bernard of 27 August 1991 (file, p. 511), and TU of 28 August 1991 (file, p. 525) to the Commission's statement of objections of 25 July 1991.

([82]) File, p. 1614.316.

([83]) File, p. I-1805.

([84]) File, p. I-229.

([85]) See Annex 4 to the letter from the FEG's legal adviser dated 15 March 1996 (file, p. 2625).

([86]) See Annex 5 to the letter from the FEG's legal adviser dated 15 March 1996 (file, p. 2628).

([87]) See, for example, the reports of the FEG-NAVEG meetings of 28 February 1989 (file, p. 1379a), the report of 24 April 1989 (file, p. I-2647) and the report of 28 April 1986 (file, p. I-2660).

([88]) See the reports of the TU meetings of 13 December 1989 (file, p. I-4940) and 13 March 1991 concerning ABB (file, p. I-4952), the TU report of 2 July 1991 concerning Holec (file, p. I-5134) and TU's letter to Draka Polva of 16 July 1990 (file, p. I-5172).

([89]) See the FEG's letter to Smoka of 4 December 1991 (file, p. I-2063).

([90]) File, p. 2668.

([91]) See the FEG's written answer to the statement of objections, p. 33 (file, p. F-22.224).

([92]) See the FEG's written answer of 15 March 1996 to the Commission's request for information of 16 February 1996 (file, p. 2487).

([93]) File, p. 2667.

([94]) See, for example, 'Schotman's disgraceful leaflet'. Cegro (consisting of FEG members Brinkman & Germeraad, Elgro, Keip, Rolff, Schiefelbusch and Wolff), informed the FEG of the leaflet by letter dated 16 December 1991 and asked it to approach the relevant wholesaler on the matter (file, p. I-2038), which the FEG did by letter of 3 January 1992 (file, p. I-2037). Cegro then inquired, by letter of 3 February 1992, about the reaction which the FEG had received to its letter to Schotman of 3 January (file, p. I-2041). In so doing, Cegro also touched on the FEG's question as to how the FEG should react to loss-leader or reduced prices. Cegro states that 'You wish to know what specifically should be discussed in a board meeting. If by that you mean the binding decision adopted years ago regarding the distribution of "disgraceful leaflets", the answer seems clear to me: the discussion of measures which might be taken to prevent any such publications appearing again. A reminder would seem appropriate in this regard'. On 10 February, the FEG sent a letter of reminder to Schotman (file, p. 2040).

([95]) File, p. I-800-808.

([96]) File, p. I-437.

([97]) See TU's written answer to the statement of objections, p. 33 (file, p. 23.226).

([98]) File, p. I-3304.

([99]) File, p. 563. The FEG disputes, however, that the said rules ever came into being; see the FEG's written answer to the statement of objections, p. 35 (file, p. F-22.226).

([100]) See TU's written answer to the statement of objections, p. 34 (file, p. F-23.227).

([101]) File, p. I-1954.

([102]) File, p. I-5427.

([103]) File, p. 632.

([104]) See TU's written answer to the statement of objections, p. 34 (file, p. F-23.227).

([105]) See the letters from the FEG of 18 June 1990 (file, p. I-729), 12 December 1990 (file, p. I-541) and 29 April 1994 (file, p. I-1881).

([106]) File, p. I-2089. In a letter of 28 February 1990, the FEG recommended its members to amend their net prices for plastic tubes following a price reduction by suppliers. If FEG members offered net terms, they were recommended to reduce them by 3% (file, p. I-2113). After this letter was sent, the FEG monitored whether its recommendation had been complied with. Reference is made in this connection to the report of the regional FEG meeting of 22 March 1990, at which the chairman asked how the members had complied with the FEG's price guideline. It was found at the meeting that, in practice, members were complying with the gross prices recommended. However, the net-price recommendation was not being complied with in all cases (file, p. I-689).

([107]) See TU's written answer to the statement of objections, p. 29 (file, p. F-23.222).

([108]) See the letters from the FEG to its members dated 18 June 1990 (file, p. I-729), 12 December 1990 (file, p. I-541) and 29 April 1994 (file, p. I-1881).

([109]) File, p. I-1813.

([110]) See the letter from CEF's legal adviser dated 20 July 1993 (file, p. 1712).

([111]) See TU's, Bernard's and Wolff's price lists of July 1990 (file, pp. 881 and 1712).

([112]) See report of the hearing, p. 153 (file, F-29.432).

([113]) See TU's written answer to the statement of objections, p. 35 (file, p. F-23.228).

([114]) See TU's written answer to the statement of objections, p. 31 (file, p. F-23.224).

([115]) See footnote 114.

([116]) File, p. I-4897.

([117]) See the FEG's written answer to the statement of objections, p. 34 (file, p. F22.225).

([118]) As applicable on 10 July 1990 (file, p. 28).

([119]) Judgment of the Court of Justice of the European Communities in Case 45/85 Verband der Sachversicherer v Commission [1987] ECR 405, paragraphs 29 to 33.

([120]) See the Commission's First Competition Report, covering 1971, pp. 35 to 36, point 19; Third Competition Report, covering 1973, p. 48, point 53; Commission Decision 72/390/EEC, Centrale Verwarming (OJ L 264, 23.11.1972, p. 327); Commission Decision 78/59/EEC, Centraal Bureau voor de Rijwielhandel (OJ L 20, 25.1.1978, p. 18, recital 21); Commission Decision 82/123/EEC, VBBB/VBVB (OJ L 54, 25.2.1982, p. 36, recitals 39 and 40).

([121]) See recital 62.

([122]) See recital 26.

([123]) See the FEG's answer of 13 August 1991 to Commission requests for information presented on 27 June and 25 July 1991 (file, p. 379).

([124]) See the profit-and-loss accounts of FEG members Vilters and Slabbers for 1990/91 and 1986/87 (file, pp. 1003 to 1005).

([125]) Report on the FEG board meeting on 29 June 1993 (file, p. I-1628).

([126]) This may be illustrated by the discussions on the membership of Van de Meerakker, which apparently met all the membership criteria, but was nevertheless not accepted as a member. See the reports on the FEG board meetings held on 27 September 1994 and 15 November 1994 (file, pp. I-1412 and I-1405).

([127]) See, for example, the report on the FEG board meeting held on 25 June 1990, concerning Frigé. Similarly revealing are the minutes of the FEG board meeting held on 29 June 1993 (file, pp. 1003 to 1005), which state that, in answer to the question of what the problem would be if everyone who applied for membership was accepted, the FEG chairman answered: 'a number of members would be very displeased'.

([128]) See recital 4.

([129]) See recital 8.

([130]) See recital 80.

([131]) See recital 76.

([132]) See recital 62.

([133]) Judgment of the Court of Justice in Case 246/86 Belasco v Commission [1989] ECR 2181, paragraph 15.

([134]) See TU's written answer to the statement of objections, p. 29 (file, p. F-23.222).

([135]) See Commission Decision 82/367/EEC, Hasselblad (OJ L 161, 12.6.1982, p. 18, recitals 39, 65 and 66).

([136]) Judgment of the Court of Justice in Joined Cases 40 to 48, 50, 54 to 56, 111, 113, and 114/73 Suiker Unie v Commission [1975] ECR 1663, paragraphs 172, 173 and 174; Commission Decision 86/398/EEC, Polypropylene (OJ L 230, 18.8.1986, p. 1, recital 87).

([137]) Commission Decision 986/398/EEC, see footnote 136, recital 90 of that Decision.

([138]) Marktverkenning electrotechnisch installatiemateriaal, file, p. I-4649. See also the article 'Internationalisering raakt vooral producent en grossier' (Internationalisation Mainly Affects Manufacturers and Wholesalers) in the periodical Installatie Journaal, October 1994, where it is stated that Dutch electricians in the border area are buying their materials from German wholesalers because of their lower prices (file, p. 4634).

([139]) See the report on the activities of the FEG Lighting product committee, 30 May 1988 (file, p. 2046).

([140]) Attached to the letter from CEF to the Commission, 7 October 1995 (file, p. 2173).

([141]) See for example the following judgments of the Court of Justice: Case 48/69 ICI v Commission [1972] ECR 619, paragraphs 115 and 116; Case 123/83 BNIC v Clair [1985] ECR 391, paragraph 29; Case 243/83 Binon v Agence et messageries de la presse [1985] ECR 2015, paragraph 44; and of the Court of First Instance in Joined Cases T-213/95 and T-18/96 SCK and FNK v Commission [1997] ECR II-1739, paragraphs 158 to 164.

([142]) See the Commission's First Report on Competition Policy, covering 1971, p. 36, point 20; and Commission Decision 78/59/EEC, Centraal Bureau voor de Rijwielhandel (OJ L 20, 25.1.1978, p. 18, recital 30).

([143]) See recital 38.

([144]) See the judgments of the Court of Justice in Case 19/77 Miller v Commission [1978] ECR 131, paragraph 18 and in Case C-279/87 Tipp-Ex v Commission [1990] I-261; see the judgments of the Court of First Instance in Case T-29/92 SPO v Commission [1995] II-289, paragraphs 356 to 358 and in Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931, paragraph 157.

([145]) See the judgments of the Court of Justice in Case C-185/95 P Baustahlgewerbe [1998] ECR I-8485 and of the Court of First Instance in Joined Cases T-213/95 and T-18/96 SCK and FNK [1997] ECR II-1739, paragraph 56.

ANNEX

The leading suppliers of the various groups and subgroups of electrotechnical products on the wholesale market are [1]:

Wire & Cable	Donné Draad (under Draka Holding), Draka Kabel, CDC (Alcatel group), Etim (Alcatel group), NKF Kabel, Twentsche Kabelfabriek/Eldra (subsidiary)
PVC tubes	Dijka, Draka Polva and Wavin
Fittings	
— cable support systems	Van Geel Systems, Stago and Tehalit, Kempenland (subsidiary of Van Geel)
— cable installation materials	Geisel, Haf, Pflitsch and Wiska
— wiring boxes	Attema and Haf
— switches	Busch Jaeger, Gira, Jung, Niko and Peha
Distribution boxes (box installation)	Attema, Haf, Hager, Holec and Odink & Koenderink (O&K)
Technical material:	
— protective circuit switches	ABB, Klöckner Moeller and Telemécanique
— automatic switches	ABB, Merlin Gerin and Vynckier
— PLCs	AEG/Modicon, Allen Bradey, Mitsubishi, Omron and Siemens
— industrial plug sockets	Balz and Mennekes
— solenoid switches	ABB, Klöckner Moeller and Telemécanique
— junction boxes plastic	Holec, O&K and Weber
Lighting	
— fixtures	Etap, Industria, Luminance, Osram and Philips
— light sources	Osram, Philips, Pope and Sylvania
— emergency lighting	Blessing, Famostar, Kagenaar and Van Lien
Other	
— fans	Itho

[1] The figures are based on the confidential report 'Market research concerning electrotechnical fittings' drawn up on 17 August 1994 by TU (file, p. I-4655 and 4656) and on answers given by various manufacturers/suppliers to requests for information presented on 15 October 1991 and 27 April 1993.