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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 Federatieve 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,

I. FACTS

Having regard to the Treaty establishing the European Community,

A. COMPLAINT

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:

(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⁾.

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

- (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

- (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.

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. Distribution channel

3.2 Wholesalers

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

- (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.

gentleman's agreement between manufacturers, agents and recognised wholesalers. The Agenten-Grossiers-Contract becomes an Agenten-Grossiers-Contract. It was generally agreed that the old state of affairs was good and worked satisfactorily'.

(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

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, Bliet, 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, Bliet, 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 from 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⁾.

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

- (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

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 Bliëk) 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.

The inevitable consequence will be that prices and, therefore, margins will come under increasing pressure'.

(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⁾.

(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⁾.

(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:

(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.

'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.

(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 NAVÉG 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 NAVÉG 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).

supply. The result is that both the suppliers and the wholesalers who do not belong to the FEG are placed at a disadvantage.

- (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

- (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.

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.

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

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,

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

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

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 Groot-handel 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 jaarnaal' (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, Roff, 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.
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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.

COMMISSION DECISION

of 22 December 1999

listing the areas of the Netherlands eligible under Objective 2 of the Structural Funds for the period 2000 to 2006

(notified under document number C(1999) 4918)

(Only the Dutch text is authentic)

(2000/118/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds⁽¹⁾, and in particular the first subparagraph of Article 4(4) thereof,

After consulting the Advisory Committee on the Development and Conversion of Regions, the Committee on Agricultural Structures and Rural Development and the Management Committee for Fisheries and Aquaculture,

Whereas:

- (1) point 2 of the first subparagraph of Article 1 of Regulation (EC) No 1260/1999 provides that Objective 2 of the Structural Funds is to support the economic and social conversion of areas facing structural difficulties;
- (2) the first subparagraph of Article 4(2) of Regulation (EC) No 1260/1999 provides that the Commission and the Member States shall seek to ensure that assistance is genuinely concentrated on the areas most seriously affected and at the most appropriate geographical level;
- (3) Commission Decision 1999/503/EC⁽²⁾ lays down, in accordance with Article 4(2) of Regulation (EC) No 1260/1999, a population ceiling for each Member State under Objective 2 of the Structural Funds for the period 2000 to 2006. The ceiling for the Netherlands is 2 333 000 inhabitants;
- (4) Article 4(4) of Regulation (EC) No 1260/1999 states that the Commission, on the basis of proposals from the Member States and in close concertation with each Member State concerned, is to draw up a list of the areas

eligible under Objective 2 with due regard to national priorities, without prejudice to the transitional support provided for in Article 6(2) of that Regulation;

- (5) Article 4(11) of Regulation (EC) No 1260/1999 provides that each list of areas eligible under Objective 2 is to be valid for seven years from 1 January 2000; however, where there is a serious crisis in a given region, the Commission, acting on a proposal from a Member State, may amend the list of areas during 2003 in accordance with paragraphs 1 to 10 of Article 4, without increasing the proportion of the population within each region referred to in Article 13(2) of that Regulation,

HAS ADOPTED THIS DECISION:

Article 1

The areas in the Netherlands eligible under Objective 2 of the Structural Funds for the period 2000 to 2006 are listed in the Annex hereto.

This list may be amended in the course of 2003.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 22 December 1999.

For the Commission

Michel BARNIER

Member of the Commission

⁽¹⁾ OJ L 161, 26.6.1999, p. 1.

⁽²⁾ OJ L 194, 27.7.1999, p. 58.

ANNEX

LIST OF AREAS ELIGIBLE UNDER OBJECTIVE 2 OF THE STRUCTURAL FUNDS IN THE NETHERLANDS

(2000 to 2006)

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Areas satisfying the criteria of Article 4(7) of Regulation (EC) No 1260/1999			
Twente		<i>Municipality:</i> Enschede (only CBS-buurtten: City Lasonder, Zeggelt Laarens West Veldkamp-Geffert-West Horstlanden-Stadsweide Cromhoffsbleek-Kotman Boswinkel-De Braker Pathmos Stevenvenne Tubantia-Toekomst (except for postcodes 7514 AA, 7514 AB, 7521 AA to 7521 AE, 7521 AG, 7521 AP to 7521 BD) Twekkelveld (except for postcode 7521 DD) Roombeek-Roomveldje Mekkelholt Deppenbroek Wesselerbrink Noord-Oost Wesselerbrink Noord-West (except for postcodes 7544 NA, 7544 NB, 7544 NC, 7544 NE to 7544 NH, 7544 NK to 7544 NZ) Industrie- en havengebied (except for postcodes 7547 AN and 7547 PH))	50 997
Arnhem/Nijmegen		<i>Municipality:</i> Arnhem (only CBS-buurtten: Markt Weverstraat Rijnstraat Janssingel Stationsplein Utrechtsestraat Hommelstraat Spijkerbuurt Boulevardwijk Bij de John Frostbrug Statenkwartier Arnhemse Broek Van Verschuierbuurt Industrieterrein Arnhemse Broek (only the part bounded by Nieuwe Kade, Westervoortsedijk, Nieuwe Havenweg along the extension of 'Nieuwe Haven' up to Pleijweg, Zevenaarseweg, oude Zevenaarseweg, Broekstraat and Badhuisstraat, except for postcode 6827 BG)	99 612

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Arnhem/Nijmegen (cont'd)		Presikhaaf I Presikhaaf II Presikhaaf III St. Marten Klarendal-zuid Klarendal-noord Onder de Linden Sint Janskerkstraat e.o. Meinerswijk en to Praets Malburgen-west Groene weide Kamillehof en Bakenhof Het Duifje Immerloo I Middelgraafaan e.o. Zeegsingel e.o. Immerloo II) <i>Municipality:</i> Nijmegen (only CBS-buurtten: Nijeveld Goffert Grootstal Hatert Biezen Wolfskuil Hees Heseveld Neerbosch Haven- en industrieterrein)	
Utrecht		<i>Municipality:</i> Utrecht (only CBS-buurtten: Welgelegen/Den Hommel (only the part bounded by Martin Luther Kinglaan, Pijperlaan, Oude Leidseweg and Amsterdam-Rijnkanaal) Halve Maan Schepenbuurt/bedrijfsgebied Cartesiusweg Lageweide/Hogeweide Pijlsweerd-Zuid Pijlsweerd-Noord Ondiep Tweede Daalsebuurt Egelantiersstraat/Mariendaalstraat Geuzenwijk De Driehoek Prins Bernhardplein e.o. J.M. de Muinck Keizerlaan Zuilen Noord Loevenhoutsedijk e.o. Taag-/Rubicondreef e.o.	70 669

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Utrecht (cont'd)		Zamenhofdreef e.o. Wolga-/Donaudreef Neckardreef Zambesidreef Bedrijfsgebied Overvecht Bedrijfsgebied Kanaleneiland (only the part bounded by Merwedekanaal, the municipal boundary of Utrecht-Nieuwegein (up to junction with Amsterdam-Rijnkanaal), Papendorpsedijk/ Amsterdam-Rijnkanaal (up to junction with Aziëlaan), Aziëlaan (up to Europalaan), Europalaan, Overste Den Oudelaan up to junction with Dr. M.A. Tegellaan and by Tegellaan up to Merwedekanaal) Transwijk-Zuid Kanaleneiland-Zuid Kanaleneiland-Noord)	
Groot-Amsterdam		<i>Municipality:</i> Amsterdam (only CBS-buurtten: Bijlmer Oost Bijlmer Centrum Amstel III/Bullewijk Oosterparkbuurt Dapperbuurt Transvaalbuurt Weesperzijde Indische buurt West Indische buurt Oost IJ-Eiland Oostelijke Eilanden/Kadijken)	119 057
Agglomeratie 's-Gravenhage		<i>Municipality:</i> 's-Gravenhage (only CBS-buurtten: Huygenspark Rivierenbuurt-zuid Rivierenbuurt-noord Kortenbos Uilebomen Zuidwal Schildersbuurt-west Schildersbuurt-noord Schildersbuurt-oost Transvaalkwartier-noord Transvaalkwartier-midden Transvaalkwartier-zuid Groente- en fruitmarkt Laakhaven-oost Laakhaven-west Spoorwijk Noordpolderbuurt Binckhorst)	96 771

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Groot-Rijnmond		<i>Municipality:</i> Rotterdam (only CBS-buurtten: Delfshaven Bospolder Tussendijken Spangen Nieuwe Westen Middelland Oud-Mathenesse (only the part bounded by Tjalklaan (continuation by Marconiplein), Spaanse Bocht, Spangense Kade and the railway to the north) Schiemond Nieuw Mathenesse Spaanse Polder Nieuwe Werk (only Schiehaven-Mullerpier (at present Lloydkwartier)) Bloemhof Hillesluis Katendrecht Afrikaanderwijk Feijenoord)	120 944
Zuidoost-Noord-Brabant		<i>Municipality:</i> Eindhoven (only CBS-buurtten: Centrum Irisbuurt Cingelshouck Sint-Josephburgh Tuindorp Heistraat Bloemenbuurt Looiakkers Industrierterrein Geldropseweg Burghplan Bonifaciuslaan Tivoli Nieuwe Erven Kruidenbuurt Kerstroosplein De Lakerlopen Het Wasven Het Busselke Poeijerstraat Het Hofke Herzenbroeken De Doornakkers Limbeek, Fellenoord Lijmbeekstraat Hemelrijken Bakkerstraat Het Groenewoud)	50 578

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Zuid-Limburg		<i>Municipality:</i> Maastricht (only CBS-buurtten: City (only the part bounded by Stadhuisstraat, Markt (outer boundary), Hoenderstraat, Maasboulevard (west side)) Jekerkwartier (only the part bounded by Maasboulevard (west side), up to Oude Minderbroeders) Statenkwartier (only the part bounded by Capucijnerstraat, Apostelengang, Bogaardenstraat, Achter de Barakken, Boschstraat) Boschstraatkwartier (only the part bounded by Boschstraat, Bassin(kade), Van Hasseltkade, Kliene Gracht, Stadhuisstraat Sint Maartenspoort Wijck (only the part bounded by Wijckerwal, Plein 1992 (west side), Ruiterij, Hoogbrugstraat, Akerstraat, Heugemerweg, Stellalunet, Daemslunet, Avenue Céramique (including adjacent museums)) Brusselsepoort Mariaberg (only the part bounded by Beeldsnijdersdreef/Borneostraat, Javastraat, Tongerseweg, Hertogsingel) Dousberg-Hazendans (only the part bounded by Hesperstraat, Keramieksingel and the Belgian border) Malpertuis Caberg Oud-Caberg Malberg Boschpoort Boscherveld Wijckerpoort Akerpoort Wittevrouwenveld (only the part bounded by Marathonweg, Stadionweg, Terblijerweg, behind the constructions to the east, along a line from north to south from Terblijerweg, the east side of the Oostermaas cemetery and the junction Bergmansweg-Bergerstraat) Nazareth Limmel Scharn (only the part bounded by Oranjeplein, the A2-E25 (President Rooseveltlaan), Europaplein up to JF Kennedysingel and the north-east curve of Europaplein) Amby (only the part bounded by the A2-E25 (west side)) Beatrixhaven Meerssenhoven Randwijck (only the part bounded by Limburglaan, Randwijcksingel, Ittersondomein, J.W. Beyenlaan, Antoin Pinaylaan, Oeslingerbaan) Heer (only the part bounded by Europaplein (east side), Philipsweg, the A2-E25 (east side))	49 506

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	

Areas satisfying the criteria of Article 4(9)(b) of Regulation (EC) No 1260/1999

Zuidwest-Overijssel		<i>Municipalities:</i> Olst Deventer/Diepenveen (except for census areas (CBS-telgebieden): Deventer 0000-0809 and Diepenveen 0000-0100) Raalte (except for census areas (CBS-telgebieden): 0000-0106) Bathmen Holten	37 400
Twente		<i>Municipalities:</i> Hellendoorn (except for census areas (CBS-telgebieden): 0000, 0100-0105, 0201, 0202) Den Ham Wierden (only census areas (CBS-telgebieden): 0405, 0300-0303, 0406-0409) Borne (only census areas (CBS-telgebieden): 0103 and 0104) Markelo Diepenheim Ambt Delden Haaksbergen (except for census areas (CBS-telgebieden): 0001-0091) Enschede (except for census areas (CBS-telgebieden): 0000-0008, 0010-0103, 0200-0207, 0300, 0301, 0400-0406, 0500-0503, 0600-0608, 0700-0703, 0800-0808, 0902, 0906, 0908) Losser (except for census areas (CBS-telgebieden): 0000-0002)	68 100
Veluwe		<i>Municipalities:</i> Ede (only census areas (CBS-telgebieden): 0305-0306, 1301-1302, 2031-2032, 4031-4034, 5001, 5031, 6001, 6031, 7031, 7051, 9052, 9053) Scherpenzeel Barneveld (only census areas (CBS-telgebieden): 0001, 0004-0009, 0103, 0107, 0200-0203, 0206-0210) Ermelo (only census areas (CBS-telgebieden): 0000-0001, 0006, 0009, 0100, 0105-0109) Nunspeet (only census areas (CBS-telgebieden): 0005, 0008-0009, 0100-0101, 0107-0109)	43 800

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Veluwe (cont'd)		Apeldoorn (only census areas (CBS-telgebieden): 0100, 0101, 0706-0709, 0800, 0802-0809, 0900, 0902-0904, 0906-0909) Brummen (only census areas (CBS-telgebieden): 0000-0005, 0007-0009, 0102, 0108-0109)	
Achterhoek		<i>Municipalities:</i> Gorssel (only census areas (CBS-telgebieden): 0001-0002, 0006, 0008-0009, 0100-0101, 0106-0109) Warnveld (only census areas (CBS-telgebieden): 0000, 0008-0009) Zutphen (only census areas (CBS-telgebieden): 0001-0002, 0005, 0007, 0100, 0200, 0300) Vorden Hengelo Lochem Borculo Ruurlo Neede Eibergen Groenlo Lichtenvoorde (only census areas (CBS-telgebieden): 0000-0005, 0007-0009, 0100-0102, 0107-0109) Winterswijk Aalten (only census areas (CBS-telgebieden): 0000, 0003, 0009, 0100, 0106-0108, 0201-0203) Doetinchem (only census areas (CBS-telgebieden): 0000, 1100, 3000, 4000, 5000, 5900, 6000, 6800, 6900, 7000, 8000, 8100, 8800, 8900, 9000, 9100, 9200, 9300, 9500, 9700, 9800, 9900) Zelhem (only census areas (CBS-telgebieden): 0002-0009, 0011)	1 37 000
Utrecht		<i>Municipalities:</i> Amersfoort (only postcodes: 3815-3815 VV, 3816-3816 BW, 3835 PA-PD, 3836) Amerongen (only postcodes: 3922 GG-GK, 3931, 3958 AA-JD, 3959-3959 BJ) Leersum (only postcodes: 3931, 3956-3956 XW) Leusden (only postcodes: 3707, 3791-3791 VX, 3818, 3831-3831 WZ, 3832-3832 RX, 3833 GN-LD, 3835 PG-PT, 3931-3931 XD)	30 100

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Utrecht (cont'd)		Maarn Renswoude Rhenen (only postcodes: 3911-3911 XD, 3921 AH-EB) Woudenberg	
Noordoost-Noord- Brabant		<i>Municipalities:</i> Veghel Uden Boekel Sint Anthonis Mill en Sint Hubert Boxmeer Landerd Bernheze Schijndel (only postcodes: 5481 AA-AE, 5481 AG-AH, 5481 AJ-AL, 5481 AN, 5481 AP, 5481 AR, 5481 BC, 5481 BE, 5481 BH, 5481 BJ-BN, 5481 BP, 5481 BR-BT, 5481 BV-BX, 5481 BZ, 5481 CA-CD, 5481 CJ, 5481 CK, 5481 CZ, 5481 EB, 5481 ED-EE, 5481 EG-EH, 5481 EJ-EL, 5481 JD, 5481 JE, 5481 JG, 5481 KA-KC, 5481 MH, 5481 PK, 5481 PM-PN, 5481 PP, 5481 SB, 5481 SC, 5481 SE, 5481 SG, 5481 SJ-SM, 5481 VB-VE, 5481 VG-VH, 5481 VJ-VN, 5481 VP, 5481 VS, 5481 XA-XB, 5481 XD-XE, 5481 XG-XH, 5481 XJ-XN, 5481 XP, 5481 XR-XS, 5481 XW, 5481 XX, 5481 XZ 5482 AA-AE, 5482 AG-AH, 5482 AJ-AN, 5482 AP, 5482 BA-BE, 5482 BG-BH, 5482 BJ-BN, 5482 BP, 5482 BR-BT, 5482 BV-BX, 5482 CA-CE, 5482 CG-CH, 5482 CJ-CN, 5482 CP, 5482 CR-CT, 5482 CV-CX, 5482 DA-DE, 5482 DL, 5482 DX, 5482 EA-EE, 5482 EH, 5482 EJ-EN, 5482 EP, 5482 ER-ET, 5482 EV-EX, 5482 EZ, 5482 GA-GE, 5482 GG-GH, 5482 GJ-GN, 5482 GP, 5482 GR-GT, 5482 GV-GX, 5482 GZ, 5482 HA-HE, 5482 HG-HH, 5482 HK-HN, 5482 HP, 5482 HR-HS, 5482 HZ, 5482 JA-JD, 5482 JG-JH, 5482 JJ-JN, 5482 JP, 5482 JR-JT, 5482 JV-JX, 5482 JZ, 5482 KA-KE, 5482 KG-KH, 5482 KJ, 5482 KK-KN, 5482 KP, 5482 KR, 5482 LA-LE, 5482 LG-LH, 5482 LJ-LN, 5482 LP, 5482 LR-LT, 5482 LV-LX, 5482 LZ, 5482 MZ, 5482 NE, 5482 NJ, 5482 NL-NM, 5482 RH, 5482 SB-SC, 5482 SE, 5482 SG, 5482 SX, 5482 SW, 5482 TA-TB, 5482 TD-TE, 5482 TG-TH, 5482 TJ-TM, 5482 TX, 5482 TZ, 5482 VA-VE, 5482 VG-VH, 5482 VJ-VN, 5482 VR, 5482 VV-VX, 5482 VZ, 5482 WA-WE, 5482 WG-WH, 5482 WK-WL, 5482 WN, 5482 WP, 5482 WZ, 5482 XA-XE, 5482 XG, 5482 XK-XN, 5482 XS-XT, 5482 XV-ZX, 5482 ZA, 5482 ZE, 5482 ZG-ZH, 5482 ZL-ZN, 5482 ZP, 5482 ZR-ZT, 5482 ZV-ZX, 5482 ZZ)	188 000

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Noord-Limburg		<i>Municipalities:</i> Venray (except for postcodes: 5801 AA-BS, 5801 BW-BZ, 5801 CA-CZ, 5801 DC-DE, 5801 DM, 5801 DP, 5801 DV-DZ, 5801 EA-EE, 5801 EJ-EZ, 5801 GB-GC, 5801 GE-GG, 5801 GJ, 5801 GL-GZ, 5801 HA-KS, 5801 LB-LE, 5801 MA-MC, 5801 ME, 5801 MK, 5801 PJ-RZ, 5801 SB-SJ, 5801 SL-SN, 5801 SR-SZ, 5801 TA-TP, 5801 TT-TZ, 5801 VB-VM, 5801 VR-VZ, 5801 XA-XZ, 5802 AA-AJ, 5802 AL-BW, 5802 CA-CW, 5802 CZ, 5802 DA, 5802 EA-EX, 5802 GA-GL, 5802 GS-GV, 5802 HA-HR, 5802 JA-JW, 5802 KA-KS, 5802 LA-LX, 5802 MA, 5802 NA-NT, 5803 AA-BW, 5803 CA-CD, 5803 CH-CW, 5803 DC-DJ, 5803 EK-EL, 5803 GA, 5803 HA-HV, 5803 HZ, 5803 JC-KZ, 5803 LA-LC, 5803 LE, 5803 LJ-LZ, 5803 MA, 5803 MZ, 5804 AA-BX, 5804 CD-CH, 5804 CN, 5807 AA-AV, 5807 BA-BW, 5807 BZ, 5807 CC, 5807 EA, 5807 ED-EE, 5807 EL-EM, 5807 EP-ES, 5807 EW, 5812 PB, 5815 CN, 5815 CR-CS, 5815 CV, 5815 EH-EJ, 5817 AA, 5817 AC-AH, 5817 AK-AL) Horst Sevenum Grubbevorst Venlo (only postcodes: 5928 LC-LL, 5928 MX, 5928 NA-PZ, 5928 RA-RE, 5928 WK, 5971 NP, 5975 PP, 5975 PV) Helden Meijel	66 300
Midden-Limburg		<i>Municipality:</i> Nederweert (except for postcodes: 6031 BK-BZ, 6031 CA-CZ, 6031 EA-EL, 6031 EN-ER, 6031 GA-GW, 6031 LC-LP, 6031 NN-NZ, 6031 PA-PZ, 6031 RA, 6031 RC-RH, 6031 RS, 6031 TA-TE, 6031 TZ, 6031 VA-VZ, 6031 WB-WL, 6031 XA-XG, 6031 XJ-XL, 6031 XN-XZ)	6 500

Areas satisfying the criteria of Article 4(9)(c) of Regulation (EC) No 1260/1999

Oost-Groningen	<i>Municipality:</i> Bellingwedde		142 583
Delfzijl en omgeving		<i>Municipality:</i> Delfzijl	30 743

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Overig Groningen		<i>Municipalities:</i> Groningen Leek Hoogezand/Sappemeer Slochteren (only Rengerspark (postcode 9615)) Eemsmond (only the 'gehuchten': Eemshaven — postcode 9979, Uithuizermeeden — 9982, Roodeschool — 9983, Oudeschip — 9984)	226 255
Noord-Friesland		<i>Municipalities:</i> Boarnsterhim Franekeradeel Harlingen Leeuwarden Menaldumadeel	155 220
Zuidwest-Friesland		<i>Municipalities:</i> Lemsterland Sneek Wymbritseradiel	56 992
Zuidoost-Friesland		<i>Municipalities:</i> Heerenveen Opsterland Skarsterlan Smallingerland Weststellingwerf	168 451
Noord-Drenthe		<i>Municipalities:</i> Assen Noordenveld	84 537
Zuidoost-Drenthe		<i>Municipalities:</i> Emmen Coevorden (only postcodes beginning with: 7741, 7742, 7751, 7753, 7754 M, 7754 N, 7755, 7756, 7844, 7845 TD, 7845 TG, 7864 P, 7864 TH, 7864 TJ, 7864 TK, 7918, except for 7754 MG and 7754 MJ)	123 188
Zuidwest-Drenthe		<i>Municipalities:</i> De Wolden Hoogeveen Meppel	100 656

COMMISSION DECISION**of 22 December 1999****listing the areas of Belgium eligible under Objective 2 of the Structural Funds for the period 2000 to 2006***(notified under document number C(1999) 4944)***(Only the French and Dutch texts are authentic)***(2000/119/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds⁽¹⁾, and in particular the first subparagraph of Article 4(4) thereof,

After consulting the Advisory Committee on the Development and Conversion of Regions, the Committee on Agricultural Structures and Rural Development and the Management Committee for Fisheries and Aquaculture,

Whereas:

- (1) point 2 of the first subparagraph of Article 1 of Regulation (EC) No 1260/1999 provides that Objective 2 of the Structural Funds is to support the economic and social conversion of areas facing structural difficulties;
- (2) the first subparagraph of Article 4(2) of Regulation (EC) No 1260/1999 provides that the Commission and the Member States shall seek to ensure that assistance is genuinely concentrated on the areas most seriously affected and at the most appropriate geographical level;
- (3) Commission Decision 1999/503/EC⁽²⁾ lays down, in accordance with Article 4(2) of Regulation (EC) No 1260/1999, a population ceiling for each Member State under Objective 2 of the Structural Funds for the period 2000 to 2006. The ceiling for Belgium is 1 269 000 inhabitants;
- (4) Article 4(4) of Regulation (EC) No 1260/1999 states that the Commission, on the basis of proposals from the Member States and in close concertation with each Member State concerned, is to draw up a list of the areas

eligible under Objective 2 with due regard to national priorities, without prejudice to the transitional support provided for in Article 6(2) of that Regulation;

- (5) Article 4(11) of Regulation (EC) No 1260/1999 provides that each list of areas eligible under Objective 2 is to be valid for seven years from 1 January 2000; however, where there is a serious crisis in a given region, the Commission, acting on a proposal from a Member State, may amend the list of areas during 2003 in accordance with paragraphs 1 to 10 of Article 4, without increasing the proportion of the population within each region referred to in Article 13(2) of that Regulation,

HAS ADOPTED THIS DECISION:

Article 1

The areas in Belgium eligible under Objective 2 of the Structural Funds for the period 2000 to 2006 are listed in the Annex hereto.

This list may be amended in the course of 2003.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 22 December 1999.

For the Commission

Michel BARNIER

Member of the Commission

⁽¹⁾ OJ L 161, 26.6.1999, p. 1.

⁽²⁾ OJ L 194, 27.7.1999, p. 58.

ANNEX

LIST OF AREAS ELIGIBLE UNDER OBJECTIVE 2 OF THE STRUCTURAL FUNDS IN BELGIUM

(2000 to 2006)

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	

Areas satisfying the provisions of Article 4(6) of Regulation (EC) No 1260/1999

Dinant		whole region	97 600
Philippeville		whole region	60 600

Areas satisfying the provisions of Article 4(7) of Regulation (EC) No 1260/1999

Région Bruxelles-Capitale/Brussels Hoofdstedelijk Gewest		<i>Communes:</i> Anderlecht (only statistical sectors: A07-Birmingham B10-Rosée-Est/Dauw-Oost B11-Rosée-Ouest/Dauw-West B17-Abattoir/Slachthuis B20-Conseil-Nord/Raad-Noord B22-Brogniez-Sud/Brogniez-Zuid B23-Conseil-Sud/Raad-Zuid B241 Révision-Sud/Herziening-Zuid B25-Révision-Nord/Herziening-Noord B31-Albert I-Immeubles/Albert I-flatgebouwen B321 Albert I-Quartier/Albert I-buurt B332 Goujons/Grondels B372 Deux Gares/Tweestations) Bruxelles/Brussel (only statistical sectors: A02-Saint-François Xavier/Sint-Franciscus Xaverius A03-Bon Secours — Palais du Midi/Bijstand — Zuidpaleis A04-Notre-Dame de la Chapelle/Kapellekerk A21-Anneessens (place)/Anneessensplein A22-Senne (rue de la)/Zennestraat A23-Nouveau marché au grain/Nieuwe Graanmarkt Varkensmarkt A32-Congrès-Gare/Congresstation A70-Blaes (rue)-Sud/Blaesstraat-Zuid A71-Blaes (rue)-Centre/Blaesstraat-Centrum A72-Saint-Thomas (institut)/Sint-Thomas (instituut) A822 Rue des commerçants/Koopliedenstraat A83-E. Jacqmain (boulevard)-Ouest/E. Jacqmainlaan-West D600 Parvis Saint-Roch/Sint-Rochus Voorplein D610 Anvers (chaussée d')-Sud/Antwerpse Steenweg-Zuid	146 167
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NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Région Bruxelles-Capitale/Brussels Hoofdstedelijk Gewest (<i>cont'd</i>)		D62-Anvers (chaussée d')-Nord/Antwerpse Steenweg-Noord D631 Allée verte — Bassin Vergote/Groendreef — Vergote Dok D64-Masui (place)-Nord/Masuiplein-Noord D672 Quai de Willebroeck/Willebroekse Kaai D69-Tour et taxis/Turn en Taxi) Forest/Vorst (only statistical sectors: A373 Charroi (rue de)/Gerijstraat A41-Pont de Luttre-Ouest/Luttrebrug-West A60-Saint-Antoine/Sint-Antonius) Saint-Gilles/Sint-Gillis (only statistical sectors: Zuid A13-Dethy (rue)/Dethystraat A201 Angleterre (rue d')/Engelandstraat A22-Régies/Regies A23-Roi (avenue du)/Koningslaan A252 Danemark (rue de)/Denemarkenstraat A291 Gare du Midi/Zuidstation A422 Crickx (rue)/Crickxstraat A612 Jamar A623 France (rue de)/Frankrijkstraat) Molenbeek-Saint-Jean/Sint-Jans-Molenbeek (only statistical sectors: A00-Centre/Centrum A011 Canal-Sud/Kanaal-Zuid A02-Brunfaut (quartier)/Brunfautwijk A03-Ransfort A041 Quatre Vents/Vier Winden A05-Saint-Joseph/Sint-Jozef A10-Duchesse de Brabant/Hertogin van Brabant A11-Industrie Zuid A13-Birmingham-Nord/Birmingham-Noord A141 Indépendance/Onafhankelijkheid A152 Etangs noirs/Zwarte Vijvers A172 Gare Ouest/Weststation A21-Marie-Jose Blocs/Marie-José-Blokken A28-Chemin de fer/Spoorweg A60-Laekenveld/Lakenveld A611 Mexico A63-Dubrucq-Nord/Dubrucq-Noord A672 Ulens A71-Piers A72-Lavallée A732 Canal-Nord/Kanaal-Noord) Saint-Josse-ten-Noode/Sint-Joost-ten-Noode (only statistical sectors: A05-Houwaert A10-Saint-François/Sint-Franciscus	

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Région Bruxelles-Capitale/Brussels Hoofdstedelijk Gewest (cont'd)		A12-Saint-Lazare/Sint-Lazarus A13-Rogier A14-Prairie/Weide A18-Jardin botanique/Kruidtuin A20-Nord/Noord A30-Manhattan A41-Bossuet) Schaerbeek/Schaarbeek (only statistical sectors: A021 Houffalize (place)/Houffalizeplein A04-L'Olivier (rue)/L'Olivierstraat A05-Royale Sainte-Marie (rue)/Koninklijke Sint-Mariastraat Brabantstraat A41-Vanderlinden (rue)/Vanderlindenstraat A421 Palais (rue de)/Paleizenstraat A43-Gare du Nord/Noordstation A44-Reine (avenue)/Koninginnelaan A45-Stephenson (place)/Stephensonplein A612 Brichaut (rue de)/Brichautstraat)	
Antwerpen		<i>Commune:</i> Antwerpen (only statistical sectors: C41-Dambruggestraat -N. (Stationswijk) C42-De Zavel (Noordwijk) C43-St. Willebrordus (Noordwijk) C44-Potgieterstraat (Noordwijk) C45-Stuivenbergziekenhuis (Noordwijk) C24-Provinciestraat (Stationswijk) H40-St.-Amandus (Noordwijk) H41-Stuivenberg-West H43-St.-Jansplein — Trapstraat (Noordwijk) H44-Stuivenbergplein H83-Slachthuiswijk H84-Dam (Dam-Schijnpoort) H89-Dam — Lobroekdok (Schijnpoort) J83-Duboisstraat (Noordwijk) J80-Luchtbal-Zuid J81-Luchtbal-Noord J820-IJzerenlaan (Dam-Schijnpoort) S00-Borgerhout-Gemeentehuis S01-Fonteinstraat S02-Den Bleekhof S03-Kroonstraat-West S04-Het Laar S05-Kattenberg S30-De Peperbus S31-St.-Anna Q001-Oud-Merksem Q021-Laatlos Q052-Eigen Heerd Q072-Duivelshoek Q49-Sportpaleis Q17-Merksem-Dokken)	63 827

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Gent		<i>Commune:</i> Gent (only statistical sectors: A040-Briel A10-Sint-Macharius A50-Drongensteenweg A531-Rooigem A542-Groendreef A60-Voormuide A62-Ham A63-Tolhuis A64-Blaisantvest A801-Wondelgemstraat A812-Rabot A873-Rabot Station C72-Muidebrug C772-Vormingsstation-Oost C800-Muide E32-Dampoort)	33 282
Verviers		<i>Communes:</i> Dison Herve (only the industrial zone of Petit-Rechain/Chaineux) Verviers Welkenraedt (only the industrial zone of Plenesses) Thimister-Clermont (only the industrial zone of Plenesses)	67 285

Areas satisfying the provisions of Article(4)(8) of Regulation (EC) No 1260/1999

Oostende		<i>Communes:</i> Bredene (except for statistical sector A21-Bredene-aan-Zee-West Villawijk)	11 456
Veurne		<i>Communes:</i> Nieuwpoort (excluding the former communes of Sint-Joris en Ramskapelle)	8 722

Areas satisfying the provisions of Article(4)(9)(c) of Regulation (EC) No 1260/1999

Turnhout		<i>Communes:</i> Balen Dessel Mol	58 864
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NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Hasselt		<i>Communes:</i> Beringen (only the former communes of Beringen, Paal, Beverlo) Genk (only the former commune of Waterschei-Zwartberg and the statistical sectors: A370-Winterslag Koolmijn A391-Zonhoverheide A500-Oud-Termien A579-Industriezone-Zuid A590-De Maten A775-Klein Langerlo A490-Domein Bokrijk A41-Hasseltweg) Ham (only the former commune of Oostham) Heusden-Zolder Diepenbeek (only statistical sectors: A291-Ginderover — LUC A20-Royerheide A490-Bijenberg) Tessenderlo (only statistical sector A10-Hulst Industriezone) Zutendaal (only statistical sectors: A074-Industriezone, A085-Zoete Dal — Vliegveld) Sint-Truiden (only statistical sectors: A072-Industriezone Schurhoven A100-Bevingen A199-Industrieterrein Brustem A413-Zepperenweg — Bouterhoven H090-Ordingen verspreide bewoning)	86 206
Maaseik		<i>Communes:</i> Lommel (only statistical sectors: A826-Balendijk A262-Blauwe Meer A270-Pidpa A291-Kattenbosserheide — Testgebied A40-Lommel-Werkplaatsen A41-Glasfabriek A422-Stevensvenne A433-Blauwe Kei A471-Maatheide-Dorperheide A492-Blauwe Kei-Russendorp A837-Heserbergen A872-Philips A200-Kattenbos) Houthalen-Helchteren (only the former commune of Houthalen) Dilsen-Stokkem (only the former communes of Dilsen, Rotem, Lanklaar)	42 749

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Tongeren		<i>Communes:</i> Bilzen Borgloon Heers Herstappe Hoeselt Kortesse Tongeren Voeren Maasmechelen (only the former communes of Mechelen-aan-de-Maas, Opgrimbie, Eisdien)	123 522
Brugge		<i>Communes:</i> Blankenberge (only Blankenberge-Centrum (31004A)) Brugge (only Zeebrugge/Lissewege (31005B)) Knokke (only statistical sectors: B00-Heist-Centrum B02-Molenhoek — Station B03-De Bolle B04-Tuinwijk B091-Heist — Polders B10-Heist — Zeedijk)	23 835
Oostende		<i>Communes:</i> Middelkerke (only statistical sectors: A031-Middelkerke Bad en Casino A052-Middelkerke Bad — West A080-Duinen A210-Middelkerke-West A260-Jonckhofwijk H20-Westende-Bad — H. Jaspalaan-Noord H21-Westende-Bad — H. Jaspalaan-Zuid J00-Lombardsijde-Centrum J08-Duinen J091-Lombardsijde — Polder) Oostende (only statistical sectors: A001-Oostende-Centrum A01-Post — Mercatordok A03-Langestraat A041-Albert-I-Promenade-Oost A10-Hazegras A19-Maria Hendrikapark A242-Albert-I-Promenade-West	26 070

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Oostende (<i>cont'd</i>)		A501-H. Hartplein A59-Renbaan A572-Troonstraat B-Oostende-Haven F721-Mariakerke — Strandplein F749-Raversijdestraat F780-Mariakerke — Duin F900-Raversijde-Oost F92-Raversijde-West F939-Raversijde — Vliegveld) De Haan (only statistical sectors: A11-De Haan — Noordhoek A12-De Haan — Concessie Klemskerke A18-De Haan — Duinen — Golf B11-De Haan — Concessie Vlissegem B183-De Haan — Nieuwmunster B19-De Haan Duinen — Zwarte Kiezel C02-Zeedijk C08-Wenduine Duinen-West C091-Wenduine Polders)	
Veurne		<i>Communes:</i> De Panne (only statistical sectors: A00-De Panne-Centrum A010-Veurnestraat-Duinenstraat A052-Westhoek A10-Zeedijk A12-Westeinde) Koksijde (only statistical sectors: A00-Koksijde-Dorp A09-Vliegveld A10-Koksijde-Bad A11-Hoge Blekker A19-Doornpanne A20-Sint-Idesbald — Kern A22-Sint-Idesbald — West B10-Oostduinkerke-Bad B11-Blekker Duinpark — Sint-Andries B191-Zeeberm B21-Groenendijk-Bad B262-Karhuizerduinen)	13 552
Huy		<i>Communes:</i> Amay Villers-le-Bouillet (only Sections B6-B7-Cabentes, B1-Fays, A1-Vieux-Clocher, A2-industrial zone of Villers) Wanze (only the industrial zone of Vinalmont) Engis	19 387

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Luik		<i>Communes:</i> Beyne-Heusay Herstal Luik Oupeye (only the former communes of Hermée, Hermalle, Oupeye, Vivegnis) Saint-Nicolas Seraing Grâce-Hollogne Flémalle	385 870

COMMISSION DECISION

of 22 December 1999

listing the areas of Finland eligible under Objective 2 of the Structural Funds for the period
2000 to 2006

(notified under document number C(1999) 4945)

(Only the Finnish text is authentic)

(2000/120/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds⁽¹⁾, and in particular the first subparagraph of Article 4(4) thereof,

After consulting the Advisory Committee on the Development and Conversion of Regions, the Committee on Agricultural Structures and Rural Development and the Management Committee for Fisheries and Aquaculture,

Whereas:

- (1) point 2 of the first subparagraph of Article 1 of Regulation (EC) No 1260/1999 provides that Objective 2 of the Structural Funds is to support the economic and social conversion of areas facing structural difficulties;
- (2) the first subparagraph of Article 4(2) of Regulation (EC) No 1260/1999 provides that the Commission and the Member States shall seek to ensure that assistance is genuinely concentrated on the areas most seriously affected and at the most appropriate geographical level;
- (3) Commission Decision 1999/503/EC⁽²⁾ lays down, in accordance with Article 4(2) of Regulation (EC) No 1260/1999, a population ceiling for each Member State under Objective 2 of the Structural Funds for the period 2000 to 2006. The ceiling for Finland is 1 582 000 inhabitants;
- (4) Article 4(4) of Regulation (EC) No 1260/1999 states that the Commission, on the basis of proposals from the Member States and in close concertation with each Member State concerned, is to draw up a list of the areas

eligible under Objective 2 with due regard to national priorities, without prejudice to the transitional support provided for in Article 6(2) of that Regulation;

- (5) Article 4(11) of Regulation (EC) No 1260/1999 provides that each list of areas eligible under Objective 2 is to be valid for seven years from 1 January 2000; however, where there is a serious crisis in a given region, the Commission, acting on a proposal from a Member State, may amend the list of areas during 2003 in accordance with paragraphs 1 to 10 of Article 4, without increasing the proportion of the population within each region referred to in Article 13(2) of that Regulation,

HAS ADOPTED THIS DECISION:

Article 1

The areas in Finland eligible under Objective 2 of the Structural Funds for the period 2000 to 2006 are listed in the Annex hereto.

This list may be amended in the course of 2003.

Article 2

This Decision is addressed to Finland.

Done at Brussels, 22 December 1999.

For the Commission

Michel BARNIER

Member of the Commission

⁽¹⁾ OJ L 161, 26.6.1999, p. 1.⁽²⁾ OJ L 194, 27.7.1999, p. 58.

ANNEX

LIST OF AREAS ELIGIBLE UNDER OBJECTIVE 2 OF THE STRUCTURAL FUNDS IN FINLAND

(2000 to 2006)

NUTS III region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	

Areas satisfying the provisions of Article 4(5) of Regulation (EC) No 1260/1999

Varsinais-Suomi		Subregion: Vakka-Suomen	42 015
Satakunta		Subregions: Rauman Porin	177 914
Kanta-Häme		Whole region	164 914
Pirkanmaa		Subregions: Etelä-Pirkanmaan Itä-Pirkanmaan Koillis-Pirkanmaan Pohjois-Pirkanmaan	88 772
Päijät-Häme		Whole region	197 443
Kymenlaakso		Subregion: Kotka-Haminan	89 600
Etelä-Karjala		Subregions: Lappeenrannan Imatran	111 010

Areas satisfying the provisions of Article 4(6) of Regulation (EC) No 1260/1999

Keski-Suomi		Subregions: Jyväskylän Kaakkoisen Keski-Suomen Keuruun Jämsän Äänekosken	222 087
Keski-Pohjanmaa		Subregion: Kokkolan	52 694

NUTS III region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Etelä-Pohjanmaa		<i>Subregions:</i> Suupohjan Eteläisten seinänaapurien Kuusiokuntien Järviseudun	108 779
Pohjanmaa		<i>Municipality:</i> Maksamaa	1 133
Pohjois-Pohjanmaa		<i>Subregions:</i> Ylivieskan <i>Municipality:</i> Hailuoto	41 153
Varsinais-Suomi		<i>Subregions:</i> Åboland-Turunmaan <i>Municipalities:</i> Rymättylä Velkua	25 325
Satakunta		<i>Subregions:</i> Pohjois-Satakunnan	30 776
Etelä-Karjala		<i>Subregions:</i> Länsi-Saimaan Kärkikuntien	27 094

Areas satisfying the provisions of Article 4(7) of Regulation (EC) No 1260/1999

Pohjois-Pohjanmaa		<i>Municipality:</i> Oulu	115 493
Varsinais-Suomi		<i>Municipality:</i> Turku (only the urban areas: Varissuo, Pääskyvuori, Lauste, Halinen, Kurala, Itäharju, Kohmo, Huhkola, Vaala, Skanski, Kupittaa)	29 221
Pirkanmaa		<i>Municipality:</i> Tampere (only the urban area of Hervanta)	20 654

NUTS III region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Areas satisfying the provisions of Article 4(9)(b) of Regulation (EC) No 1260/1999			
Pohjanmaa		<i>Municipalities:</i> Maalahti (only the islands) Mustasaari (only the islands; also Köklot, Raippaluoto, Värilax (*)) Oravainen (only the islands; also Ovkangar (*)) Luoto (only the islands; also Eugmo (*))	4 614
Uusimaa (Maakunta)		<i>Municipalities:</i> Inkoo (only the islands; also Storramsjö-Hirdal, Barö, Rafsö, Degerö, Stavö (*)) Tammisaari (only the islands; also Bromarv, Trollshovda, Lindö, Svedja-Öby, Odensö-Norrby-Båsa (*))	2 529
Itä-Uusimaa		<i>Municipalities:</i> Porvoo (only the islands; also Emäsalo, Vässölandet, Tirmo-Fagersta (*)) Sipoo (only the islands; also Kitö, Löparö (*)) Pernaja (only the islands; also Sarvsalö, Kabböle-Isnäs, Tjuvo, Strömsland (*)) Ruotsinpyhtää (only the islands; also Vahterpää, Gäddbergsö (*))	2 866
Varsinais-Suomi		<i>Municipalities:</i> Halikko (only the islands; also Angelniemi, Angelansaari (*)) Särkisalo (only the islands; also Isoluoto, Kaukassalo (*)) Askainen (only the islands; also Lempisaari, Livonsaari (*)) Merimasku (only the islands; also Otavan saari (*)) Piikkiö (only the islands)	2 294
Ahvenanmaa/Åland	<i>Municipality:</i> Mariehamn		15 091

(*) Islands and other areas with a fixed road connection to the mainland.

COMMISSION DECISION**of 22 December 1999****listing the areas of Denmark eligible under Objective 2 of the Structural Funds for the period 2000 to 2006***(notified under document number C(1999) 4946)***(Only the Danish text is authentic)**

(2000/121/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds⁽¹⁾, and in particular the first subparagraph of Article 4(4) thereof,

After consulting the Advisory Committee on the Development and Conversion of Regions, the Committee on Agricultural Structures and Rural Development and the Management Committee for Fisheries and Aquaculture,

Whereas:

- (1) point 2 of the first subparagraph of Article 1 of Regulation (EC) No 1260/1999 provides that Objective 2 of the Structural Funds is to support the economic and social conversion of areas facing structural difficulties;
- (2) the first subparagraph of Article 4(2) of Regulation (EC) No 1260/1999 provides that the Commission and the Member States shall seek to ensure that assistance is genuinely concentrated on the areas most seriously affected and at the most appropriate geographical level;
- (3) Commission Decision 1999/503/EC⁽²⁾ lays down, in accordance with Article 4(2) of Regulation (EC) No 1260/1999, a population ceiling for each Member State under Objective 2 of the Structural Funds for the period 2000 to 2006. The ceiling for Denmark is 538 000 inhabitants;
- (4) Article 4(4) of Regulation (EC) No 1260/1999 states that the Commission, on the basis of proposals from the Member States and in close concertation with each Member State concerned, is to draw up a list of the areas

eligible under Objective 2 with due regard to national priorities, without prejudice to the transitional support provided for in Article 6(2) of that Regulation;

- (5) Article 4(11) of Regulation (EC) No 1260/1999 provides that each list of areas eligible under Objective 2 is to be valid for seven years from 1 January 2000; however, where there is a serious crisis in a given region, the Commission, acting on a proposal from a Member State, may amend the list of areas during 2003 in accordance with paragraphs 1 to 10 of Article 4, without increasing the proportion of the population within each region referred to in Article 13(2) of that Regulation,

HAS ADOPTED THIS DECISION:

Article 1

The areas in Denmark eligible under Objective 2 of the Structural Funds for the period 2000 to 2006 are listed in the Annex hereto.

This list may be amended in the course of 2003.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 22 December 1999.

For the Commission

Michel BARNIER

Member of the Commission⁽¹⁾ OJ L 161, 26.6.1999, p. 1.⁽²⁾ OJ L 194, 27.7.1999, p. 58.

ANNEX

LIST OF AREAS ELIGIBLE UNDER OBJECTIVE 2 OF THE STRUCTURAL FUNDS IN DENMARK

(2000 to 2006)

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	

Areas satisfying the provisions of Article 4(6) of Regulation (EC) No 1260/1999

Bornholms amt		Whole region	44 359
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Areas satisfying the provisions of Article 4(8) of Regulation (EC) No 1260/1999

Nordjyllands amt		Municipalities: Hirtshals Læsø Skagen	29 560
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Areas satisfying the provisions of Article 4(9)(c) of Regulation (EC) No 1260/1999

Vestsjællands amt		Municipalities: Skælskør (only the islands, Agersø, Omø) Bjergsted (only the islands, Nekselø, Sejerø) Holbæk (only the island, Orø)	1 870
Storstrøms amt		Municipalities: Holeby Højreby Maribo Møn Nakskov Nykøbing-Falster Nysted Nørre Alslev Ravnø Rudbjerg Rødby Sakskøbing Stubbekøbing Sydfalster	126 044

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Fyns amt		<i>Municipalities:</i> Egebjerg Faaborg (except the parishes of Brahetrolleborg and Øster Hæsinge) Gudme Marstal Rudkøbing Svendborg Sydlangeland Tranekær Ærøskøbing Assens (only the island, Baagø)	95 365
Sønderjyllands amt		<i>Municipalities:</i> Åbenrå (only the island, Barsø) Haderslev (only the island, Årø)	216
Ribe amt		<i>Municipality:</i> Ribe (only the island, Mandø)	75
Vejle amt		<i>Municipality:</i> Juelsminde (only the island, Hjarnø, Endelave)	286
Ringkøbing amt		<i>Municipalities:</i> Thyholm Struer (only the island, Venø)	3 933
Århus amt		<i>Municipalities:</i> Samsø Grenå (only the island, Anholt) Odder (only the island, Tunø)	4 533
Viborg amt		<i>Municipalities:</i> Morsø Sundsøre Sydthy Aalestrup	49 107

NUTS III level region	Eligible areas		Population living in the eligible areas of the NUTS III level region (number of inhabitants)
	All of the NUTS III level region except	Only the following areas are eligible within the NUTS III level region	
Nordjyllands amt		<i>Municipalities:</i> Aalborg (only the island, Egholm) Arden Brovst Brønderslev Dronninglund Farsø Fjerritslev Frederikshavn Hobro Løgstør Løkken-Vrå Nørager Pandrup Sindal Sæby	182 370

COMMISSION DECISION

of 5 January 2000

on the application of Article 9 of Council Directive 96/67/EC to Düsseldorf Airport (Flughafen Düsseldorf GmbH)

(notified under document number C(1999) 5067)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/122/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports⁽¹⁾, and in particular Article 9(5) thereof,

Having regard to the request of 5 October 1999 for approval of the decision of the German authorities, and after consulting those authorities,

After consulting the Advisory Committee,

Whereas:

1. Scope of the exemption notified by the Government of the Federal Republic of Germany

1.1. Notification by the German authorities

- (1) By letter received by the Commission on 5 October 1999, the German authorities notified a request for approval of the decision of the Government of the Federal Republic of Germany of 30 September 1999 to grant Düsseldorf airport (Flughafen Düsseldorf GmbH) an exemption to:

- ban self-handling, and
- reserve for Düsseldorf Airport (Flughafen Düsseldorf GmbH) the provision of services to third parties,

for the categories of services referred to in items 4.1 (with regard to the physical handling of freight, whether

incoming, outgoing or being transferred, between the air terminal and the aircraft), 5.4 (with regard to the loading and unloading of the aircraft and the transport of passengers and baggage between the aircraft and the terminal), 5.5 and 5.6 of the Annex to the Directive.

This exemption is granted, on the basis of Article 9(1)(b) and (d) of the Directive, from 1 January 2000 until 31 December 2001. It follows the Commission Decision of 14 January 1998⁽²⁾ concerning a derogation granted by the authorities of the Federal Republic of Germany on 9 October 1997.

- (2) Pursuant to Article 9(3) of the Directive, the Commission published an extract from the said notification in the *Official Journal of the European Communities* of 26 October 1999⁽³⁾ and invited interested parties to submit their comments.

- (3) In accordance with Article 9(5) of the Directive, the Commission consulted the German Government on its draft evaluation on 24 November 1999 and the German authorities gave their comments by letter of 29 November 1999.

Basis of the exemption

- (4) The general rules on access to the groundhandling services market are set out in Articles 6 and 7 of the Directive. These provisions clearly state the principle that most categories of groundhandling services should be opened up to the maximum possible extent. For an airport with a volume of traffic like that of Düsseldorf the Directive provides for recognition of the right to selfhandle from 1 January 1998 and opens up the handling market to third parties from 1 January 1999. However, in order to take into account the specific situation and role of an airport, and in particular the safety, security, space and capacity constraints which

⁽¹⁾ OJ L 272, 25.10.1996, p. 36.

⁽²⁾ OJ L 173, 18.6.1998, p. 45.

⁽³⁾ OJ C 307, 26.10.1999, p. 3.

can arise in certain parts of most airports, the Directive does not impose complete liberalisation for four categories of services located air-side, i.e. in a particularly sensitive area of the airport, but does require a minimum degree of liberalisation of both selfhandling and the supply of services to third parties. These categories concern ramp-handling, baggage-handling, field-handling and certain freight- and mail-handling operations.

- (5) Article 9 of Council Directive 96/67/EC also takes account of the fact that, in certain very special cases, severe space and capacity constraints prevent the opening-up of the market to the degree provided for. In such cases, exemptions may be granted on a temporary basis to give the airports time to overcome the constraints. These exemptions can therefore be only exceptional in nature and are not intended to automatically give airports an extra transitional period in addition to that already provided for in Article 1 of the Directive.
- (6) An exemption can be granted only on the basis of specific space or capacity constraints. This is the basis on which the German authorities granted an initial exemption on 9 October 1997. A Commission Decision of 14 January 1998⁽⁴⁾ confirmed that exemption, but restricted it to a period ending no later than 1 January 2000.

This is also the basis, in conjunction with Article 9(6) of the Directive, on which the German authorities have granted the exemption to which this Decision refers, in accordance with Article 3 of the German 'Verordnung über Bodenabfertigungsdienst auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften'⁽⁵⁾ transposing Directive 96/67/EC into national law.

1.2. Situation regarding handling at Düsseldorf airport

- (7) Pursuant to the exemption granted by the German authorities on 17 April 1998 following the Commission Decision of 14 January 1998, the activities covered by the exemption to which this Decision refers are already covered by an exemption allowing the airport to prohibit selfhandling and to reserve to itself freight-handling, the transport of passengers and baggage between the aircraft and the terminal (5.4), engine starting (5.5), and aircraft movements (5.6). Thus the exemption to which this Decision refers extends the exemption granted with respect to such services.

⁽⁴⁾ OJ L 173, 18.6.1998, p. 45.

⁽⁵⁾ Bundesgesetzblatt 1997, Part I, No 82, 16 December 1997, p. 2885.

- (8) No new exemption has been requested extending the exemption granted by the decision of the German authorities of 17 April 1998 which hitherto permitted the restriction of aircraft cleaning (6.1), cabin cooling and snow removal (6.2), and the rearrangement of the cabin (6.3) to two users and two service-providers, so these services will be opened up to unrestricted competition from 1 January 2000.

2. Constraints referred to by the German authorities

- (9) The exemption granted by the German authorities is based on space and capacity constraints resulting from the fire in the terminal on 11 April 1996, the increase in space requirements which would result from the opening-up of the market to more than one operator, and problems encountered in implementing the proposed reconstruction and restructuring plan.
- (10) It relies on the arguments presented in the file drawn up by Düsseldorf airport:
- Nachtrag zum Maßnahmenplan des Antrages auf Verlängerung der Freistellung der Flughafen Düsseldorf GmbH, September 1999
 - Antrag auf Verlängerung der Freistellung der Flughafen Düsseldorf GmbH, Juli 1999
 - Dokumentation des Maßnahmenplans, Oktober 1998 und April 1999
 - Netherlands Airport Consultant BV study entitled 'Consequences of liberalising groundhandling to permit several service providers', July 1997.

- (11) There is no need to go back over the fact, already recorded in the Commission Decision of 14 January 1998⁽⁶⁾, that the data indicating a shortage of space relate exclusively to the 1996 fire and that no structural problem is cited in justification of the present situation and the resulting exemption.

2.1. The aftermath of the fire of 11 April 1996

- (12) The fire destroyed the central terminal building and rendered the three piers (A, B and C) unusable. As it is not possible to transit through the central building:

⁽⁶⁾ OJ L 173, 18.6.1998, p. 45.

- several gate positions, including all those on pier B, have to be used solely as remote positions, thus generating a substantial increase in the bussing of passengers across the apron,
 - all arrivals initially had to be concentrated in pier C, the only pier with an operational baggage reclaim system,
 - passenger embarkation modules (D and E) had to be installed to the east and west; these structures took up space on the ground and resulted in rather long bus transfers,
 - three positions (50, 51 and 60) had to be closed completely to allow the rebuilding of pier B and the storage of equipment used in the building works.
- (13) However, it was possible for pier C and the corresponding part of the central building to be reopened in November 1996, thus permitting the reactivation of the baggage reclaim system. Three additional luggage belts were installed here by suppressing equipment parking areas on the airport apron.
- (14) According to the file presented by the German authorities in support of the initial exemption request, pier A was to be opened in spring 1998, with the full reopening of 7 to 8 positions, thus ending the need for some of the passengers arriving at this pier to be bussed to pier C to reclaim their baggage and reducing the frequency of passenger bussing. At the same time, there would be a substantial reduction in the equipment needed for the embarkation of passengers at pier A, thus reducing congestion on the apron and freeing space for the parking of new handling equipment.
- (15) Work on pier B, on the other hand, is scheduled to finish in June 2001. These are major works concerning most of the airport. Pier B had to be completely demolished, along with a large part of the corresponding terminal. This pier and the central part of the terminal will be completely rebuilt, the terminal being enlarged, the pier widened along its entire length, and an extra level added in order to accommodate Schengen and non-Schengen passenger flows. Although the fire occurred in 1996, the time required for insurance assessments, project studies and demolition works have resulted, three years later, in a situation which is still temporary and which causes considerable disruption both to passenger access to gate lounges and to the transport of groundhandling equipment across the apron. The use of numerous gate parking positions as remote positions obliges the airport to make a large number of bus transfers. Additional baggage transport equipment was also needed, which affected traffic and parking. The multiplication of equipment and the need to divert around the works area each time equipment is moved causes traffic problems in the vicinity of the terminal. Moreover, in this part of the airport, all available space is fully used, in particular in the two temporary departure modules (D and E).
- (16) The comprehensive restructuring plan presented by the German authorities in support of the initial exemption request in 1998 provided for this infrastructure to come into operation in 2002, but was nevertheless supposed to allow the groundhandling market to be opened up at the beginning of 2001. The Commission Decision of 14 January 1998 forced the airport to open the market up early, as from 1 January 2000, on the grounds in particular of the space which should have been freed up when piers A and C were opened, the progress of work on pier B, and the new west apron.
- (17) According to the German authorities, it is no longer feasible to open up the market within the time allowed on account of problems which have arisen in connection with the schedule for the various works.
- ## 2.2. Difficulties encountered during the reconstruction works
- ### 2.2.1. Pier A
- (18) According to the report presented by the German authorities, although a large part of pier A was brought back into operation in April 1998, as provided for in the restructuring plan, demolition of the provisional departure area could not begin until pier A came into operation, so that, step by step, as areas became available, work on the apron level of pier A and the corresponding passenger bridges could be completed.
- (19) Moreover, to enable passengers to reach the airport terminal via pier A, without having to transit through terminal C, and because the progress of the works resulted in belts 9 to 12 being moved, it was necessary to create an arrivals structure at pier A. These measures were taken largely in response to intense lobbying from Lufthansa and its partners, the main users of this pier, in order to improve conditions for their passengers.
- (20) To fit out this eastern part of pier A it was necessary to convert aircraft stand 80 into a baggage reclaim hall and to construct a collection hall open to passengers here. The arrivals hall was then connected to the rest of the terminal by a passenger tunnel at gate 37 (halls 5/6).

- (21) The construction of these additional structures on the apron caused a deterioration in the traffic situation in this area, mainly affecting baggage transport, as the traffic generated by the reopening of the positions increased.
- (22) According to the German authorities, this unplanned reorganisation of pier A, at the request of the carriers, prevented the improvement in the situation forecast by the first Commission Decision. External circumstances and operational requirements resulted in a reduction of 500 m² in equipment storage areas. Moreover, this reduction was accompanied by the closure of aircraft stand 80 and a reduction in the size of the adjacent stand.

2.2.2. Pier B

- (23) The construction site plans presented in support of the first exemption, relating to the construction of pier B and the associated part of the central terminal, no longer correspond to the current situation. It was planned to limit the works area in order to maximise the area available for parking groundhandling equipment.
- (24) The measures planned to overcome the constraints relating to groundhandling services form part of the wider-ranging 'Airport 2000 plus' reconstruction and enlargement plan. As the works progressed, it proved necessary for the airport authorities to adapt the plans in order to meet passenger service requirements. This resulted in the reconfiguration of pier B and the ensuing increase in the shortage of space for storing equipment during the rest of the works. The shortage of space at this pier is estimated at 3 000 m². This reorganisation also makes it impossible to reopen the road junction under this pier, an essential step towards improving traffic on the apron, within the time allowed.
- (25) According to the German authorities, the new exemption for the period up to 31 December 2001 is justified by this extension of the work on pier B, which cannot be completed before July 2001, and which cannot therefore be truly operational until late autumn 2001.

2.2.3. Apron extension west

- (26) The 'Airport 2000 plus' project also comprises an extension of the apron which should allow new aircraft positions to be developed, but should also provide space for parking handling equipment. The main extension consisted in the construction of an apron extension to the west, half of which would be used to create new aircraft positions, the other half being used to store

handling equipment on over 14 000 m². However, these works were referred to in the plans presented at the time as merely complementary to the other measures intended to overcome the identified constraints, as, according to the file presented at the time, these works were not due to be finished until the end of 2000, i.e. after the period of exemption granted by the Commission in its Decision of 14 January 1998.

- (27) However, construction of this new area has been delayed both by technical problems relating to drainage and by administrative complications regarding the authorisation from the Ministry responsible for water protection. According to the file presented by the German authorities, these delays mean that the new infrastructure cannot be brought into service until the end of 2001 at the earliest.
- (28) Thus the exemption is based on the fact that the airport cannot, in general, find additional space on account of the adaptations made necessary both by the additional infrastructure in pier A to improve passenger conditions at the request of the users and by the reorganisation of pier B.
- (29) Compared with the initial forecasts, the total space shortage for the three piers has risen by more than 3 500 m². On the other hand, some 1 600 m² has been gained by restructuring the apron around the administrative buildings, plus 2 000 m² at the deicing area on the western apron (cargo area) and 300 m² on the eastern part of the apron. For the airport as a whole, a net gain of just 350 m² has been possible, compared with the situation at the beginning of 1998⁽⁷⁾, which is insufficient to permit the market to be opened up to the extent planned.

3. Reactions of the interested parties

- (30) Following the Commission's publication of an extract from the notification by the German authorities, and in accordance with Article 9(3) of the Directive, the various interested parties were invited to submit comments.

One carrier felt the figures given in the airport's exemption file failed to demonstrate either the need to alter the plan of appropriate measures or the shortage of space. It was astonished that the airport had not reported a shortage of office space, and believed additional space could be found by making use of the vacated army huts and the area freed by the reduction in the airport's own equipment needs following the arrival of a second service-provider. According to the same user, it will not be possible to provide much space for the new service-provider, which will therefore have

⁽⁷⁾ Antrag auf Verlängerung der Freistellung der Flughafen Düsseldorf GmbH, July 1999, Table 2, p. 11.

to employ only a reduced amount of specialised equipment in certain types of aircraft, something which will limit its market opportunities. The user also proposes that certain equipment be pooled, or that the newcomer buy existing equipment. Lastly, it finds the 40 % market share suggested by the NACO study at the time of the Commission's first Decision to be far too optimistic, and believes a scenario based on a mere 1 % market share for the second service-provider is plausible.

4. Evaluation of the exemption in the light of the provisions of Directive 96/67/EC

4.1. The rules in force concerning groundhandling

4.1.1. The scope for limiting access to the market

- (31) Council Directive 96/67/EC provides for the market to be opened up to different extents as a function of the way groundhandling services are provided (selfhandling or service suppliers) and the level of traffic at the airport.
- (32) The general rules governing groundhandling for the service categories listed in the German authorities' notification are set out in Articles 6(2) and 7(2) of the Directive. Those rules have been incorporated into the provisions of Article 3(2) of the German regulations transposing the Directive. The Directive allows a Member State to restrict selfhandling to not less than two users. The latter must be selected on the basis of relevant, objective, transparent and non-discriminatory criteria. Likewise, the number of groundhandling service suppliers may be restricted to two, in which case the suppliers must be chosen through a public tender procedure. On this basis Düsseldorf airport is required, pursuant to Annex 5 to the Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften of 10 December 1997⁽⁸⁾, which transposes the Directive into German law, to open up the market for groundhandling services to a second service supplier and to permit selfhandling by two users for the services in respect of which the number of service suppliers or selfhandling users can be limited pursuant to Articles 6(2) and 7(2) of the Directive.
- (33) However, where specific space or capacity constraints, arising in particular from the rate of utilisation of space

or space occupation, make it impossible to authorise selfhandling or the provision of services to third parties to the extent provided for by the Directive, the Member State concerned may, on the basis of Article 9(1)(b) and (d), restrict the provision of groundhandling services to third parties to a single supplier and ban selfhandling or restrict it to a single user.

- (34) Article 9(6) of the Directive restricts the duration of the exemptions granted and provides that any further exemption must be the subject of a new procedure. Exemptions granted pursuant to Article 9(1)(d) may not exceed three years. Those granted pursuant to Article 9(1)(b), which reserve the provision of services to a single supplier, may not exceed two years and may be extended by a single period of not more than two years. This is the framework within which this exemption has been granted by the German authorities.

However, under Article 9(2) any such exemption must:

- specify the category or categories of groundhandling services for which the exemption is granted and the specific constraints of available space or capacity which justify it,
- be accompanied by a plan of appropriate measures to overcome the constraints.

Moreover, pursuant to Article 9(2), it must not:

- unduly prejudice the aims of the Directive,
- give rise to distortions of competition,
- extend further than necessary.

- (35) As stated by the Commission, *inter alia*, in its Decisions of 14 January 1998 on Frankfurt and Düsseldorf airports⁽⁹⁾, the main aim of the Directive is to liberalise groundhandling services. The restrictions imposed on third parties are restrictions on the freedom of such parties to supply such services. By analogy with state measures restricting the freedom to supply services⁽¹⁰⁾, measures likely to exclude or prohibit the activities of service suppliers or, in the present instance, those of users wishing to selfhandle, even if they apply without distinction to national service suppliers or users and to those from other Member States, must be justified by

⁽⁹⁾ Commission Decisions of 14 January 1998 (OJ L 173, 18.6.1998, pp. 32 and 45).

⁽¹⁰⁾ Judgments of 25 July 1991, *Médiawet* [1991] ECR I-4007 and C-76/90, *Säger: Denmeyer*, [1991] ECR I-4221.

⁽⁸⁾ Bundesgesetzblatt 1997, Part I No 82, 16 December 1997, p. 2885.

overriding public-interest requirements and not by economic factors and must, moreover, be in proportion to the aims pursued.

4.1.2. *Procedure*

(36) The German authorities have undertaken to make the entry into force of the exemption decision subject to the Commission's Decision.

(37) As stated in its two Decisions on the airports at Frankfurt and Düsseldorf⁽¹⁾, the Commission must direct its examination towards:

- the existence and extent of the constraints justifying the exemption and the inability to open up the market to the extent provided for by the Directive; only space and/or capacity constraints may be taken into account,
- the plan of appropriate measures intended to overcome those constraints; that plan must be credible and unconditional and include a timetable for the implementation of those measures,
- conformity with the principles of compliance with the aims of the Directive, absence of distortions of competition, and the extent of the measure referred to in Article 9(2) of the Directive.

(38) The aim of granting an exemption is not to give the airport a further adaptation period in addition to that already granted by Article 1 of the Directive. It must permit the airport to overcome the specific constraints which it may encounter when the market is opened up. Any exemption must therefore be examined in the light of the specific constraints put forward in justification of the impossibility of opening up the market within the time allowed. In addition, in accordance with the case-law of the Court of Justice of the European Communities, any exception must be interpreted strictly and the scope of any exemption must be determined on the basis of the purpose of the measure in question.

(39) This exemption must be examined in the light of these considerations.

(40) In accordance with Article 9(4) of the Directive, the Commission has made a detailed analysis of the alleged space and capacity constraints, whether the decision

taken is appropriate to those constraints, and the measures put forward to overcome them. Its examination drew upon the studies provided by the German authorities, its visit to Düsseldorf airport on 20 October 1999, and the technical assessment made at its request by Aerotec. Finally, the Commission took account of the comments made by the airport and the German Government concerning its analysis, and in particular those concerning space constraints due to the delay in the reorganisation of the terminal on account of the changes which had to be made to the working plan.

4.2. *Examination of the constraints referred to by the German authorities*

4.2.1. *Background*

(41) As stated above, there is no need to go back over the absence of structural space problems at Düsseldorf airport and the fact that the impossibility of opening up the market to the extent provided for in the Directive, to which the German authorities refer, is a result exclusively of the problems caused by the fire in April 1996.

(42) In its Decision of 14 January 1998, the Commission recognised that at that time there was a shortage of space at the airport which justified the granting of an exemption in respect of the services for which exemption was requested.

(43) Unlike the earlier exemption, which was the subject of the Commission Decision of 14 January 1998, this exemption does not cover the categories of services listed in item 6 of the Annex to the Directive relating to the external and internal cleaning of the aircraft and the removal of snow and ice. The fact that the airport authorities can now use certain old British army huts adjacent to the airport and the creation of the deicing area on the eastern part of the apron enables them to comply with the conditions of the Directive by fully liberalising the market for these services. The decision to open these services up to competition, but not those covered by this exemption, is justified by the new deicing area, the small size of the area freed up, and the mobility of the equipment used for these services. The old military huts are located outside the airport boundary and the vehicles have to cross a very busy road, which would be inconceivable for the heavy, slow equipment used for ramp-handling services such as pusher tugs.

(44) The Commission's examination of this exemption must therefore be limited to changes in space and capacity

⁽¹⁾ See footnote 9.

since its Decision of 14 January 1998 and the reasons for which the German authorities claim that it is impossible for Düsseldorf airport to fully implement the proposed plan and the conditions laid down in that Decision.

4.2.2. *Implications of changes in the reconstruction of the airport*

(45) As stated above, the problems mentioned by the German authorities are the result of the fire of April 1996 and of the works in progress which, while forming part of a wider-ranging plan to extend the airport, are a direct result of that fire. These works do not extend the airport by simply adding new infrastructure or renovating an existing terminal, they primarily concern the almost total reconstruction of a building which was destroyed by fire. This brings with it quite specific constraints, due in particular to the need:

— to first demolish the existing buildings, which in turn requires most of the existing infrastructure to be evacuated, before starting to rebuild (this is true in particular of pier B and the corresponding central part of the terminal building),

— to proceed in stages (pier B and the adjacent part of the terminal building must be rebuilt before the central part of the terminal can be demolished) and combine demolition and building works on a single site,

— carry out these works in the middle of an airport which must continue to operate.

(46) The entire works programme requires advanced logistics, and problems arising in part of the works or part of the terminal can have an impact on the programme as a whole. It is clear, following the Commission's visit in connection with this exemption on 20 October 1999, that the entire operation of the airport is affected by these works and that all the space left free by the works on the apron has been used to build temporary structures in order to provide basic services to carriers and their passengers. In addition to departure modules D and E, structures facilitating the arrival of passengers and their baggage have been added, in particular at point A, at the request of carriers. Baggage transfer is effected in large part by vehicles with integral conveyor belts which nose onto the baggage reclaim belts alongside the terminal building. These vehicles are large and heavy, but they reduce the congestion of roadways and unloading areas caused by conventional trolleys.

(47) The space requirements for groundhandling operations must be examined in detail for each of the piers and parts of the terminal affected by the works and for the western part of the apron.

Pier A

(48) The file presented by the German authorities in support of the first exemption indicated that this pier was scheduled to be brought into operation in spring 1998. The reduction in operations on this part of the apron was expected to free up space which could be used to store groundhandling equipment. However, the new possibility for passengers to disembark at pier A made it necessary, in response to intense lobbying from the companies operating at this pier, to provide a passenger arrivals facility at this point. The Commission recognises that this not only meets an operational requirement by facilitating passenger access but also helps to reduce congestion on the apron by ending bus transfers to pier C as had been necessary since the fire.

(49) However, this arrangement made it necessary to build the arrivals structure, which in turn made it necessary to close the nearest position (aircraft stand 80). Moreover, the arrival of passengers at the new structure at pier A means that their baggage also arrives here rather than at pier C, thus replacing passenger bus traffic on the apron with baggage traffic here. During its visit the Commission verified that full use is made of the space available, in particular at former aircraft stand 80.

(50) Thus the reduction in the number of bus movements achieved as a result of direct access to pier A has to a large extent been offset by the arrival of baggage at the new facility. This has been compounded by the closure of aircraft stand 80 and a reduction in the corresponding space in the adjacent area. Thus the situation at this part of the airport has deteriorated.

Pier B

(51) Reconfiguration of the pier following the decision to adapt the 'Airport 2000 plus' project to the changing needs of carriers and their passengers and in order to facilitate passenger transfer has involved an extension of the pier, and therefore of the building site. The Commission's assessment shows that:

— the state of the works will not allow even part of the area currently occupied by the building site to

be used to park groundhandling equipment by 1 January 2000, the date on which the current exemption expires, as foreseen by the Decision of 14 January 1998; the rebuilding of the pier has only just started, and it will not be possible to open the road junction to traffic for many months,

- the buildings site has been kept as small as possible while ensuring safe conditions; apart from the roadway used by construction plant, there is only enough space to store a very small amount of building equipment,
- the aircraft are separated from the building site only by the service road used by groundhandling equipment, and there is no room for any additional parking at this point.

(52) It is therefore clear that it is not now feasible to free up any extra space at pier B at least until the end of the works, i.e. early summer 2001, before work starts on finishing the inside of the pier in preparation for its planned opening in autumn 2001.

(53) Completion of construction work on pier B is to be followed by the construction of passenger bridges on the ramp, and this will significantly restrict the movement and storage of equipment at this point for an estimated period of five months.

(54) It is therefore not possible to free up any space at pier B beyond the 7 500 m² which have already been made available.

Apron

(55) Extension of the apron formed part of the plan of appropriate measures presented in support of the first exemption.

(56) The apron was initially to be extended to the east during 1999 with the main aim of creating a deicing area. However, the extra 4 000 m² this has provided cannot be allocated to the parking of groundhandling equipment during periods when deicing is required. Only a few hundred square metres can be used throughout the year. As stated above, the creation of the deicing area and the occupation of certain old British army huts have enabled the airport authorities to open up aircraft cleaning and deicing operations to competition. The choice of these operations, which are covered by item 6 of the Annex to the Directive, is justified by the creation of the deicing area, the small size of the area freed up, and the mobility of the vehicles concerned, which have to be parked outside the area and cross a busy road.

(57) The plan of appropriate measures presented in support of the first exemption also provided, in a second stage, for the creation of a new apron to the west. Half of the new apron, which is to be of a considerable size, will accommodate new aircraft positions, while the other half can be devoted to the storage of groundhandling equipment (on more than 14 000 m²).

While the authorisation to build this apron extension does not in itself pose a problem, the scale of the works requires a major modification of the entire drainage system on the whole of the western part of the airport. This not only holds up the building works as such, it also requires authorisation from the authorities responsible for water protection, which in turn depends on the results of environmental tests. The time needed to perform these tests and to assemble the required documentation means that the authorisation is unlikely to be obtained before spring 2000.

4.3. Plan of appropriate measures

(58) In accordance with the provisions of Article 9(2) of the Directive, the file submitted by the German authorities identifies a plan of appropriate measures to overcome the constraints cited.

(59) The construction of the new apron to the west, which had originally been planned for the end of the year, would provide more than 14 000 m² for the parking of groundhandling equipment. However, the problems which have arisen in connection with the need to reorganise the drainage make the schedule for these works on the apron uncertain.

The plan of measures to overcome the constraints cited must be credible and unconditional, and be accompanied by a timetable for its implementation. The Commission cannot consider a plan whose implementation within the time allowed is uncertain to constitute a plan of appropriate measures within the meaning of Article 9 of the Directive.

(60) However, the German authorities have presented other measures aimed at overcoming the constraints. These measures are linked to the completion of the work on pier B and the central part of the terminal. The freeing-up of the space needed for future groundhandling equipment depends on the commitment by the consortium overseeing the construction works to finish those works by autumn 2001. This commitment is firm and is subject to very substantial penalties for late completion. Work on the building site is currently continuing 24 hours a day, and occupies 600 persons per day. This number is set to rise to 1 000 persons per day in January 2000. As soon as the terminal is operational, at the end of the period covered by the exemption, the space freed up not only around pier B

will be able to accommodate groundhandling equipment. However, the airport authorities no longer plan to demolish the two temporary departures modules (D and E) but to convert them into accommodation for groundhandling equipment. The surface area and height of these modules will allow their rapid conversion.

(with a reduction of just 5 % in airport equipment). If Lufthansa were to selfhandle, it would require approximately 50 % of the equipment currently used by the airport. The reduction in the airport's requirements would be of the order of 25 %, so 25 % additional space would be required.

- (61) This alternative solution, irrespective of the completion of the western apron extension and of any other administrative authorisation, will allow the market to be opened up to the extent provided for in the Directive at the end of the period covered by the exemption and can therefore be considered to constitute a plan of appropriate measures within the meaning of Article 9(2) of the Directive.

- (64) Thus it is not possible, given the acute space problems at the airport, to allow a second service supplier to operate or a user to selfhandle at the airport in respect of the operations covered by the exemption, and the restriction of liberalisation to aircraft cleaning and deicing is perfectly justified. Thus the exemption granted by the German authorities does not extend further than necessary in relation to these services.

4.4. *Compliance with the criteria of Article 9(2) of the Directive*

- (62) The exemption notified by the German authorities covers freight loading and unloading and the various ramp-handling operations such as marshalling aircraft, assistance to aircraft parking, moving aircraft, engine starting, and the transport of passengers and baggage. Most of these operations require a large number of pieces of equipment, some of them slow and heavy (such as pusher tugs), which have to be parked near the aircraft positions and cannot, as has been suggested, be parked near the old army huts, i.e. outside the airport's reserved area and on the far side of a busy road. It is also necessary to take account of the impact which the arrival of a second service supplier will have on the already highly congested traffic around the piers.

Likewise, in view of the difficulties encountered in carrying out the various works and the substantial modifications which these have entailed, the schedule of works presented, in particular the part concerning pier B and the central part of the terminal, is an adequate response to the known constraints and the period of exemption.

Thus the principles set out in Article 9(2) of the Directive are respected.

5. Conclusion

- (63) Examination of flight schedules and of the groundhandling operations concerned leads the Commission to estimate that the arrival of a second service supplier would require nearly 22 % additional space in the most realistic hypothesis of that supplier handling some 15 % of the market. If the decision is taken to effectively open up the market, it would not be for the Commission to officially restrict the future service-provider's market share, as has been suggested, by imposing the limitation and specialisation of its equipment on grounds of insufficient space. All it can do is evaluate the impact of the arrival of operators. Moreover, as it has reiterated in its various Decisions, the arrival of a new operator only affects the equipment requirements of an existing operator when the incoming operator has a market share of something between 10 and 15 %. Below that threshold, all the equipment of the new operator must be considered additional to that of the airport.

- (65) The exemption granted by the German authorities to Düsseldorf airport is based on the consequences of the fire which destroyed most of the terminal in April 1996 and completely disrupted the operation of the airport. Reconstruction, which forms part of a more ambitious development plan, is made particularly difficult by the need to proceed in stages, the need to demolish the damaged buildings first, and the fact that the works are located in the middle of an airport which must continue to operate.

- (66) The scale and complexity of the works and the essential link between the various stages are compounded by technical and operational difficulties which have delayed the full entry into service of the various piers and prevented the freeing-up of space for groundhandling equipment as previously planned. The full use of the space available, either by groundhandling equipment or by essential building materials, and the existing difficulties with regard to parking and traffic on the apron make it impossible to accommodate a new

In the case of selfhandling by one user, 25 % additional space would be required for LTU to cover its peak loads

operator, whether a selfhandler or a service-provider,
before the end of the period covered by the exemption,

Article 2

This Decision is addressed to the Federal Republic of Germany.

HAS ADOPTED THIS DECISION:

Article 1

Done at Brussels, 5 January 2000.

The exemption granted on 30 September 1999 to Düsseldorf airport on the basis of Article 9(1)(b) and (d) of the Directive, as notified to the Commission on 5 October 1999, is hereby approved.

For the Commission
Loyola DE PALACIO
Vice-President

COMMISSION DECISION

of 10 January 2000

on the application of Article 9 of Council Directive 96/67/EC to Funchal airport

(notified under document number C(1999) 5194)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2000/123/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports⁽¹⁾, and in particular Article 9(5) thereof,

Having regard to the decision of the Portuguese authorities, as notified to the Commission on 11 October 1999, and after consulting those authorities,

After consulting the Advisory Committee,

Whereas:

1. Scope of the exemption notified by the Government of Portugal

1.1. Notification by the Portuguese authorities

- (1) By letter received by the Commission on 11 October 1999, the Portuguese authorities notified a request for approval of the decision of the Portuguese Government to grant Funchal airport an exemption to:

- restrict self-handling to two users for the categories of services listed under point 2 of the Annex to the Directive,
- restrict self-handling to a single user for the categories of services listed under points 3, 4, 5.2, 5.3, 5.4, 5.5 and 5.6 of the Annex to the Directive.

This exemption is granted, on the basis of Article 9(1)(c) and (d) of the Directive, until 31 December 2000.

- (2) Pursuant to Article 9(3) of the Directive, the Commission published an extract from this notification in the *Official Journal of the European Communities* of 25 November 1999⁽²⁾ and invited interested parties to submit comments.

- (3) In accordance with Article 9(5) of the Directive, the Commission consulted the Portuguese Government on its draft evaluation on 8 December 1999.

Basis of the exemption

- (4) The general rules for access to the groundhandling services market are set out in Articles 6 and 7 of the Directive. These provisions clearly state the principle that most categories of groundhandling services should be opened up to the maximum possible extent. For an airport with a volume of traffic like that of Funchal with 1.7 million passengers in 1997, the Directive provides for recognition of the right to self-handle as from 1 January 1998. However, in order to take into account the specific situation and role of an airport, and in particular the safety, security, space and capacity constraints which can arise in certain parts of most airports, the Directive does not impose complete liberalisation for four categories of services located air-side, i.e. in a particularly sensitive area of the airport, but does require a minimum degree of liberalisation of both self-handling and the supply of services to third parties. The categories concerned are ramp handling, baggage handling, fuel handling and certain freight and mail handling operations, corresponding in particular to points 3, 4 and 5 listed in the Annex and covered by this Decision. As for the right to 'passenger' self-handling, this is not normally restricted in the context of self-handling rights and each carrier should be able to make use of this right.
- (5) However, Article 9 of Directive 96/67/EC also takes account of the fact that, in very special cases, severe space and/or capacity problems prevent the opening-up of the market to the degree provided for. In such cases, exemptions may be granted on a temporary basis to give the airports time to overcome the constraints.

⁽¹⁾ OJ L 272, 25.10.1996, p. 36.

⁽²⁾ OJ C 337, 25.11.1999, p. 4.

These exemptions can therefore be only exceptional in nature and are not intended to automatically give airports an extra transitional period in addition to that already provided for in Article 1 of the Directive.

- (6) An exemption can be granted only on the basis of specific space or capacity constraints. This is the basis on which the Portuguese authorities granted the exemption covered by this decision in accordance with Article 23 of Portuguese Decree-Law No 275/99 of 23 July 1999 transposing Directive 96/67/EC into national law⁽³⁾.

1.2. *Presentation of the airport*

- (7) Funchal airport has a passenger terminal alongside a 1 800 metre runway oriented south-west/north-east with a declared capacity of 9 movements per hour. Located in the autonomous region of Madeira, this airport is of vital importance to the economy of this outlying island region. Access is difficult, however, owing to the area's weather conditions — mainly strong winds. This difficulty is heightened by the location of the airport on the sea coast and against the mountains, which meant that the terminal had to be built on four levels to save space.
- (8) In general, the number of movements grew by an average of 3% a year over the period 1990 to 1995; growth then increased substantially up to 16,5% later in the nineties.

Passenger traffic was 1,53 million in 1997 (nearly 1,7 million in 1998) and is growing at an average of 6,5% a year; connections with mainland Portugal account for 88% of that traffic. Traffic structure has not changed since the 1980s and is divided into half domestic and half international flights, two thirds of traffic being scheduled flights.

Mean annual growth is forecast at 4% for the next five years, due mainly to the larger aircraft which can use the airport since the runway was extended.

1.3. *Situation regarding handling at Funchal airport*

- (9) Since traffic is less than three million passengers and 75 000 tonnes of freight, the opening-up of the market does not concern services provided to third parties. Part of these services, which account for 31% of the airport's movements, are already provided two thirds by TAP and the rest by TRIAM.

- (10) On the other hand, the Directive provides for the right to self-handle with effect from 1 January 1998. TAP currently self-handles for the operations covered by the exemption, namely those relating to passenger, baggage, freight and mail handling, and ramp handling operations. Until the end of 1998 TAP benefited under a public service obligation pursuant to Article 4 of Council Regulation No 2408/92 for the service connecting the island of Madeira with the Portuguese mainland; it accounted for 66% of movements. Overall, it operates 69% of movements to and from Funchal airport, involving 85% of passenger movements and 95% of freight.

2. **Constraints referred to by the Portuguese authorities**

2.1. *Notification by the Portuguese authorities*

- (11) The present position of TAP as the only company entitled to self-handle is to a large extent explained by the fact that benefited until last year under a public service obligation for the domestic routes with mainland Portugal. In 1997, total scheduled traffic accounted for 77% of movements and 88% of those movements were operated by TAP. Scheduled passenger traffic is evaluated at 66%, 78% of which is carried by TAP.
- (12) According to the dossier presented by the Portuguese authorities, there are space and capacity problems for both terminal and air-side operations.
- (13) For departures from the terminal, the check-in area is currently limited to 480 m² for 15 check-in desks (plus three desks on the side with no space for queuing). Only 10 desks, allocated to TAP, have computerised systems; the provider TRIAM, which operates charter flights only, carries out check-ins manually. The lack of space in the boarding area causes real problems for passengers travelling at peak times, forcing them to wait for a long time in cramped conditions in a terminal which has no air conditioning; the Portuguese authorities consider that it would not be possible to accommodate an additional handler.
- (14) Baggage handling (point 3 of the Annex to the Directive) is carried out manually over a length of 30 metres and in premises of 350 m² where it is difficult to manoeuvre and it would be impossible to accommodate an additional handler.
- (15) According to the dossier submitted by the Portuguese authorities, there is very little space on the apron for air-side operations (point 5 of the Annex) and the equipment of the two present handlers, TAP and

⁽³⁾ Diário da República — 23.7.99 — I Series-A No 170, p. 4588.

TRIAM, fill that space completely (2 000 and 200 m² respectively). Moreover, the equipment maintenance sheds, although recent, seem to be already inadequate, with space of only 400 m² for TAP and 200 m² for TRIAM. Furthermore, at peak times (30 peak hour with nine movements), traffic on the apron is especially difficult and dangerous since all the aircraft positions are of the 'nose-in' type, requiring fairly heavy pusher tugs at all times. Yet the airport has a single two-way service road crossed by embarking and disembarking pedestrians.

- (16) The new freight shed has an area of only 450 m² and is currently fully occupied by TAP which self-handles 95 % of all the airport's freight traffic.
- (17) The Portuguese authorities therefore consider that it is not possible to accept an additional handler for these operations, some of which are already provided by two handlers.

3. Reactions of the interested parties

- (18) Following the publication by the Commission of an extract of the notification by the Portuguese authorities, and in accordance with Article 9(3) of the Directive, the various interested parties were invited to submit comments.

No particular opinion has been delivered on this exemption.

4. Evaluation of the exemption in the light of the provisions of Directive 96/67/EC

4.1. The rules in force concerning groundhandling

4.1.1. The scope for limiting access to the market

- (19) Directive 96/67/EC provides for the market to be opened up to different extents as a function of the way groundhandling services are provided (self-handling or service suppliers) and the level of traffic at the airport.
- (20) The general rules governing groundhandling for the categories of service listed in the Portuguese authorities' notification are set out in Article 7 of the Directive. Those rules have been incorporated into the Portuguese regulations transposing the Directive⁽⁴⁾. The Directive

allows a Member State to restrict self-handling of baggage, freight and mail, and air-side operations to not less than two users. The latter must therefore be selected on the basis of relevant, objective, transparent and non-discriminatory criteria. Self-handling for passenger operations is normally open to all users.

- (21) However, where specific space or capacity constraints, arising in particular from the rate of utilisation of space or space occupation, make it impossible to authorise self-handling or the provision of services to third parties to the extent provided for by the Directive, the Member State concerned may, depending on the categories of service concerned, restrict the number of self-handlers on the basis of Article 9(1)(c) or ban self-handling or restrict it to a single user on the basis of Article 9(1)(d).
- (22) However, under Article 9(2) any such exemption must:
- specify the category or categories of groundhandling services for which the exemption is granted and the specific constraints of available space or capacity which justify it,
 - be accompanied by a plan of appropriate measures to overcome the constraints.

Moreover, pursuant to Article 9(2), it must not:

- unduly prejudice the aims of the Directive,
- give rise to distortions of competition,
- extend further than necessary.

- (23) As stated by the Commission, *inter alia*, in its decisions of 14 January 1998 on Frankfurt and Dusseldorf airports⁽⁵⁾, the main aim of the Directive is to liberalise groundhandling services. The restrictions imposed on third parties consist of restrictions of freedom of such parties to provide such services. By analogy with State measures restricting the freedom to supply services⁽⁶⁾, measures likely to exclude or prohibit the activities of service suppliers or, in the present instance, those of users wishing to self-handle, even if they apply without distinction to national service suppliers or users and to those from other Member States, must be justified by overriding public-interest requirements and not by economic factors and must, moreover, be in proportion to the aims pursued.

⁽⁵⁾ Commission Decisions of 14 January 1998, OJ L 173, 18.6.1998, pp. 32 and 45.

⁽⁶⁾ Judgments of 25 July 1991, Cases C 288/89 *Mediawet*, [1991] ECR I-4007 and C-76/90, *Säger v Dennemeyer*, [1991] ECR I-4221.

⁽⁴⁾ Diário da República — 23.7.99 — I Series-A No 170, p. 4588.

4.1.2. **Procedure**

(24) As stated in its two decisions on the airports at Frankfurt and Dusseldorf⁽⁷⁾, the Commission must focus its examination on:

- the existence and extent of the constraints justifying the exemption and the inability to open up the market to the extent provided for by the Directive; only space and/or capacity constraints may be taken into account,
- the plan of the appropriate action that is intended to overcome those constraints; that plan must be credible and unconditional and include a timetable for the implementation of those measures,
- conformity with the principles of compliance with the aims of the Directive, absence of distortions of competition, and the extent of the measure, as referred to in Article 9(2) of the Directive.

(25) The aim of granting an exemption is not to give the airport a further adaptation period in addition to that already granted by Article 1 of the Directive. It must permit the airport to overcome the specific constraints which it may encounter when the market is opened up. Any exemption must therefore be examined in the light of the specific constraints put forward in justification of the impossibility of opening up the market within the time allowed. In addition, in accordance with the case law of the Court of Justice of the European Communities⁽⁸⁾, any exception must be interpreted strictly and the scope of any exemption must be determined on the basis of the purpose of the measure in question.

(26) This exemption must be examined in the light of these considerations.

(27) In accordance with Article 9(4) of the Directive, the Commission has made a detailed analysis of the alleged space and capacity constraints, whether the Portuguese authorities' decision is appropriate to those constraints, and the measures put forward to overcome them. It based its examination on the dossier submitted by the Portuguese authorities, on the visit it made to Funchal airport on 8 November 1999, and on the technical assessment made at its request by Aerotec. Finally, the Commission took account of the comments made by the airport and the Portuguese Government concerning the Commission's analysis.

4.2. *Examination of the constraints referred to by the Portuguese authorities*

(28) The island of Madeira is a major holiday destination and Funchal airport is essential for this tourist development. Annual traffic growth is estimated at 4% for the next five years, almost all of it accounted for by passenger traffic. The airport has extended the runway and substantially enlarged the terminal. The airport's situation, especially as regards the space available on the apron, is therefore temporary and should improve, for some areas of the apron, over the next few months as the work proceeds.

(29) With 1,53 million passengers in 1997, Funchal airport must allow self-handling by carriers in order to comply with the Directive. In view of the substantial growth in traffic, from 2001 when it exceeds the threshold of two million passengers a year, the airport should also open up competition for groundhandling operations for third parties. The Portuguese authorities' exemption relates to a restriction for passenger groundhandling operations, which should be entirely liberalised, and self-handling services on the apron, covering baggage sorting, passenger and crew baggage transport and freight and mail operations.

Passenger groundhandling operations

(30) According to the Portuguese authorities there are capacity and space problems in the terminal, with serious congestion in the check-in hall. The Commission acknowledges that there may be serious difficulties in the hall since it is too small for all the passengers waiting to check in at certain peak times, in view of the number of flights that have to be processed at those times.

(31) Passenger groundhandling operations are currently carried out by two companies: TAP — which handles its own aircraft and those of third-party customers — and the independent TRIAM company which provides services to third parties consisting entirely of charter carriers. Airport users thus already have a free choice for passenger groundhandling services.

(32) However, according to Article 7(1) of the Directive, these groundhandling operations must be fully liberalised in the case of self-handling. The only grounds for restricting the number of self-handling users are space and/or capacity constraints. It is therefore necessary to check whether it is impossible to accept new operators.

(33) While there can be no doubt of the cramped nature of the present check-in hall, it must be acknowledged that

⁽⁷⁾ See footnote 5.

⁽⁸⁾ See footnote 6.

the problem is caused by the hall itself and to a lesser extent by the number of check-in desks. It is not the fault of the company processing check-ins, whether it be one of the current two providers or a newcomer. It is not the practice, as in some airports, to check-in several flights at the desks at the same time. Specific desks are assigned one at a time to each flight concerned, two or three hours in advance. Therefore, the operator only moves on to the next flight once the previous one is completely checked in. If all 18 desks are assigned to a flight, the number of operators is of no import since the number of desks remains constant owing to the system of checking in one flight at a time, and so capacity does not vary either.

- (34) From a practical point of view, in the worst case, i.e. on the busiest day of the year, in actual fact the flights planned for 3 January 2000, the flight schedules show that there are only two hours when there might not be enough desks and even then, two desks would not overlap for more than 20 minutes.

- (35) The Portuguese authorities argue that four desks could not be properly used owing to their poor location in the hall. However, these desks were indeed in use on the day of the Commission's visit, which was not a particularly busy day. It must be acknowledged that their position in the terminal makes them impractical and access to desks 1 and 2 is very tight. However, they would be more usable if they were used for a single flight, sharing a single check-in queue. In any case, limiting the number of operators would have no impact on present congestion in that area, nor would it reduce the need for extra desks.

- (36) The flight schedules for the busiest day of the year show that between 08.00 and 10.30, five desks are free in the area currently assigned to TRIAM and that no desk is in use between 16.30 and 22.00. Similarly, on certain days in November, TRIAM is not using a single desk. The eight TAP desks are in use but, between 11.00 and 15.45, at least three of them could be freed according to the flight schedules and the usual practice for assigning desks.

- (37) The lack of computer equipment at the desks currently used by TRIAM is certainly a drawback for users but does not rule out the admission of a new operator. The decision to self-handle or not is an economic one for each user to take once he has weighed up all the advantages and disadvantages of operating such services, including the airport's equipment problems.

- (38) In view of the flight schedules and check-in practices, the admission of new self-handling users would not aggravate the airport's difficulties; these are real but related to the waiting area. The airport should therefore assign the desks to the various operators on a clear and fair basis according to their individual needs.

Baggage

- (39) Based on the Portuguese authorities' arguments in the dossier, the baggage sorting and loading area is very small. Baggage is processed manually from a straight 30 metre conveyor by two service providers. It would be quite impractical to admit an additional operator for baggage sorting. The same applies to baggage transport in and out of that hall, owing to its restricted access.

Air-side operations

- (40) With the exception of baggage transport, where it is impossible to admit an additional operator into the sorting areas, there does not seem to be an acute space or capacity problem for other air-side operations. On the day of the Commission's visit, space could easily have been made for additional equipment, especially on the western part of the apron. Even at the calmest time of the day, i.e. when the equipment was not in use and parked, it was clear that these parking areas were far from crowded. Moreover, the current layout of those areas is temporary and it should be possible to make more space available from spring 2000 when the aircraft positions on the west side of the apron are rearranged. Apart from this improvement, according to the standards and practices recommended by the International Civil Aviation Organisation (ICA), 'nose-in' parking of aircraft allows groundhandling equipment to be parked between the noses of aircraft, notably around positions 2-4, A06-A04 and A01-A03. The Portuguese authorities have therefore failed to demonstrate that it is impossible to recognise the right to self-handle in accordance with the provisions of the Directive.

Freight handling

- (41) A new terminal has recently been built. This terminal covers 450 m² (350 m² of which is for operations and 100 m² for offices) and is currently occupied by TAP. It

is divided into two parts, for imports and exports, each having a single access door to the runway. TAP is the airport's only operator for freight services and over 95% of its business relates to self-handling. Services to third parties, representing only 5% of traffic, need not necessarily be opened up until the airport reaches the threshold of two million passengers a year, as provided for in the Directive. It is unlikely that any operator will apply to self-handle for a mere 1 or 2% of traffic. However, in line with Article 9 of the Directive, it must be proved that it is impossible to accommodate a second operator who would be allocated space proportional to its freight traffic. It does not appear impossible to find such a space in the building as the need is very small. However, the arrangement of the doors would not seem to allow a second operator to enter and leave efficiently. Furthermore, the layout and size of the offices earmarked for the staff in the building would rule out a second operator.

accompanied by an extension of the apron and an increase in the number of positions from nine to 14, including four positions for large-capacity aircraft. This extension and the new positions will of course allow more space for loading and unloading operations and almost 7 000 m² of new space for parking equipment. Space restrictions will not enable the terminal service road to be doubled up, however. On the other hand, the plan includes a major extension of the terminal, including a new baggage sorting hall and a check-in hall of some 4 400 m², with 40 fully computerised check-in desks. A 1 250 m² vehicle maintenance building and a 3 000 m² covered area for freight will also be built.

6. Compliance with the criteria set out in Article 9(2) of the Directive

- (42) The Portuguese authorities' dossier also claims that the maintenance sheds and rest rooms are cramped. Firstly, these buildings are very new and should have been designed with enough space to take account of the requirements of the Directive. Secondly, an examination of the areas allocated shows that TAP has 2 000 m² of space on the apron to park its equipment and 400 m² to maintain it; this enables it to handle 70% of the traffic without major difficulty. For the remaining 30%, TRIAM has 200 m² on the apron and half of the maintenance installations and rest rooms. The installations allocated to TRIAM could therefore be regarded as generous in relation to the volume of traffic handled and so it has not been proven that space could not be found for a new operator.

- (46) Article 9 of the Directive states that an exemption may be granted only where space and/or capacity constraints make it impossible to open up the market to the extent provided for by the Directive. The Commission's examination shows that this is indeed quite impossible as regards baggage sorting and transport activities owing to the cramped premises which already make working with two companies very difficult and lack sufficient space for any additional operator. The same applies to freight and mail handling activities, where the layout of the premises and inadequate office space for staff would not allow for an additional operator at present. On the other hand, this has not been proved to be impossible for other services, either because simple discomfort is not sufficient reason or because the reason given is not related to the number of operators. The scope of the Portuguese authorities' exemption is therefore broader than necessary.

5. Plan of appropriate measures

- (43) In accordance with the provisions of Article 9(2) of the Directive, the dossier submitted by the Portuguese authorities identifies a plan of appropriate measures to overcome the constraints cited.
- (44) This plan is part of the comprehensive airport extension project in response to growing traffic, designed to improve access to the island of Madeira; it should eventually allow larger capacity aircraft on intercontinental flights to be accommodated with improved safety conditions.
- (45) The project consists firstly of an extension to the runway on piles and a change of orientation to avoid having to build in too deep water. This will be
- (47) As regards the duration of the exemption, the space needed to allow the Directive to be applied in areas where constraints have been observed cannot be made available before the new baggage sorting hall opens in late 2000. Similarly, the plan of measures submitted includes a covered freight area around the same time. The exemption therefore appears to comply with the principles of Article 9(2) in this respect.

7. Conclusion

- (48) Traffic at Funchal airport is growing fast, requiring major work in order to be able to handle safely all types of aircraft, including large-capacity ones, and also to handle passengers properly. However, the problems

with checking in passengers are caused by the cramped hall and not by a particular problem with the check-in desks or staff. Sufficient space can be freed on the apron to enable an additional user to self-handle for air-side operations, especially when the western side has been reorganised in the early part of 2000.

On the other hand, in view of the cramped premises it is impossible to accept an additional operator in a space where the two suppliers' equipment already has great difficulty manoeuvring for baggage sorting and transport operations. According to the Commission's examination, it would also be impossible to have a new operator in the freight shed at the moment,

must be limited to the operations defined in points 3, 4 and 5.4 of the Annex to the Directive as regards baggage transport between aircraft and the airport buildings.

Article 2

The Portuguese Republic shall notify the Commission, before it enters into force, of the exemption decision as amended in accordance with Article 1.

Article 3

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 10 January 2000.

HAS ADOPTED THIS DECISION:

Article 1

The exemption granted by the Portuguese Republic for Funchal airport, as notified to the Commission on 11 October 1999,

For the Commission
Loyola DE PALACIO
Vice-President

COMMISSION DECISION

of 10 January 2000

on the application of Article 9 of Council Directive 96/67/EC to Oporto (Francisco Sá Carneiro)

(notified under document number C(1999) 5196)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2000/124/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports⁽¹⁾, and in particular Article 9(5) thereof,

Having regard to the decision of the Portuguese authorities, as notified to the Commission on 11 October 1999, and after consulting those authorities,

After consulting the Advisory Committee,

Whereas:

1. Scope of the exemption notified by the Government of Portugal

1.1. Notification by the Portuguese authorities

- (1) By letter registered by the Commission on 11 October 1999, the Portuguese authorities notified a request to approve the decision of the Portuguese Government to grant to Oporto (Francisco Sá Carneiro) airport an exemption to limit to four the number of users authorised to self-handle for the categories of services listed under point 2 of the Annex to the Directive.

This exemption is granted, on the basis of Article 9(1)(d) of the Directive, until 31 August 2001.

- (2) Pursuant to Article 9(3) of the Directive, the Commission published an extract from this notification in the *Official Journal of the European Communities* of 25 November 1999⁽²⁾ and invited interested parties to submit comments.

- (3) In accordance with Article 9(5) of the Directive, the Commission consulted the Portuguese Government on its draft evaluation on 3 December 1999.

Basis of the exemption

- (4) The general rules for access to the groundhandling services market are set out in Articles 6 and 7 of the Directive. These provisions clearly state the principle that most categories of groundhandling services should be opened up to the maximum possible extent. For an airport with a volume of traffic like that of Oporto, the Directive provides for recognition of the right to self-handle as from 1 January 1998.
- (5) Article 9 of Council Directive 96/67/EC also takes account of the fact that, in certain very special cases, severe space and capacity constraints prevent the opening-up of the market to the degree provided for. In such cases, exemptions may be granted on a temporary basis to give the airports time to overcome the constraints. These exemptions can therefore be only exceptional in nature and are not intended to automatically give airports an extra transitional period in addition to that already provided for in Article 1 of the Directive.
- (6) An exemption can be granted only on the basis of specific space or capacity constraints. This is the basis on which the Portuguese authorities granted the exemption covered by this decision in accordance with Article 23 of Portuguese Decree-Law No 275/99 of 23 July 1999 transposing Directive 96/67/EC into national law⁽³⁾.

1.2. Presentation of the airport

- (7) Oporto airport covers a total surface area of 319 hectares and has one passenger terminal at the southernmost point of a north/south runway 3 480 metres long. The terminal has a capacity of 3 million passengers per year which allows no gate

⁽¹⁾ OJ L 272, 25.10.1996, p. 36.

⁽²⁾ OJ C 337, 25.10.1999, p. 5.

⁽³⁾ Diário da República - 23.7.99 - I Series-A No 170, p. 4588.

parking. The freight terminal has a capacity of 40 000 tonnes with a surface area of 8 700 m² for handling operations plus 2 200 m² of office space.

- (8) A total of 2,3 million passengers used the airport in 1997 (2,7 million in 1998), principally on scheduled (87%) and international (78%) flights. Traffic forecasts suggest average annual growth of around 6% over the next five years.

1.3. Situation regarding handling at Oporto airport

- (9) With between 2 and 3 million passengers and 75 000 tonnes of freight, the opening-up of the market does not apply to services for third parties before 1 January 2001. Most of these services are provided by TAP, with the exception of freight handling, which is dealt with by a second supplier at the airport. However, these freight operations account for only 1% of movements at the airport.
- (10) On the other hand, the Directive provides for the right to self-handle with effect from 1 January 1998.
- (11) As regards self-handling, two users (TAP and Portugalia) have been given authorisation on the airside. On the groundside and, in particular, for the passenger handling covered by this Decision four airlines — TAP, Portugalia, KLM and GB Air — currently effectively exercise their self-handling rights. Normally, however, the Directive provides for unlimited recognition of self-handling rights for these services.

2. Constraints referred to by the Portuguese authorities

- (12) The file presented by the Portuguese authorities shows a major lack of space for passengers checking in. In particular, traffic at the airport is irregular and the departure hall totals just 500 m² with only 18 check-in counters. As a result, in peak traffic periods, particularly during the traditional summer, Christmas and Easter holidays, the hall is completely overcrowded with passengers waiting to check in. To add to the congestion, most of them have several items of baggage to register and are accompanied by relatives.
- (13) According to the file submitted by the Portuguese authorities, an average of three counters per flight, including one specially for business class passengers, would be needed for high-quality check-ins. According to the Portuguese authorities, it is therefore very difficult to maintain a high quality of service during peak traffic periods.

- (14) Studies by the airport have shown that traffic levels would require 24 check-in counters from 1998 on and 26 in 1999. These figures are based on the counters remaining open for an average of 90 minutes for each flight, on the current growth of 6% per year and on the assumption that there must be two check-in counters for category A aircraft (up to 160 passengers) three for category B (between 161 and 300) and four for category C (over 300).
- (15) According to the Portuguese authorities, the objective of striking a balance between traffic growth at the airport and maintaining high-quality groundhandling services rules out admission of any new operators of this category of services at the moment.

3. Reactions of the interested parties

- (16) Following the publication by the Commission of an extract of the notification by the Portuguese authorities, and in accordance with Article 9(3) of the Directive, the various interested parties were invited to submit comments.

One carrier has remarked that it is impossible in the short term to open up completely the services covered by the exemption.

4. Evaluation of the exemption in the light of the provisions of Directive 96/67/EC

4.1. The rules in force concerning groundhandling

4.1.1. The scope for limiting access to the market

- (17) Directive 96/67/EC provides for the market to be opened up to different extents as a function of the way groundhandling services that are provided (self-handling or service suppliers) and the level of traffic at the airport.
- (18) The general rules governing groundhandling for the categories of service listed in the notification from the Portuguese authorities are set out in Article 7(1) of the Directive. Those rules have been included in the Decree-Law transposing the Directive into Portuguese law⁽⁴⁾. The Directive provides for passenger handling

⁽⁴⁾ Decree No 275/99, Diário da República - 23.7.99 - Series-A No 170, p. 4588.

services to be opened up, without restriction, for self-handling by carriers operating at the airport.

factors and must, moreover, be in proportion to the aims pursued.

(19) However, where specific space or capacity constraints arising, in particular, from the area utilisation rate or congestion make it impossible to authorise self-handling to the degree provided for by the Directive, the Member State in question may, on the basis of Article 9(1)(c), reserve self-handling to a limited number of airport users; these must be chosen on the basis of relevant, objective, transparent and non-discriminatory criteria. On this basis, in accordance with Article 23 of the Portuguese Decree-Law transposing the Directive⁽⁵⁾, the Portuguese authorities decided to limit self-handling at Oporto airport to four users.

(20) However, under Article 9(2) any such exemption must:

- specify the category or categories of ground handling services for which the exemption is granted and the specific constraints of available space or capacity which justify it,
- be accompanied by a plan of appropriate measures to overcome the constraints.

Moreover, pursuant to Article 9(2), it must not:

- unduly prejudice the aims of the Directive,
- give rise to distortions of competition,
- extend further than necessary.

(21) As stated by the Commission, *inter alia*, in its decisions of 14 January 1998 on Frankfurt and Düsseldorf airports⁽⁶⁾, the main aim of the Directive is to liberalise groundhandling services. The restrictions imposed on third parties are restrictions on those parties' freedom to provide such services or to exercise their right to self-handle. By analogy with State measures restricting the freedom to supply services⁽⁷⁾, measures likely to restrict or prohibit the activities of service suppliers or, in the present instance, those of users wishing to self-handle, even if they apply without distinction to national service suppliers or users and to those from other Member States, must be justified by overriding public-interest requirements and not by economic

4.1.2. Procedure

(22) As stated in its two decisions on the airports at Frankfurt and Düsseldorf⁽⁸⁾, the Commission must direct its examination towards:

- the existence and extent of the constraints justifying the exemption and the inability to open up the market to the extent provided for by the Directive; only space and/or capacity constraints may be taken into account
- the plan of appropriate measures to overcome the constraints
- conformity with the principles of compliance with the aims of the Directive, absence of distortions of competition, and the extent of the measure, as referred to in Article 9(2) of the Directive.

(23) The aim of granting an exemption is not to give the airport a further adaptation period in addition to that already granted by Article 1 of the directive. It must permit the airport to overcome the specific constraints which it may encounter when the market is opened up. Any exemption must therefore be examined in the light of the specific constraints put forward in justification of the impossibility of opening up the market within the time allowed. In addition, in accordance with the case law of the Court of Justice of the European Communities, any exception must be interpreted strictly and the scope of any exemption must be determined on the basis of the purpose of the measure in question⁽⁹⁾.

(24) This exemption must be examined in the light of these considerations.

(25) In accordance with Article 9(4) of the Directive, the Commission has made a detailed analysis of the alleged space and capacity constraints, has considered whether the decision taken by the Portuguese authorities is appropriate to those constraints, and has appraised the measures put forward to overcome them. It based its examination on the file submitted by the Portuguese authorities, on the visit it made to Oporto airport on 5 November 1999 and on the technical assessment made at its request by Aerotec. Finally, the Commission took account of the comments made by the airport and the Portuguese Government concerning the Commission's analysis.

⁽⁵⁾ Decree No 275/99, Diário da República - 23.7.99 - Series-A No 170, p. 4588.

⁽⁶⁾ Commission decisions of 14 January 1998, OJ L 173, 18.6.1998, p. 32.

⁽⁷⁾ Judgments of 25 July 1991, Cases C-288/89 *Mediawet*, [1991] ECR I-4007 and C-76/90, *Säger v. Dennemeyer*, [1991] ECR I-4221.

⁽⁸⁾ See footnote 6.

⁽⁹⁾ See footnote 7.

4.2. *Examination of the constraints referred to by the Portuguese authorities*

number of operators. There is therefore no need to allocate counters permanently to particular airlines.

(26) At the moment Oporto airport has a rectangular terminal with a declared capacity of 3 million passengers per year. With 2,7 million passengers carried in 1997, this capacity limit should soon be reached. The strong growth at this airport will force it to produce an ambitious expansion plan. As an airport serving holiday destinations, it has to handle traffic concentrated heavily around the peak season. The terminal has 18 check-in counters, six of which are allocated permanently to TAP and two to Portugalia. These two airlines also use additional counters as and when needed. In addition, KLM and GB Air temporarily rent check-in counters to self-handle their own flights. Self-handling by these four users caters for approximately 70% of the traffic. The airport has no gate parking and all boarding is via the apron.

(27) Passenger handling services for third parties are, in turn, currently provided solely by TAP. Like Portugalia, this airline uses the counters permanently allocated to it first and then, if necessary, additional counters. As a result, the arrival of a new supplier would affect only services of this kind by TAP, the sole supplier to third parties. According to the Portuguese authorities, the conditions for these services are far from satisfactory at peak periods and there is no doubt that saturation point is reached at certain times. However, the problem is that the 500 m² departure hall is too small to cope with all the passengers waiting to check in at peak times and that there are not enough check-in counters. However, this is not related to the company providing check-in services, whether one of the current self-handling users or a new arrival.

There is no joint checking-in at Oporto airport, either for self-handled flights or for the flights handled for third parties by TAP, i.e. it is not possible to check in at any of the airline's counters, as can be done at some airports. Separate counters are opened for each flight two hours before take-off or even three in the case of charter flights. Passengers may check in at the allotted counters only, with the sole exception of TAP's business class counter. The airline does not move on to the next flight until check-in for the previous flight is closed. Last-minute check-ins are possible at any time at the business class counter. If the counters are opened by flight, as is the current practice, the quality of the groundhandling suppliers bears no relation, in principle, to the saturation of the check-in hall. Saturation is actually linked to the number of flights rather than the

(28) It must be checked whether, in practice, the overlap between certain flights could create particular problems if new operators were present. This cannot be ruled out since at the moment all flights handled for third parties are dealt with by TAP. However, even where flights overlap, TAP provides groundhandling services and operates its own flights at the same time at different counters. In practice, use of these counters for the same flights but by self-handling airlines poses no particular problem.

(29) The quality of service need not be taken into consideration unless other users or operators are affected. Here, however, the lack of space has nothing to do with the number of check-in operators. The services provided by any airline wishing to self-handle concern only the airline in question, since it handles only its own aircraft.

(30) The Commission bases its appraisal on the worse case scenario at the airport, i.e. the busiest day of the busiest month of the year. In 1998 this was 19 December, when 16 369 passengers checked in here. It must be added that passenger numbers exceeded 10 000 on only five days in 1998. Examination of the flight schedules shows that on the busiest day of the year there was a shortage of counters at around 09.00 and midday. However, on the one hand this problem already exists and the arrival of a new operator would have no direct impact at these particular times because there is no joint checking-in and, on the other, this situation is the direct result of having to handle charter flights at this particular time. The allocation rules place an obligation on the airport to handle scheduled flights within specified periods but leave it free to regulate the check-in times for charter flights to ensure more efficient management of the counters. In practice, all these charter flights are occasional flights accepted by the airport case by case and on which conditions may be imposed, particularly with regard to check-in times. Examination of the flight schedules shows that slots are available for flights at certain times of the day and that rescheduling of charter flights to those times would avoid problems of this type. The airport cannot, therefore, invoke a problem which it has the power to resolve itself.

(31) Analysis of the check-in counters in turn shows that six of the 18 counters are allocated permanently to TAP

and two permanently to Portugalia. These two airlines also use other counters as and when needed, as do GB Air and KLM. This mobility shows that there are no particular compatibility problems with the computer system used and that the arrival of a new operator would pose no problem in this respect.

- (32) Similarly, the file submitted by the Portuguese authorities makes no mention of any particular problems with offices and rest rooms for staff. Inspection on-the-spot confirmed that space could be made available in the baggage-sorting hall just behind the check-in counters, next to that occupied by other operators.
- (33) Finally, the Portuguese authorities stated that the work planned to expand the terminal should not affect the current check-in arrangements.
- (34) The Portuguese authorities have thus failed to demonstrate that it is impossible to open up the market to the extent required by the Directive.

4.3. *Plan of appropriate measures*

- (35) In accordance with the provisions of Article 9(2) of the Directive, the Portuguese authorities presented a schedule of measures designed to overcome the constraints cited.
- (36) These measures form part of an extensive, more general renovation and expansion plan to enable the airport to cope with the increase in traffic, in particular by building a new taxiway and new aircraft positions and doubling the number of floors in the terminal building so that the arrival and departure areas can be kept separate.
- (37) As regards the groundhandling services covered by this exemption, the plan is to double the number of check-in counters and to expand the departure hall, to create a new departure terminal for baggage allowing 100% screening of baggage and to build five gates with walkways adjustable to aircraft of all types. According to the Portuguese authorities these measures should make it possible to cope with traffic growth and to overcome the constraints mentioned. They should also make it possible to open up the groundhandling market in 2001, as provided for by Article 1(2) of the Directive.
- (38) However, since the constraints cited by the Portuguese authorities have not been proven, as required by Article

9 of the Directive to justify an exemption, it is not necessary to examine in closer detail the measures proposed by the airport in order to overcome them.

- (39) Likewise, since there are no genuine constraints it is pointless to examine whether the action is in proportion to the aims, as specified by Article 9(2) of the Directive.

5. **Conclusion**

- (40) The Commission recognises that Oporto airport is particularly overcrowded at certain times and that a development plan has been adopted to overcome this. In particular, it recognises that the baggage registration area is too small at certain peak periods, making it extremely difficult to cope with the large number of passengers all checking in at the same time for scheduled and charter flights. On the other hand, since the problem is the hall and not the check-in counters themselves and could be partly resolved by better scheduling of the flights, it has not been demonstrated that an increase in the number of users carrying out self-handling would lead to a deterioration in check-in operations and that opening-up to other users would be impossible, as defined in Article 9 of the Directive,

HAS ADOPTED THIS DECISION:

Article 1

The exemption granted to Francisco Sá Carneiro Airport in Oporto on the basis of Article 9(1)(c) of the Directive, as notified to the Commission on 11 October 1999, fails to meet the conditions laid down in Article 9 of the Directive. Consequently, Portugal may not implement the abovementioned decision.

Article 2

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 10 January 2000.

For the Commission
Loyola DE PALACIO
Vice-President