

Case T-35/92

John Deere Ltd

v

Commission of the European Communities

(Competition — Information exchange system —
Anti-competitive effect — Refusal to grant an exemption)

Judgment of the Court of First Instance (Second Chamber), 27 October 1994 II - 961

Summary of the Judgment

1. *Acts of the institutions — Presumption of validity — Dispute — Measures of inquiry by the Community judicature — Conditions*
(EEC Treaty, Article 189)
2. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Successive notifications — Consideration by the Commission*
(EEC Treaty, Article 85)
3. *Competition — Agreements, decisions and concerted practices — Effect on competition — Agreement creating an information exchange system not concerning prices and not underpinning any other anti-competitive arrangement — Permissible on a competitive market — Not permissible on an oligopolistic market*
(EEC Treaty, Article 85(1))

4. *Competition — Agreements, decisions and concerted practices — Effect on competition — No evidence of actual anti-competitive effects — Irrelevant having regard to the possibility of taking purely potential effects into account*
(EEC Treaty, Article 85(1))
 5. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Concept — Information exchange system — System presupposing a tacit agreement to define its detailed rules, which restricts the ability of the participants to make independent decisions*
(EEC Treaty, Article 85(1))
 6. *Competition — Agreements, decisions and concerted practices — Effect on competition — Agreement not having an anti-competitive object — Assessment by reference to the effects on the market — Criteria*
(EEC Treaty, Article 85(1))
 7. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Agreement covering the market of a single Member State — Restriction of competition between traders operating throughout the common market — Effect on imports*
(EEC Treaty, Article 85(1))
 8. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Cumulative nature of the conditions for exemption*
(EEC Treaty, Article 85(3))
 9. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Obligation on the undertaking to show that its application is well founded*
(EEC Treaty, Article 85(3))
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1. In the absence of any evidence to call into question the validity of a Commission decision, the presumption of validity enjoyed by Community measures must apply to the decision. If the applicants have failed to produce the slightest evidence which might rebut that presumption, it is not appropriate for the Community judicature to order measures of inquiry in order to establish whether the formalities laid down in the Commission's Rules of Procedure have been followed in the case in point.
 2. If, in order to obtain an individual exemption, two consecutive notifications of an information exchange system have been made to the Commission, it is required to consider the lawfulness under Article 85 of the Treaty of both notifications, where the second notification was not made by all the signatories to the first notification and the notifying parties have not expressly withdrawn the first of those two notifications.

3. An agreement creating an information exchange system which does not concern prices and does not underpin any other anti-competitive arrangement is likely, on a truly competitive market, to lead to the intensification of competition between suppliers, since the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomized nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct. On the other hand, general use, as between the major suppliers, of exchanges of precise information at short intervals is, on a highly concentrated oligopolistic market on which competition is already greatly reduced and exchange of information facilitated, likely to impair considerably the competition which exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors.
4. The fact that the Commission has been unable to establish that an agreement between undertakings produces an actual anti-competitive effect on the market in question has no bearing on the outcome of the case, since Article 85(1) of the Treaty prohibits both actual anti-competitive effects and purely potential effects, provided that they are sufficiently appreciable.
5. The provision to traders operating on a national market of detailed information, broken down according to predetermined geographical areas, concerning transactions performed on that market presupposes at least a tacit agreement between those traders to agree on those areas and to define the institutional framework for the exchange of information. By acting in concert in that way, the traders participating in the information exchange system have necessarily restricted their ability to make independent decisions in ways which may have affected competition between them.
6. Where there is no anti-competitive object, an agreement may be challenged only on the basis of its effects on the market. In such a case, its anti-competitive effects should be assessed by reference to the competition which would in fact occur in the absence of the agreement in dispute.
7. An information exchange system enabling the exact sales volume and market shares of 88% of the suppliers of a national market, when established on a national oligopolistic market where the traders involved are principally those active throughout the common market, is liable

substantially to affect trade between Member States. By lessening competition, it necessarily influences the volume of imports to the market in question.

satisfied, the Commission may lawfully reject the application made to it.

8. The four conditions laid down in Article 85(3) of the Treaty for the grant of an individual exemption to an agreement properly notified to the Commission are cumulative, so that if one of them is not
9. Where an application for an individual exemption from the prohibition on restrictive agreements is made, it is primarily for the undertakings concerned to present to the Commission the evidence to show that the agreement satisfies the conditions laid down in Article 85(3) of the Treaty.