

COMMISSION

COMMISSION DECISION

of 13 April 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty

(IV/B-2/34.179 — Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven)

(Only the Dutch text is authentic)

(94/272/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal and in particular Article 15 (6) thereof,

Having regard to the complaint submitted on 13 January 1992 by Van Marwijk and others, together with an application for interim measures, and having regard to the statutes and rules notified on 15 January 1992 by the Stichting Certificatie Kraanverhuurbedrijf and on 6 February 1992 by the Federatie van Nederlandse Kraanverhuurbedrijven,

Having given the undertakings concerned, pursuant to Article 19 (1) of Regulation No 17, the opportunity of being heard on the matters to which the Commission has taken objection,

Whereas :

I. THE FACTS

The complaint

- (1) On 13 January 1992 a complaint, together with an application for interim measures, was submitted by M. W. C. M. van Marwijk and 10 other firms alleging that the Federatie van Nederlandse Kraanverhuurbedrijven (hereinafter referred to as 'FNK') and the Stichting Certificatie Kraanverhuurbedrijf (hereinafter referred to as 'SCK') had infringed

Articles 85 (1) and 86 of the Treaty by excluding non-member firms from the mobile crane-hire trade and by imposing fixed price rates under their statutes and rules.

The notified agreements

- (2) SCK's statutes and its rules on the certification of the crane-hire trade (hereinafter referred to as 'the rules') were notified to the Commission on 15 January 1992, and FNK's statutes and internal rules were similarly notified on 6 February 1992. In both cases, an application was made for negative clearance or, alternatively, exemption pursuant to Article 85 (3). Central to the notified agreements is the so-called 'inhuurverbod' (ban on the hire of extra cranes from non-affiliated firms) laid down in the second indent of Article 7 of the rules, which states 'in addition to his other obligations under these rules, the certificate-holder is required (...) to use or allow to be used only cranes which are provided with valid certification plates.'

The parties

- (3) The complainants are firms which hire out mobile cranes. Nine of them are established in the Netherlands, the other two being established in Belgium. They are not members of FNK, nor do they participate in SCK.
- (4) FNK is an association of firms that hire out mobile cranes. It was established on 13 March 1971 and has its registered office in Culemborg. As at 31 December 1991 it had 186 members.
- (5) SCK, which has its registered office at the same address in Culemborg, was established on 15 December 1987. Under its statutes, its object is to provide a guarantee, through a system of super-

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

vision sion and registration of firms in the crane-hire business, of the quality and competence of the affiliated firms and of their staff and the quality of their machinery. As at 31 December 1992, 187 firms were affiliated, mostly firms which are also members of FNK. In its pre-operational phase (from 1985 to 1987), SCK received a subsidy from the Netherlands authorities.

The market

- (6) The relevant cranes are employed, above all, in the construction, petrochemical and transport industries in the Netherlands. In the crane-hire business, the hiring of extra cranes from other crane-hirers occurs on a large scale. In 1991 there were, according to FNK's figures, 350 crane-hire firms in the Netherlands with a total turnover of some ECU 450 million. FNK's members accounted for at least 75 % of this total. Because of transport difficulties, according to FNK, most cranes operate within a radius of about 50 km, which would limit the market in the Netherlands for firms from other Member States to areas near the Belgian and German borders.

Government supervision

- (7) Under the Law on conditions at the workplace, employers must ensure that the tools and equipment they use are appropriately and reliably constructed. They are also required to have such equipment inspected periodically. In various safety decrees based on the Law on conditions at the workplace, these rules are stipulated in greater detail. Particular mention may be made here of the Decree on safety in factories and at work sites and the Decree on safety at other types of workplace, in which provisions are laid down relating to the safe construction and safe use of cranes and lifting equipment. These provisions are spelt out in detail, as regards the various types of crane and the various types of lifting equipment, in ministerial regulations, with due regard to the requirements laid down in Council Directive 89/392/EEC⁽¹⁾ relating to machinery.

Under the Decree on safety in factories and at work sites, the Ministry of Social Affairs designated KeBoMa as the only body officially responsible for carrying out inspections of cranes and lifting

equipment. If any serious shortcomings are found, KeBoMa has to inform the Labour Inspectorate.

Structure of FNK and SCK

- (8) SCK is recognized by the Certification Council as a certification institution, which means amongst other things that, in the Certification Council's view, it meets the requirements of independence. This does not take away from the fact that, in practice, the links between FNK and SCK are so close that it is inconceivable that either could take any action without the full knowledge and agreement of the other.
- (9) The statutes of SCK show that half of its management committee is appointed by FNK and that decisions are taken by simple majority vote. It follows from this that no decision can be taken without the approval of FNK. The other members of the management committee are drawn from outside the crane-hire industry (Article 5.1). They include representatives of large firms which award contracts to crane-hire firms on a large scale and on a regular basis. This means that SCK participants are well placed to obtain the largest contracts. This is apparent, for example, from the internal operating rules of Nederlandse Spoorwegen (Dutch Railways), under which only crane-hire firms certified by SCK may be used.

The management committee is assisted by an advisory body composed of members appointed by the management committee, in consultation with FNK, which can itself nominate candidates. The advisory body consists of eight members, including two drawn from FNK itself and four from affiliated organizations and associations of undertakings which place contracts with crane-hire firms. The task of the advisory body includes advising the SCK management committee on the nature and content of the certification system and the establishment of requirements and methods of inspection underlying the certification system. The advice given by the advisory body is binding in nature (Article 2 of the rules of the advisory body).

Although FNK claims that SCK was set up on the initiative of the firms awarding contracts, the impetus seems to have come more from FNK itself; the firms awarding contracts were themselves scarcely organized.

The two organizations have the same address, telephone number and secretariat. The statutes and rules of both organizations were notified by the same representative and in the same form.

⁽¹⁾ OJ No L 183, 29. 6. 1989, p. 9. Directive as last amended by Directive 93/68/EEC (OJ No L 220, 30. 8. 1993, p. 1). In an earlier amendment (Directive 91/368/EEC (OJ No L 198, 22. 7. 1991, p. 16)), cranes were included within the scope of the Directive.

Behaviour of FNK and SCK

- (10) Under its statutes, FNK's object is to promote the interests of the crane-hire business in general and of its members in particular, and to encourage contacts and cooperation in the broadest sense between members. These objectives and the manner in which they are to be achieved are set out in the statutes and internal rules. Firms established outside the Netherlands cannot be members of FNK.

Its statutes included provisions requiring FNK's members who needed additional cranes to hire them wherever possible from other members, and to quote reasonable hire prices. These provisions were annulled by FNK following the interlocutory judgment of the Utrecht District Court on 11 February 1992.

Until 1991 FNK published price-lists; an independent survey of the industry found two sets of price rates, one for clients and one for other members hiring extra cranes.

- (11) Under its statutes, SCK's object is to promote and maintain the quality of crane-hire firms. The objective is to be attained through the establishment of a code of conduct, through a certification system and through monitoring arrangements to ensure compliance with the code of conduct. Certification involves the monitoring of a number of aspects of the crane-hire firm itself: compliance with legal requirements concerning tax and social security payments; evidence of insurance cover, creditworthiness and liquidity; the skills and conditions of employment of the staff. It also involves checking that the firm is on the trade register of the Chamber of Commerce, which excludes or at least seriously impedes access for firms from outside the Netherlands. Certification also covers technical aspects of the cranes themselves, although SCK does not itself inspect any cranes. The cranes are provided with certification plates by SCK to show that the statutory conditions have been complied with. Finally, certified firms are obliged to apply FNK's general conditions. These include conditions concerning prices.

Certification is carried out by members of the advisory body and the certification committee. Members drawn from the sector that awards contracts to crane-hire firms are prominently represented on these SCK bodies. For example, AKZO, DSM and Shell have representatives on the SCK

bodies. Firms placing such contracts are thus encouraged to award them to certified firms. The system is made watertight by the abovementioned 'inhuurverbod' which entered into force on 1 January 1991, under which the certified firm is not allowed to hire extra cranes from firms that are not affiliated to SCK. Since a lot of work in the sector is carried out on a subcontracting basis, the likely effect has been a significant decrease in the turnover of non-affiliated firms; this has already placed a number of such firms in difficulties.

The course of the proceeding

- (12) Following preliminary examination of the case, the Commission issued its statement of objections on 16 December 1992. The Commission considered withdrawing, pursuant to Article 15 (6) of Regulation No 17, the immunity against fines provided for in Article 15 (5) of the Regulation, since it is of the opinion that Article 85 (1) of the Treaty has clearly been infringed and that application of Article 85 (3) is not justified, principally because SCK prohibits its participants from hiring cranes from non-affiliated firms and excludes the affiliation of foreign firms. This ban on hiring extra cranes from non-affiliated firms has far-reaching consequences, particularly in view of the clear involvement in FNK and SCK of large firms that regularly and frequently award contracts to crane-hire firms, which places SCK participants in an extremely favourable position.

The facts and arguments adduced by FNK and SCK in their reply of 3 February 1993 to the statement of objections did not provide any grounds for the Commission to change its views on SCK's certification system, and in particular the ban on the hiring of extra cranes from non-affiliated firms.

In its letter of 4 June 1993 the Commission informed FNK and SCK of this. The Commission indicated that the procedure pursuant to Article 15 (6) of Regulation No 17 could be terminated only if FNK and SCK decided to withdraw the ban.

- (13) In response, FNK and SCK proposed, in their letter of 12 July 1993, that the ban on the hire of extra cranes from non-affiliated firms, as set out in the second indent of Article 7 of the rules, should be amended in such a way that only cranes could be employed which were provided with valid proof of certification granted either by SCK 'or by another certification institution which is qualified under EN 45011 to certify crane-hire firms and in so doing applies demonstrably equivalent criteria.'

The Commission considers that this proposal does not meet its objections, since it has not been established that a private-law certification system such as that introduced by SCK adds anything essential to the already existing statutory requirements applying to cranes and lifting equipment. All such machines and parts thereof are, moreover, covered by the abovementioned Directive 89/392/EEC. In addition, KeBoMA, the crane inspection body recognized by the Dutch Government, does not rank as a certification institution qualified under EN 45011, with the result that cranes which have only KeBoMa approval and which thus satisfy all statutory requirements are still caught by the ban. The amendment proposed by FNK and SCK will consequently have little or no effect in practice.

The Commission thereupon proposed, in a letter dated 2 August 1993, that the second indent of Article 7 of the rules should be amended in such a way as to allow the use only of cranes which can be shown to comply with the statutory provisions in force in the place where the user has his registered office. FNK and SCK did not accept this proposal. The Commission thereupon decided to continue the proceeding pursuant to Article 15 (6).

The course of the proceeding before the national court

- (14) In an interlocutory judgment delivered on 11 February 1992 the President of the Utrecht District Court, in proceedings brought by Van Marwijk and others, ordered SCK to suspend application of the ban. This judgment was overturned, similarly in interlocutory proceedings, on 9 July 1992 by the Amsterdam Court of Appeal. The Court of Appeal took the view that it was not for the time being evident and beyond all doubt that the arrangements in question did not have any chance of being exempted by the Commission. In the view of the Court of Appeal, a national court had to be careful in delivering any judgment in the matter, especially since the arrangements were now subject to the decision to be taken by the Commission.
- (15) Following the issuing of the statement of objections on 16 December 1992, Van Marwijk and others once again applied to the President of the Utrecht District Court. The latter ruled, in an interlocutory judgment delivered on 6 July 1993, that the ban on the hire of cranes from non-affiliated firms should be suspended, since the circumstances which prompted the Court of Appeal to overturn the earlier judgment of the District Court no longer applied. The President of the District Court took account of the fact that the Commission had in the

meantime, both in the statement of objections and in the abovementioned letter of 4 June 1993, made known its point of view on the arrangements in question and that it was accordingly clear that the ban did not have any chance of being exempted by the Commission. However, in view of the fact that the judgment was to a considerable extent based on an interpretation of the Amsterdam Court of Appeal's earlier judgment of 9 July 1992, the President of the District Court postponed the entry into effect of the judgment for four months (until 8 November) so as to give parties the opportunity of obtaining a new ruling from the Amsterdam Court of Appeal.

That appeal has meanwhile been rejected by the judgment of the Amsterdam Court of Appeal of 28 October 1993. FNK and SCK accordingly prepared and distributed on 4 November, in order to comply with the Court order, a statement to the effect that the 'inhuurverbod' is withdrawn until the Commission has adopted a definitive position on the matter.

II. ARTICLE 85 (1)

- (16) As is evident from the facts described above, the FNK rules and the SCK rules form an indissoluble whole and should be assessed together as regards the applicability of Article 85 (1) of the Treaty.
- (17) FNK is an association. The members of the association are undertakings engaged in the crane-hire trade. This is clear from Articles 1 and 2 of FNK's statutes and from the explanatory memorandum attached to the notification.
- FNK is accordingly an association of undertakings within the meaning of Article 85 (1).
- (18) The internal rules of FNK constitute a decision by an association of undertakings, in that they were adopted under the FNK statutes, and in particular Article 4 thereof.
- (19) SCK is a foundation under Dutch law set up on the initiative of FNK for the purpose of certifying crane-hire firms against payment. SCK is, however, an independent legal person, as may be seen from Article 6 of its statutes and from the notification. SCK does not have any public-law basis.
- SCK, which carries out commercial or economic activities, is accordingly an undertaking within the meaning of Article 85 (1).

(20) The fact that SCK is a certification institution recognized by the Certification Council as complying with the pertinent European standards (the EN 45 000 series) does not prevent Article 85 (1) from being applicable. The fact that the SCK rules are recognized by the Certification Council does not in any case mean that SCK can act in breach of competition law.

(21) The crane-hire firms certified by SCK are also undertakings within the meaning of Article 85 (1).

Participation in the SCK system, which involves acceptance of the statutes and rules, therefore constitutes an agreement or decision by an association of undertakings within the meaning of Article 85 (1), for the reasons set out below.

(22) A feature of the SCK system, set up on FNK's initiative, is that it is a closed circuit. The 'inhuurverbod' under Article 7 of the rules is largely the cause of this. This ban, spelt out in Articles 8, 9 and 10 of the rules, prevents affiliated firms from calling on non-affiliated firms as subcontractors. This not only limits the freedom of action of affiliated firms, thereby restricting competition among them, but also substantially restricts access by other firms, particularly those from other Member States, to the Dutch market. This also results from the certification requirements, which are arranged to suit to the situation in the Netherlands (see recital 25). The FNK and SCK arrangement, seen as a whole, is tantamount to an attempt to control the entire Dutch crane-hire market. In these circumstances the conclusion must be that competition is restricted within the meaning of Article 85 (1) of the Treaty. FNK and SCK have not demonstrated that their certification system cannot function without the 'inhuurverbod'.

(23) The arrangements are based in practice on two essential elements: the market share of the undertakings affiliated to FNK or SCK (see recital 6) and the fact that the largest firms using hired cranes, for example Esso, Shell, DSM and the Dutch Railways, make use only of the services of firms affiliated to SCK. It is significant in this context that such large firms are heavily represented in SCK's bodies and that the FNK representatives have a blocking majority within those same bodies. This procedure results in the best markets being reserved. The ban on the hire of cranes from non-affiliated firms ensures that, if there is a need for any extra hired cranes, only firms affiliated to SCK can provide them.

(24) The arrangements are made watertight by means of the monitoring system set up by SCK.

Articles 9 and 10 of the rules provide for the suspension and decertification of affiliated firms if they fail to comply with the various requirements, including the ban on hiring extra cranes from non-affiliated firms. Appeals against any such decisions are heard by a panel whose appointment is indirectly in the hands of FNK (Article 14 of the rules). Suspension or decertification of an affiliated firm is announced by means of an advertisement in the specialized press, which thus, first, poses a threat of decertification of other affiliated firms if they continue to do business with the firm in question and, secondly, creates the suggestion that it is better to avoid doing business with the firm in question. Such advertisements are extremely damaging to the firms concerned.

(25) The FNK and SCK systems require members and participants to be established in the Netherlands (Article 4 (a) of the FNK statutes; SCK certification requirements, which are entirely and exclusively based on and geared to the situation in the Netherlands), which excludes undertakings from other Member States, particularly Belgium and Germany (see recital 6). Germany and Belgium have a comparable system to that in the Netherlands for the statutory inspection of cranes.

(26) The abovementioned arrangements may significantly restrict competition, in view of total turnover in the crane-hire business, the market share of the participants and the involvement in SCK of the firms that award contracts.

(27) When notifying its statutes and internal rules, FNK initially conceded that the system could have the effect of restricting trade within the common market, but subsequently reversed its position and claimed that there was no such effect. This latter claim was based on the limited extent of cross-frontier trade in this branch of industry, since 'mobile cranes are by their nature not meant to be transported'. However, it is evident from the FNK handbook that Krupp cranes can travel at maximum speeds of between 63 and 78 kph (1991 handbook, page 10). An advertisement on page 124 of the FNK handbook offers for hire cranes with a lifting capacity of 12 to 400 tonnes which 'can be set up rapidly anywhere'. This means (as indeed the word 'mobile' implies) that it is in fact possible to move mobile cranes and that the system therefore constitutes a potential restriction of intra-

Community trade. This remains true even if the participants do not at present engage in intra-Community trade, as the Court held in Case 107/82, *AEG v. Commission* ⁽¹⁾. The fact that two of the complainants are from Belgium shows that intra-Community trade is in fact possible and that trade between Member States can be adversely affected. Furthermore, the competition rules cover the whole of the Netherlands. For the reasons set out in recital 26, the (potential) effect on trade is appreciable.

III. ARTICLE 85 (3)

(28) The statutes and internal rules of FNK and the statutes and rules of SCK were notified to the Commission with a view to obtaining negative clearance or, alternatively, exemption pursuant to Article 85 (3). As already stated in recital 16, the FNK and SCK arrangements should be examined jointly.

(29) In order to qualify for exemption, FNK and SCK must, *inter alia*, show that the agreements or decisions by associations of undertakings contribute to improving the crane-hire business while allowing consumers a fair share of the resulting benefit. The improvement must entail objective and appreciable advantages such as to compensate for any disadvantages they cause in the field of competition ⁽²⁾.

The requirements imposed on members and affiliated firms are virtually identical to the statutory requirements applicable, particularly as regards tax and social security provisions on the one hand and compliance with safety rules on the other (see recital 11).

It is the responsibility of the authorities to ensure compliance with such statutory provisions by all undertakings, whether or not they participate in the system ⁽³⁾. It is therefore hard to see how any measurable benefits can result from the system. The conclusion must therefore be that the restrictions imposed on affiliated firms and the resulting disadvantages for non-affiliated firms are merely designed to coerce crane-hire firms to join a cartel. The disadvantages thus clearly outweigh any benefits claimed by FNK and SCK. Furthermore, the

restrictions imposed by FNK and SCK are not indispensable to the attainment of their objectives as set out in their statutes, since they merely duplicate the monitoring of compliance with Dutch statutory provisions.

Most of the safety requirements which SCK imposes for certifying a crane-hire firm are also imposed by the safety decrees based on the Law on conditions at the workplace and by the various ministerial regulations. Official supervision of compliance with such provisions is carried out by KeBoMa in particular. Similarly, most of the non-safety-related requirements which SCK imposes, such as those relating to the payment of tax and social security contributions, registration with the Chamber of Commerce, third-party insurance, creditworthiness and application of the collective labour agreement, are already covered by statutory provisions. SCK goes beyond the statutory requirements by imposing requirements regarding the manner of conducting business, but that alone is insufficient reason to regard the restrictions of competition imposed as indispensable.

Rather, it would seem that the restrictions imposed by FNK and SCK are aimed at excluding other undertakings and at sharing markets in the Netherlands, thereby eliminating competition in respect of a substantial part of the crane-hire market. In particular competition from firms in other Member States is in effect eliminated (see recital 25).

(30) The fact that the Commission's policy on certification allows scope for private-law certification systems that are designed to provide supplementary monitoring of compliance with statutory provisions is without prejudice to the need for the details of such systems to be in accordance with the competition rules laid down in the Treaty. Restrictions of competition that are caught by Article 85 (1) cannot therefore be justified solely on the grounds that the introduction of a certification system as such fits in with the Commission's certification policy.

(31) It is therefore not possible, for the reasons set out above, to grant exemption pursuant to Article 85 (3) of the EC Treaty.

IV. ARTICLE 15 (6) OF REGULATION No 17

(32) Article 15 (5) of Regulation No 17 stipulates that fines are not to be imposed in respect of activities relating to decisions after notification to the Commission and before the latter's decision.

⁽¹⁾ [1983] ECR, paragraph 60, p. 3151.

⁽²⁾ Joined Cases 56 and 58/64, *Consten and Grundig v. Commission*, [1966] ECR, p. 299.

⁽³⁾ Case T-30/89, *Hilti v. Commission*, [1991] ECR II, paragraph 118, p. 1439.

Article 15 (6) provides that immunity from fines may be withdrawn where the Commission has indicated that after preliminary examination it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

- (33) As may be seen recitals 17 to 27, the Commission is of the opinion that the decisions fall within the scope of Article 85 (1). The decisions constitute a clear and serious infringement of Article 85 (1), particularly in view of the ban on hiring extra cranes from non-affiliated firms.

As may be seen from recitals 28, 29 and 30, application of Article 85 (3) is not at first sight justified. It should also be pointed out here that the anti-competitive nature of the arrangements was examined in detail in the proceedings before the Utrecht District Court, whose findings on this point were not contradicted on appeal.

- (34) It is therefore appropriate that the Commission should inform the undertakings accordingly pursuant to Article 15 (6) of Regulation No 17. Under this Decision, the immunity from the imposition of fines that normally results from the notification of an agreement is withdrawn in respect of the ban on the hire of certain extra cranes as notified by FNK and SCK and as laid down in the second indent of Article 7 of the rules and spelt out

in greater detail in Articles 8, 9 and 10 of those rules,

HAS ADOPTED THIS DECISION :

Article 1

After a preliminary examination pursuant to Article 15 (6) of Regulation No 17, the Commission is of the opinion that the arrangements notified by FNK and SCK in respect of certification of crane-hire businesses meet the conditions of Article 85 (1) of the EC Treaty and that application of Article 85 (3) is not justified.

Article 2

This Decision is addressed to :

1. Stichting Certificate Kraanverhuurbedrijf
Postbus 312
NL-4100 AH Culemborg ;
2. Federatie van Nederlandse Kraanverhuurbedrijven
Postbus 312
NL-4100 AH Culemborg.

Done at Brussels, 13 April 1994.

For the Commission

Karel VAN MIERT

Member of the Commission