JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
27 October 1994 *

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In Case T-35/92,

John Deere Limited, a company whose registered office is in Edinburgh (United Kingdom), represented by Hans-Jörg Niemeyer and Rainer Bechtold, of the Stuttgart Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 rue Goethe,

applicant,

v

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, and Stephen Kon, Solicitor, and Leonard Hawkes, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 92/157/EEC of 17 February 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.370 and 31.446 — UK Agricultural Tractor Registration Exchange, OJ 1992 L 68, p. 19),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, C. P. Briët, D. P. M. Barrington, A. Saggio and J. Biancarelli, Judges,

Registrar: M. H. Jung,

having regard to the written procedure and further to the hearing on 16 March 1994,

gives the following

Judgment

The facts

1 The Agricultural Engineers Association Limited (hereinafter 'the AEA') is a trade association open to all manufacturers or importers of agricultural tractors operating in the United Kingdom. At the material date, it had approximately 200 mem-

bers including, in particular, Case Europe Limited, John Deere Limited, Fiatagri UK Limited, Ford New holland Limited, Massey-Ferguson (United Kingdom) Limited, Renault Agricultural Limited, Same-Lamborghini (UK) Limited, and Watveare Limited.

(a) *The administrative procedure*

2 On 4 January 1988 the AEA notified to the Commission, primarily with a view to obtaining negative clearance, or alternatively an individual exemption, an agreement relating to an information system based on data held by the United Kingdom Department of Transport relating to registrations of agricultural tractors, called the 'UK Agricultural Tractor Registration Exchange' (hereinafter 'the first notification'). That information exchange agreement replaced a previous agreement dating back to 1975 which had not been notified to the Commission. That latter agreement had been brought to the attention of the Commission in 1984 during investigations carried out following a complaint made to it concerning obstacles to parallel imports.

3 Membership of the notified agreement is open to all manufacturers or importers of agricultural tractors in the United Kingdom, whether or not they are members of the AEA. The AEA provides the secretariat for the agreement. According to the applicant, the number of members has varied during the period in which the matter has been under investigation, in line with the restructuring operations which have affected the sector; at the date of the notification, eight manufacturers, including the applicant, took part in the agreement. The parties to that agreement are the eight traders named in paragraph 1 above, which, according to the Commission hold 87 to 88% of the United Kingdom tractor market, the remainder of the market being shared by several small manufacturers.

4 On 11 November 1988 the Commission issued a statement of objections to the AEA, to each of the eight members concerned by the first notification, and to Systematics International Group of Companies Limited (hereinafter 'SIL'), a data-

processing company with responsibility for the processing and handling of the data contained in Form V55 (see paragraph 6, below). On 24 November 1988 the members of the agreement decided to suspend it. During a hearing before the Commission, the applicant, relying in particular on a study carried out by Professor Albach, a member of the Berlin Science Center, claimed that the information distributed had a beneficial effect on competition. On 12 March 1990 five members of the AEA, including the applicant, notified to the Commission a new agreement (hereinafter 'the second notification') for the dissemination of information, called 'the UK Tractor Registration Data System' (hereinafter 'the Data System') and undertook not to implement the new system before receiving the Commission's response to their notification.

5 In Decision 92/157/EEC of 17 February 1992 relating to a proceeding under Article 85 of the Treaty (IV/31.370 and 31.446 — UK Agricultural Tractor Registration Exchange, OJ 1992 L 68, p. 19, hereinafter referred to as 'the Decision') the Commission:

— held that the agreement on the exchange of information on registrations of agricultural tractors infringed Article 85(1) of the Treaty 'in so far as it gives rise to an exchange of information identifying sales of individual competitors, as well as information on dealer sales and imports of own products' (Article 1);

— refused the application for exemption under Article 85(3) of the Treaty (Article 2);

— required the AEA and the members of the agreement to put an end to the infringement, in so far as they had not already done so, and to refrain in future from entering into any agreement having an identical or similar object or effect (Article 3).

(b) *The content of the agreement and its legal context*

6 Under the law of the United Kingdom all vehicles must be registered with the Department of Transport if they are to be used on public roads in the United Kingdom. Approximately 60 Local Vehicle Licensing Offices ('LVLO') have responsibility for those registrations. The registration of vehicles is subject to procedural guidelines issued by the Department of Transport entitled 'Procedure for the first licensing and registration of motor vehicles'. According to those guidelines, a special form, Form V55, must be used for the application to register a vehicle. Under an arrangement made with the Department of Transport, that department sends to SIL some of the information it receives when vehicles are registered.

7 The parties disagree on a number of factual questions concerning the information appearing on the form and the use of that information. Those matters of disagreement can be summarized as follows:

8 According to the applicant, Form V55 has five different versions, numbered V55/1 to V55/5, which are described in the procedural guidelines, referred to above. Forms V55/2 and V55/4, which were used only by British Leyland, are no longer used, whereas Form V55/3, used when Form V55/1 is lost, misplaced or destroyed, is completed manually. The only forms which are relevant in this case are therefore versions V55/1 and V55/5.

9 According to the Commission, there are basically two versions of the form. Forms V55/1 to V55/4, which are 'pre-completed' by manufacturers and sole importers and used by dealers to register vehicles delivered to them, and Form V55/5, which is used for parallel imports.

10 According to the applicant, that distinction is misleading. Form V55/5 is used where vehicles are registered for the first time in the United Kingdom, and also for vehicles imported into the United Kingdom by independent importers.

11 The applicant states, first, that only Form V55/1 is 'pre-completed' on the front by the manufacturer of the vehicle or its importer, the reverse side being completed by the registered keeper (the customer or the owner). The information on page 1 of Form V55/1, apart from that appearing on its bottom half, is reproduced on an undercopy (sheet 2). The bottom half of that sheet is intended for statistical data. It can be filled out voluntarily by the registered keeper of the vehicle. Even when the statistical part is not completed by the registered keeper, the dealer who has carried out the sale is requested by the departmental guidelines, referred to above, to insert the postcode of his customer. The completed form is then sent to the LVLO for the relevant area. The LVLO separates the two sheets. It sends the first to the Driver and Vehicle Licensing Centre (hereinafter referred to as 'the DVLC') which produces and issues the registration document. Still in compliance with the departmental guidelines, the second sheet is transmitted to a data-processing company which is designated for each major category of vehicle to the public authority by the trade sector concerned. In the case of tractors, this is SIL.

12 Secondly, the applicant states that Form V55/5 is used for all sales other than first sales. Contrary to the Commission's claims, it does not enable parallel imports to be identified. SIL extracts the information appearing on the form, after which it is destroyed without it ever having been sent directly to the members of the agreement.

13 According to the Commission, the form contains the following information, certain points being disputed by the applicant:

— make (manufacturer);

— model, serial and chassis number; the applicant considers that the statement contained in the third indent of point 14 of the Decision is in that respect incomplete and inaccurate; according to the applicant, that information is purely for SIL's internal use in order to avoid double registrations; the appliant states that, contrary to the Commission's assertion, SIL does not make the serial numbers of the vehicles available to the members; in that respect, it is apparent from the meeting between the parties and the Judge-Rapporteur on 7 December 1993 that the information relating to serial (or chassis) numbers is recorded by SIL but, under the system based on the first notification, it is no longer disseminated to the members of the agreement, it having been agreed since 1 September 1988 that SIL is not to send the vehicle registration form to the members of the agreement;

— original and selling dealer (code number, name, address and postcode): according to the applicant, whose statements on that point were confirmed by SIL at the meeting on 7 December 1993, and contrary to the indication given in the fourth indent of point 14 of the Decision, SIL does not enter into its data base the name, address and postcode of the dealer; furthermore, the original dealer code (box 54) is recorded only if there is no selling dealer code (box 61);

— full postcode of the registered keeper of the vehicle:

— name and address of the registered keeper; according to the applicant, and contrary to the suggestion in the seventh indent of point 14 of the Decision, SIL does not extract from Form V55 the name and address of the keeper of the vehicle. In that respect it was confirmed at the meeting on 7 December 1993 that, although that information may appear on page 3 of Form V55, which is the only sheet sent to SIL, the information is in any event not recorded by it, so that it is not passed on to the members of the agreement.

14 The applicant states that the information extracted by SIL, which it states concerns exclusively registrations and not sales, is as follows:

— the make of the vehicle (box 18);

— the vehicle model (box 21);

— the description of the body of the vehicle (box 23);

— the selling dealer (box 61);

— the postcode sector of the registered keeper of the vehicle (box 70);

— the date of receipt by SIL of the second sheet of the form by SIL.

15 The Commission considers that the information sent to the members of the agreement can be divided into three separate categories as follows:

— Aggregate industry information: aggregate industry sales with or without a breakdown by horsepower or by driveline; the information is available for time periods broken down by year, quarter, month or week;

— Information concerning the sales of each member: the number of units sold by each manufacturer and their market shares for various geographical areas: the United Kingdom as a whole, region, county, dealer territory, identified using the postcode sectors of which each territory is composed; that information is available for time periods broken down by month, quarter, or year (and in the latter case, by reference to the preceding 12 months, the calendar year or rolling year);

— Information concerning the sales made by the dealers in the distribution network of each member, in particular imports and exports in their respective territories. It is therefore possible to identify imports and exports between the different dealer territories and to compare those sales activities with the sales achieved by dealers in their own territories.

16 Furthermore, the Commission states that until 1 September 1988 SIL provided members of the agreement with copies of Form V55/5 which is used by independent importers. Since that date it has been providing them only with the information taken from that form. However, in the Commission's view, that enables parallel imports from other Community countries to be identified, mainly through the use of the serial number.

17 The applicant states that, if the Court annuls the decision, the members of the agreement will operate the Data System described in the second notification under which SIL would furnish four types of information to the members:

— Aggregate industry data: each member could obtain information on aggregate industry registrations without any product breakdown by model or with a breakdown by horsepower or by driveline for the United Kingdom or each of the ten regions of the Ministry of Agriculture, Fisheries and Food ('MAFF'), as well as by land use, county, own dealer territories and postcode sector. Those sales could be obtained on a weekly or monthly basis;

— Data about the company's own sales: SIL can provide members with 'tailor-made' reports about their individual total sales, and also sales by model for the United Kingdom, by MAFF region, by land use, by county, by own dealer territory and by postcode sector. In addition SIL could provide to each manufacturer individually information, in aggregate or broken down by model, on sales

made by a dealer in its territory or on total sales by a dealer, without indicating the location of the sale. Such data could be provided monthly. The applicant states that it ought to be pointed out that, although point 26 of the Decision correctly describes the information which may be sent in that context, the expressions 'imports' and 'exports' by dealers must be understood as meaning, with regard to the former, sales made by other dealers in a given dealer territory and, with regard to the latter expression, sales made by a dealer outside his own dealer territory. In no case do those potentially confusing expressions indicate imports from other Member States or exports to such states. The purpose of the system is therefore not to monitor parallel imports. The applicant states that the Commission's description is liable to mislead. The system would give each of the members of the agreement only data about total sales to customers within the territory of a dealer, without indicating the dealer who made the sale, and indicate the total sales made by a dealer to customers within his own territory;

— Data about the sales of each competitor: SIL could indicate the aggregate sales of a given competitor, with or without breakdown by model, for the whole of the United Kingdom, by MAFF region, by land use, county, own dealer territory and by postcode sector. Those data would be disseminated on a monthly basis;

— Information derived from Form V55: chassis number and registration date of each tractor of a company's make sold in the United Kingdom. That information would be disseminated on a monthly basis. It is intended to enable warranty and bonus claims to be verified.

18 Finally, the cost of SIL's services are invoiced to each member of the agreement at a price which is individually negotiated. Each member of the agreement is contrac-

tually linked to SIL on an individual basis. The applicant stresses the fact that, despite the name given to the system, there is no exchange of information between the members of the agreement. If such exchanges have taken place, the applicant has taken no part in them and they are not associated with the system itself.

Forms of order sought by the parties

19 The applicant brought the present proceedings by application lodged at the Registry of the Court of First Instance on 7 May 1992.

20 The applicant claims that the Court should:

(i) declare void the Commission decision of 17 February 1992 relating to a proceeding under Article 85(1) of the EEC Treaty (IV-2/31.370 and 31.446-UK Agricultural Tractor Registration Exchange);

(ii) order the defendant to pay the costs.

21 The Commission contends that the Court should:

(i) reject the application as unfounded;

(ii) order the applicant to pay the Commission's legal fees and expenses.

22 After the closure of the written procedure the President of the Second Chamber of the Court of First Instance, by order dated 28 October 1993, ordered the present case to be joined with Case T-34/92 *Fiatagri UK Limited and Ford New Holland Limited* v *Commission* for the purposes of the oral procedure, subject to confidential treatment of certain parts of the present application and some of its annexes vis-à-vis the applicants in Case T-34/92.

23 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to reply to certain written questions and to produce certain documents. The Commission replied to those questions and produced the documents requested on 2 December 1993. In addition, the parties and SIL were invited to take part in a meeting with the Judge-Rapporteur in accordance with Article 64 of the Rules of Procedure. That meeting took place on 7 December 1993. The parties presented oral argument and gave their replies to the oral questions put by the Court at the public hearing on 16 March 1994. During the course of that hearing, Mr Hodges, representing SIL, was examined as a witness in accordance with Article 68 et seq. of the Rules of Procedure.

Pleas in law and arguments of the parties

24 The applicant has submitted eleven pleas in support of its application for annulment; they are divided into three separate groups.

25 With regard to the regularity of the administrative procedure, the applicant claims that the Decision is marred by:

— infringement of essential procedural requirements; and

— a contradiction between the grounds of its reasoning and its operative part.

26 Under the second group of pleas, the applicant puts forward four 'general arguments'. It claims that:

— the Decision is based on materially incorrect facts;

— an information exchange system does not, by itself, constitute an infringement of Community competition rules, and that the Decision is incompatible with Community competition policy and is therefore based on a misuse of powers;

— the practice in question does not constitute an infringement of Article 5 of the Treaty by the United Kingdom authorities;

— the Decision fails to observe the rules concerning the burden of proof.

27 Finally, the third group consists of five pleas. In this respect, the applicant claims that:

— the information exchange system at issue is not an agreement within the meaning of Article 85(1) of the Treaty;

— dissemination of information on the sales of each competitor does not weaken competition;

— the same argument applies to the dissemination of information on the sales of each member's dealers;

— the information dissemination system in question does not affect trade between the Member States to a sufficiently material extent;

— even admitting that the information exchange system in question falls within Article 85(1) of the Treaty — which it denies — the conditions for the application of Article 85(3) are satisfied.

A — *The first group of pleas concerning the regularity of the administrative procedure*

First plea: infringement of essential procedural requirements

Arguments of the parties

28 The applicant claims that it has reason to doubt whether the Decision was authenticated in compliance with the requirements of Article 12 of the Commission's Rules of Procedure 63/41/EEC of 9 January 1963 (JO 1963 17, p. 181) provisionally maintained in force by Article 1 of Commission Decision 67/426/EEC of 6 July 1967 (JO 1967, No 147, p. 1), as last amended by Commission Decision 86/61/EEC, Euratom, ECSC of 8 January 1986 (OJ 1986 L 72, p. 34), then in force. It refers in that respect to the judgment of the Court of First Instance in Joined Cases T-79/89, 84/89, 85/89, 86/89, 89/89, 91/89, 92/89, 94/89, 96/89, 98/89, 102/89 and 104/89 *BASF and Others* v *Commission* [1992] ECR II-315), and states that it has received only a copy of the Decision and does not know whether it has been authenticated by the President and the Secretary General of the Commission in accordance with Article 12 of the Provisional Rules of Procedure, cited above. It therefore requests the Commission to produce, in the pre-trial inquiry, the original of the Decision and, should the Commission refuse to do so, it requests this Court to order appropriate measures of inquiry to that end. If the communication of the original were to reveal an infringement of Article 12 of the Commission's Rules of Procedure, the Decision would infringe essential procedural requirements and would have to be declared null and void.

29 The applicant also states that it does not know whether the Commission's decision of 5 November 1980 concerning delegation to the Commissioner with responsibility for competition matters, which has not been published, empowered that Commissioner to notify copies of decisions. It considers that, if the Commission were to rely on such a delegation, that decision ought to be produced to enable the Court to review whether the exercise of that delegation is valid. Furthermore, the applicant claims that in the present case the Commission could not validly consent to such a delegation, because the Court of Justice has held that a decision delegating power to a single commissioner must be published. Since the Commission has not published the decision to delegate, the Decision infringes essential procedural requirements and must be declared null and void.

30 The Commission considers that nothing enables the applicant validly to claim that its Rules of Procedure have not been complied with in this case. The Commission observes that the plea is not supported by detailed allegations and that it must therefore be rejected. Finally, it observes that the notification of the Decision is lawful, because the copy notified is certified as a true copy of the original by the Secretary General of the Commission and the addressee was able to take note of it. The Commission is not therefore under any obligation to produce the original of the Decision, but it will nevertheless do so if the Court so orders.

Findings of the Court

31 The Court considers that in the absence of any evidence to call into question the validity of the Decision, the presumption of validity enjoyed by Community measures must apply to the Decision, as notified to the applicant. Since the applicant has failed to produce the slightest evidence which might rebut that presumption, it is not appropriate for the Court to order the measures of inquiry requested. As regards the propriety of the procedure for adopting the copy of the Decision and its notification, the Court also considers that, even if flaws affecting that copy or the propriety of its notification to the undertakings were proved to exist, those

flaws would not in any event effect the legality or, *a fortiori*, the existence of the Decision and would only have a bearing on the date from which the period for bringing proceedings against it begins to run. Furthermore, as is apparent from the thrust of the action itself, the applicant was able to take full cognizance of the Decision and to assert its procedural rights to their full extent. In the present case, the applicant was sent a copy of the Decision certified as a true copy by the Secretary General of the Commission. In the absence of any solid evidence which would call into question its regularity, such a copy is authentic (judgment of the Court of Justice in Joined Cases 97/87 to 99/87 *Dow Chemical Iberica and Others* v *Commission* [1989] ECR 3165, paragraph 59, and judgment of the Court of First Instance in Case T-43/92 *Dunlop Slazenger* v *Commission*, [1994] ECR II-441, paragraphs 24 and 25). Having regard to all those circumstances, the plea must therefore be dismissed and it is not necessary for the Court to grant the applicant's requests for the production of documents.

The plea that there is a contradiction between the operative part of the Decision and the grounds upon which it is based

Arguments of the parties

32 According to the applicant the operative part of the Decision lacks coherence and clarity. First, pursuant to Articles 1 and 3 of the operative part, the members of the agreement are to put an end to the information exchange system in so far as it enables sales of individual competitors to be identified, while, in contradiction to that operative part, the Decision accepts that an exchange of sales figures by the various competitors, namely one which enables individual data to be identified, is lawful, provided that the information disseminated is one year old; secondly, pursuant to the same articles of the Decision's operative part, the parties are to terminate the information exchange system in so far as it gives its members information on sales and imports by their own dealers. However, the Decision does not explain

whether the dissemination of data on dealer sales is permitted at least where the aggregate data relate to at least ten vehicles, as indicated by point 54 of the Decision, or whether, as seems to be indicated by points 55 and 56, dissemination of such information is still considered to be capable of restricting the dealers' activity, in which case it should be stated under which conditions the information exchange system would be such as to eliminate any possibility of restricting the activities of those dealers.

33 The Commission considers that, when read in the light of the statement of reasons and in particular of point 61 concerning exchanges of information which do not by themselves have anti-competitive effects, the operative part of the Decision is sufficiently clear (judgment of the Court of Justice in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663).

Findings of the Court

34 The Court observes, first, that in point 50 of its grounds, the Decision examines the extent to which an information exchange system relating to past sales is likely to distort competition on the market under consideration. In the last paragraph of that point the Commission states that it considers 'an *annual* exchange of one-year-old sales figures of individual competitors at the UK, MAFF region and land use level and with a breakdown by model can be accepted as commercial data with no appreciable distorting effect on competition between the manufacturers or between the dealers operating on the UK tractor market'. That assessment concerns exclusively the dissemination to the members of the agreement of data on the sales of each competitor. It is apparent from its very terms that such an assessment concerns only information which is disseminated on an annual basis, and does not prejudice the Commission's assessment regarding the lawfulness of the information exchange system as a whole, in so far as certain of the information disseminated by that system is disseminated on a weekly, monthly or quarterly basis. Such an assessment also leaves open the question of the lawfulness of the system under

Article 85 of the Treaty, in so far as it concerns, in particular, the sales of the dealers of each member. Such an assessment is therefore not incompatible with Article 1 of the Decision, cited above.

35 Secondly, it is clear from a comparison of points 54, 55 and 56 of the Decision that the Commission considers that dissemination to members of the agreement of information on sales made is likely to distort competition on the market under consideration only in so far as such dissemination does not relate to aggregate sales of at least 10 units. Nor, therefore, is the applicant justified in relying on an alleged contradiction between that ground of the Decision and its operative part, of which the grounds form the essential basis.

36 It follows that applicant's the second plea, alleging a contradiction between the grounds of the Decision and Articles 1 and 3 of its operative part, must be dismissed.

B — *The second group of pleas concerning 'general arguments'*

First plea: material inaccuracy of the facts on which the Decision is based

Arguments of the parties

37 According to the applicant, the Decision may relate only to the new information exchange system notified to the Commission on 12 March 1990. A decision requir-

ing the parties to terminate an agreement which has been expressly abandoned is unlawful. Accordingly, the Decision could relate only to the new agreement. Such a decision would not be justified, since the Commission's contention that the 'anti-competitive aspects' found in the old system remain unchanged in the new system is based on an error of fact. The two systems are different in several respects, so that the Commission's claims relating to aspects of the old system which are not incorporated in the new system are irrelevant.

38 The Commission considers that, since the Data System was notified only in the name of five of the parties to the agreement, the Commission considers that it was obliged to rule on the system notified in 1988, by reference to which the notification of 12 March 1990 was made, and which has not been withdrawn. In any event, the Commission considers that the Data System, in which the changes are limited to four types of information, does not contain material changes in relation to the first notification of such a kind as to require a separate analysis. As with the previous system, the new system enables the origin and destination of each tractor to be identified. It is therefore clear that the Decision concerns at the same time the first notification and the changes made to it in 1990.

Findings of the Court

39 The Court considers first of all that the Commission is correct in contending that, since in this case both the first and the second notification were before it at the same time, it had to consider the lawfulness under Article 85 of the Treaty of both notifications, since at any rate the second notification was not made by all the signatories to the first notification and the notifying parties had not expressly declared that the first of those two notifications was being withdrawn. The first part of the plea, contending that the Decision could relate only to the new system, must therefore be dismissed.

40 The Court finds next that after examining the compatibility with Article 85 of the Treaty of the information exchange system based on the first notification, the Commission then stated in point 65 of the Decision that 'The reasoning in Article 85(1) and (3) developed hereabove applies *mutatis mutandis* to the amended notification of 12 March 1990'. However, the applicant's argument that such an assessment is materially incorrect, on the ground that the Data System to which the second notification relates no longer provides for the daily transfer of information or the sending of Form V55 to the members of the agreement, must be rejected. It is agreed that the Decision, which states that the Data System 'continues ... to provide information identifying sales volumes and market shares of the members and dealers for monthly periods and to give details on the chassis number and date of registration of each tractor sold', does not assert that in the Data System certain information is transferred daily to the members of the agreement or that Form V55 is sent to them. The second part of the plea is therefore unfounded in point of fact.

41 It follows that the plea that the Decision is marred by errors of fact must be dismissed.

Second plea: the agreement at issue does not infringe the Community rules on competition

Arguments of the parties

42 The applicant claims that the Commission has found for the first time that an information exchange system is contrary to the Community's competition rules solely on the basis of an assessment of the system itself without establishing the existence of concerted restrictions of competition resulting from the agreement. The Decision does not therefore fit in with previous decisions adopted by the Commission, and is a misuse of power.

43 The assertion in the first sentence of point 37 of the Decision that an information exchange system necessarily restricts competition if it produces its effects on a highly concentrated market amounts to laying down a *'per se'* prohibition, for which there is no precedent. The system in question provides only information of a historical nature and concerns neither pricing policy nor any aspect of commercial strategy. Furthermore, the data disseminated are not ancillary to anti-competitive agreements. The members of the agreement are not seeking to stabilize their respective market shares. Nor does the information exchange in question concern a market-sharing agreement or an information exchange system forming part of a pricing agreement. Finally, the Commission cannot rely on the judgment in *Suiker Unie and Others* v *Commission*, cited above, which concerned exchange of information relating to future sales.

44 The applicant states that for the first time the Commission has criticized the existence of an information exchange system on a 'highly concentrated market' without investigating whether such a system actually produces anti-competitive effects. Such a *'per se* violation' of the competition rules by an information exchange system has no justification in the case-law of the Community judicature. Consequently, it is not possible to infer from it the criteria to which the Commission claims to refer as a means of assessing the effects on the market of an information exchange system. The case-law adopts other criteria and makes a distinction between agreements which are prohibited *per se* and those which do not necessarily restrict competition. In the latter case, the Court of Justice has inquired into the competitive conditions which would exist in the absence of the practices at issue. In this case, there has been no such analysis. Far from 'necessarily' lessening competition, as the Decision alleges, the transparency of the market increases it by permitting undertakings to react immediately to competitors' activities. The transparency of the market, for which the undertakings expends significant sums, is the only means for them of knowing whether a competitive initiative is successful.

45 According to the applicant, in the *Seventh Report on Competition Policy*, published in 1978, the Commission intended to distinguish between information

exchanges which concerned statistics and those which concerned prices. In the present case, the information exchange system in question does not concern sensitive information and the Commission has wrongly equated an information exchange concerning prices with one which does not relate to prices. By doing so, the Commission has therefore abandoned its position set out in the *Seventh Report on Competition Policy.* Contrary to the Commission's claim, the 'Policy Outline of the AEA' does not contradict the applicant's view that no information is communicated between the members of the system. The Commission's assertion that the sole effect of the exchange of information between the competitors is to improve transparency between them, to the exclusion of any increase in transparency for customers, is incorrect, since a large proportion of the information is made available to the public through the AEA. Moreover, the consumer benefits from the exchange of information, since it enables better production planning and a reduction in costs.

46 The Commission considers that the applicant is wrong in claiming that it found a *per se* infringement. Such a finding would mean that the practice in question is prohibited regardless of the market conditions. The Decision contains a detailed analysis of the conditions in which the market functions. The Commission considers that the applicant also wrongly alleges that the Decision contradicts the Commission's previous decisions. The approach adopted in the present case is consistent with the case-law of the Court of Justice as well. In its *Seventh Report on Competition Policy,* the Commission drew a distinction between information exchange systems which are neutral with regard to competition and those which are likely to affect competition. It enumerated three principal criteria to be taken into consideration in order to evaluate the lawfulness of the information exchange system in question with reference to Article 85 of the Treaty. Those three criteria are the type of information exchanged, the structure of the relevant market and whether the information exchange system is also likely to improve transparency of the market for consumers. Those are the criteria which the Commission applied in this case in reaching its conclusion that the information exchange system at issue was contrary to Article 85 of the Treaty.

Findings of the Court

47 The Court notes that, according to the Decision, the analysis of the impact of the exchange of information on competition on the United Kingdom agricultural tractor market is made, in points 35 to 56, exclusively from the point of view of the agreement's effects. That analysis is carried out using two distinguishing criteria. First, the Decision distinguishes between the anti-competitive effects resulting from the dissemination of data relating to each competitor (points 35 to 52), on the one hand, and the anti-competitive effects resulting from the dissemination of data relating to business transacted by the dealers of each member (points 53 to 56), on the other hand. Secondly, in the analysis of the effects resulting from the dissemination of the sales made by each competitor, the Decision distinguishes between the negative effect on 'hidden competition' (points 37 to 43), on the one hand, and the negative effects on market access, which thus confront manufacturers who are not members of the agreement (points 44 to 48), on the other hand.

48 With regard, first of all, to the anti-competitive effect resulting from the dissemination of the 'sales' of each competitor, it is stated in points 35 to 43 of the Decision, first, that the information exchange system ensures complete transparency between suppliers with regard to market conditions. Having regard to the characteristics of the market, that transparency would destroy any remaining 'hidden competition' between traders and eliminate any margin of uncertainty regarding the foreseeable nature of the conduct of competitors. Secondly, the Decision states that the information exchange system at issue leads to fundamental discrimination in terms of the conditions of access to the market between its members, which have information enabling them to forecast the conduct of their competitors, and traders which are not members of the agreement, which are not only uncertain as to the conduct of their competitors but will also immediately have their conduct revealed to their main competitors if, in order to overcome that handicap, they join the system.

49 Next, with regard to the anti-competitive effect resulting from dissemination of the 'sales' of the dealers, the Decision (points 53 to 56) states that the information

exchange system may reveal the sales of the different competitors at the level of each dealer territory. The Decision states that below a certain threshold sales made in the territory of a given dealer are likely to enable each of the transactions concerned to be precisely identified. In the Decision the Commission takes the view that, in respect of a given period and product, ten units is the threshold below which individualization of information is possible and enables identification of each sale (point 54). Through the knowledge which it gives of sales made by competitors in the territory of a dealer ('dealer imports') and also of sales made by a dealer outside his territory ('dealer exports'), the system enables the activity of dealers to be monitored and imports and exports to be identified, and thus 'parallel imports' to be monitored (point 55). That situation is likely to reduce intra-brand competition with the negative effects which that may have on prices.

50 With regard to the inconsistency alleged to exist between the Decision and decisions previously adopted by the Commission, the Court considers that the Decision does not in any event reveal any inconsistency with decisions previously adopted by the Commission or any misuse of powers. The Commission decisions referred to concern either information exchanges relating to information different from that at issue in this case or to markets whose characteristics and methods of operation are by their very nature different from those of the relevant market. Similarly, the applicant has not established that in the Decision the Commission disregarded certain of the principles which it had undertaken to observe, in particular in its *Seventh Report on Competition Policy.*

51 The Court observes that, as the applicant points out, the Decision is the first in which the Commission has prohibited an information exchange system concerning sufficiently homogeneous products which does not directly concern the prices of those products, but which does not underpin any other anti-competitive arrangement either. As the applicants correctly argues, on a truly competitive market transparency between traders is in principle likely to lead to the intensification of com-

petition between suppliers, since in such a situation, 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, the Court considers that, as the Commission argues this time, general use, as between main suppliers and, contrary to the applicant's contention, to their sole benefit and consequently to the exclusion of the other suppliers and of consumers, of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, on a highly concentrated oligopolistic market such as the market in question and on which competition is as a result already greatly reduced and exchange of information facilitated, likely to impair substantially the competition which exists between traders (see paragraph 81, below). 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 the competitors the market positions and strategies of the various individual competitors.

52 Furthermore, provision of the information in question to all suppliers presupposes an agreement, or at any rate a tacit agreement, between the traders to define the boundaries of dealer sales territories by reference to the United Kingdom postcode system, as well as an institutional framework enabling information to be exchanged between the traders through the trade association to which they belong and, secondly, having regard to the frequency of such information and its systematic nature, it also enables a given trader to forecast more precisely the conduct of its competitors, so reducing or removing the degree of uncertainty about the operation of the market which would have existed in the absence of such an exchange of information. Furthermore, the Commission correctly contends, at points 44 to 48 of the Decision, that whatever decision is adopted by a trader wishing to penetrate the United Kingdom agricultural tractor market, and whether or not it becomes a member of the agreement, that agreement is necessarily disadvantageous for it. Either the trader concerned does not become a member of the information exchange agreement and, unlike its competitors, then forgoes the information exchanged and the market knowledge which it provides; or it becomes a member

of the agreement and its business strategy is then immediately revealed to all its competitors by means of the information which they receive.

53 It follows that the plea that the information exchange agreement at issue is not of such a nature as to infringe the Community competition rules must be dismissed.

Third plea: the United Kingdom authorities have not infringed Article 5 of the Treaty

Arguments of the parties

54 The applicant claims that, by sending the second sheet of Form V55, the United Kingdom authorities do not favour or support any agreement, decision or concerted practice, so that point 49 of the Decision, which states that public authorities may lay themselves open to allegations of an infringement, is not in accordance with the case-law of the Court of Justice on this point. In the present case, the individual contracts made with SIL by each of the members of the agreement cannot be characterized as agreements, decisions or concerted practices. Moreover, the authorities of various Member States publish numerous detailed statistics on various specific markets, and the compatibility of this practice with the rules of the EEC Treaty has not been called in question by the Commission.

55 The Commission did not submit any specific observations on this plea.

Findings of the Court

56 The Court observes that the plea considered here must be interpreted as questioning the lawfulness of the sixth and last paragraph of point 49 of the Decision, which states 'Lastly, the fact that a Government Department makes available to the industry registration data identifying the sales of individual competitors in a given market as opposed to aggregate data not identifying individual companies, does not prevent the application of Article 85 to the conduct of the undertakings in question. On the contrary, it only means that the public authority may, in certain circumstances, also be laying itself open to the allegations of an infringement, in this case of Article 5, for it follows from the combined provisions of Article 85, Article 3(f) and the second paragraph of Article 5 that provisions of national law or national administrative practices may not adversely affect the application in full of the Community competition rules'.

57 The Court also notes that Article 5 of the Treaty requires the Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty and requires them to abstain from 'any measure which could jeopardize the attainment of the objectives of this Treaty'.

58 In the present case, the Court finds that it is clear from point 49 of the Decision, cited above, that in certain circumstances the practices in question could at the same time amount to an infringement by the undertakings concerned of Article 85 of the Treaty and an infringement of Articles 3(f), 5 and 85 of the Treaty by the Member State on whose territory such practices occur, without the conduct of the national authorities being in any event capable of exonerating the traders from the consequences of their infringement of Article 85(1) of the Treaty. Furthermore, it is apparent from point 49 of its grounds that the Decision expressly refrains from ruling on the question whether the practice in question is capable of constituting an infringement of the obligations which Article 5 of the Treaty places on the United Kingdom authorities. Consequently, the submission that the practice in question does not constitute an infringement of Article 5 of the Treaty must be dismissed in any event.

Fourth plea: infringement of the rules regarding the burden of proof

Arguments of the parties

59 The applicant claims that the Commission has failed to fulfil its obligation to adduce proof of the alleged anti-competitive effects. Since the information exchange system in question was applied from 1975 to 1991, assessment of it under Article 85(1) of the Treaty ought to be based solely on the assessment of its actual effects and not simply its potential effects. In the absence of actual anti-competitive effects, any doubt ought to benefit the parties making the notification. By confusing the notions of effect on competition and effect on trade between Member States, the Commission did not investigate whether, as a result of the information exchange in question, competition was actually restricted and it has not established the existence of a negative effect on competition resulting from the exchange of information at issue. In the present case, nothing leads to the conclusion that an information exchange system affects competition on a highly concentrated market. If no enquiry is made into the negative effects on competition resulting from the practice in question, any agreement could ultimately be regarded as having an effect on competition.

60 According to the Commission, the Decision satisfies the principles laid down in that regard by the Court of Justice in Case 56/55 *Société Technique Minière* ([1966] ECR 235). The Commission first of all examined the object of the agreement and of the Data System, then it investigated whether the effects of the agreement were likely to affect competition on the common market. The Decision contains an account of all the legal and factual matters on the basis of which the Commission came to the conclusion that the effect of the agreement was to distort to an appreciable extent competition on the common market. The reference to the judgment of the Court of Justice in Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique* v *Commission* [1975] ECR 1491 is not relevant, since the Decision does not lay down any new principle but merely applies pre-existing principles to the

situation in this case. That assessment is based on the finding that the market is oligopolistic, stagnant and narrow. The Commission has fulfilled the requirements laid down in the case-law which are that it should make a full factual and legal analysis and explain why, having regard to the information exchanged and the structure of the market, the effect of the agreement and the Data System is to prevent, restrict or distort competition to an appreciable extent.

Findings of the Court

61 The Court finds that, contrary to the applicant's submission, the fact that the Commission is unable to establish that the practice at issue produces an actual anti-competitive effect on the market in question, which could be accounted for by the fact *inter alia* that the agreement in its general form has been in force since 1975, 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 (judgment of the Court of Justice in Case 126/81 *Salonia* v *Poidomani and Others* [1981] ECR 1563; judgment of the Court of First Instance in Case T-2/89 *Petrofina* v *Commission* ([1991] ECR II-1087), which they are in the present case, having regard to the characteristics of the market (see paragraph 78, below).

62 The applicant is therefore not justified in claiming that the Commission, which certainly has the burden of proving the existence of an infringement of Article 85(1) of the Treaty, has not sufficiently demonstrated the anti-competitive effects of the agreement at issue. The plea must therefore be dismissed.

C — *Third group of pleas*

First plea: there is no agreement within the meaning of Article 85(1) of the Treaty

Arguments of the parties

63 The applicant claims that there has never been an agreement between the parties concerning 'a common system of organization of dealer territories'. After the introduction of the system of postcodes in the United Kingdom the members of the agreement changed the boundaries of their dealer territories by grouping together postcode sectors. However, that reorganization was not carried out on the basis of an agreement between the members of the AEA with the aim of facilitating comparison of their data. Its sole purpose was to adjust the dealer territories to the corresponding postcode sectors in order to avoid a postcode sector being part of different dealer territories. Each member then sent to SIL a list of the postcodes comprised in the territory of each of its dealers, and there is only a bundle of individual agreements with SIL and no other type of agreement. According to the Commission's 'notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises' (OJ 1968 C 75, page 3), such practices have neither the object nor the effect of restricting competition. That assessment is not altered by the AEA's involvement, which occurs merely because the United Kingdom authorities do not send Forms V55 directly to the manufacturers or importers. The AEA's note of 31 August 1979, on which the Commission relies, does not prove the existence of any concerted action. Contrary to the Commission's claims, the members of the agreement were moreover not aware of the fact that the system ought to be notified to the Commission. On the basis of the *Seventh Report on Competition Policy*, cited above, the members of the information exchange agreement assumed that it did not infringe Article 85(1) of the Treaty.

64 The Commission contends that it has not made any complaint against the undertakings which it has not justified. In the present case, its complaint is that in order to determine boundaries of the sales territories of their dealers the members of the agreement have agreed to resort to postcodes which enable the most efficient use of the information extracted from Form V55. As the fourth paragraph of point 49 of the Decision explains, if the members of the agreement had established their dealer territories on another basis, the information gathered would not have been comparable and the analysis would not have been as precise. If the members of the agreement had not agreed to organize the sales territories of their dealers on the basis of postcode sectors, SIL would not have been able to draw up reports such as the 'selling dealer analysis' of the type ordered by Case Europe Limited.

65 Furthermore, the Commission considers that the information exchange system in question is indeed an agreement within the meaning of Article 85(1) of the Treaty, in accordance with the Commission's 'notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises', cited above, in which the Commission states that it is sometimes difficult to distinguish between information exchange systems which are neutral from the point of view of competition and those which are likely to fall within the scope of Article 85 of the Treaty. According to the Commission, which refers in that regard to an AEA note of 31 August 1979, investigation showed that, as from that date, the members of the agreement were aware that the information exchange system in question could fall within the scope of Article 85, even though the notification was not made until almost nine years later, after it became the subject of an investigation by the Commission.

Findings of the Court

66 As has already been stated previously (see point 51, above), the Court considers that the provision of information collected upon registration of every vehicle presupposes an agreement, or at any rate a tacit agreement, between the traders con-

cerned to define the boundaries of dealer sales territories by reference to the United Kingdom postcode system, as well as an institutional framework enabling information to be exchanged between traders through the trade association to which they belong. If such an agreement did not exist, the information disseminated could not be exploited in the same way by its addressees. By acting in concert in that way, the traders participating in the information exchange system on the United Kingdom agricultural tractor market have necessarily restricted their ability to make independent decisions in ways which may have consequently affected competition between those traders. That being so, the applicant cannot argue that the members of the information exchange agreement did not infringe Article 85(1) of the Treaty when by common accord they agreed to such methods of organizing the respective sales territories of their dealers, as described in point 49 of the Decision. The statements in point 49 in no way contradict either the principles stated in the Commission's notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises, cited above, or the three criteria, cited above, laid down by the *Seventh Report on Competition Policy,* which the Commission has taken into account in order to assess the lawfulness of the information exchange system at issue.

67 It follows that the plea that there is no agreement, within the meaning of Article 85(1) of the Treaty, between the members participating in the information exchange system must be dismissed.

Second plea: there is no restriction of competition as a result of the dissemination of data on the sales of each competitor

68 This plea has three parts. The applicant submits, first, that there is no restriction of competition resulting from the alleged 'prevention of hidden competition'; secondly, that there is no restriction of competition resulting from the alleged reinforcement of barriers to entry into the market for competitors who are not mem-

bers of the agreement; and, thirdly, that there is no effect on competition resulting from the meetings of the AEA committee.

First part: no restriction on competition owing to alleged 'prevention of hidden competition'

Arguments of the parties

69 The applicant claims that the Commission's conclusion that the relevant market is a highly concentrated market in which competition is weakened is based on materially incorrect facts and provides no support for the contention, on which the Decision is based, that the market must be characterized as a narrow oligopoly. The market ought to be characterized as a wide oligopoly. The applicant claims that although the aggregate market share of four manufacturers in 1990 was approximately 75% of the market, those manufacturers did not dominate the market. The mere finding that a large aggregate market share exists is not sufficient to establish the existence of a collective dominant position, since the rest of the market is divided between some 40 undertakings which distribute approximately 500 different models.

70 Similarly, the Commission's claim that the members of the agreement are 'major suppliers' in the markets of other Member States is not correct. Although it is true that all the members of the agreement are active in the other Member States, they are not all 'major suppliers'.

71 Furthermore, there is no substantial gap between the market shares of the members of the agreement and the market shares of non-members. The Commission's

assertion that the four largest manufacturers dominate the market is incompatible with the decision of 8 February 1991 adopted by the Commission in the merger control case *Fiat/Ford New Holland* in application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (revised version published in OJ 1990 L 257, page 13), since that decision did not find that a collective dominant position existed.

72 In any event, the existence of a narrow oligopoly does not necessarily lead to a reduction in competition, as the Commission moreover admitted in its *Fifteenth Report on Competition Policy* published in 1986 (page 231, point 267). Access to the market is not very difficult, as is shown by the presence of new entrants who offer an almost complete range of products. In the context of the control of concentrations between undertakings, the Commission has moreover accepted on several occasions that an undertaking, even where it has high market shares, is not able to dominate the market if low or no barriers render competition probable. Furthermore, it is incorrect to state, as the Decision does, that imports from non-member countries are insignificant.

73 According to the applicant, the nature of the information exchanged is essential when considering whether an exchange of information is contrary to Article 85(1) of the Treaty. In the present case, the information exchanged relates exclusively to past conduct and does not reveal any future conduct. Nor does it reduce the margin of uncertainty with regard to forecasting that conduct. Moreover, no information relating to prices charged can be derived, directly or indirectly, from the information disseminated by SIL. The individualization of data alone is not sufficient to cause an information exchange system to fall within the scope of Article 85(1) of the Treaty. It is also necessary that the information exchanged relates to trade secrets, as the Commission expressly stated in its *Seventh Report on Competition Policy,* cited above. The data on which the information disseminated by SIL is based in no way constitute trade secrets.

74 Finally, the applicant claims that an analysis of the United Kingdom agricultural tractor market not only fails to confirm that the growth in transparency of the market has affected competition in it, but indeed shows that it has intensified. That is confirmed by changes in market shares, as well as by changes in prices, which, over a certain period, demonstrate the existence of real competition. Furthermore, the Commission's assertion that the transparency of the market affects discount and price reduction policy is incorrect. The buyers are powerful, well organized, able to exercise pressure and well informed. Brand loyalty is only relative. It is incorrect to state that parallel imports are monitored, because SIL has ceased sending Form V55/5 to the members of the agreement. All in all, the Commission has over-estimated the transparency between suppliers, and such transparency also benefits buyers. Finally, the information exchange system at issue could amount to collusive conduct only if two conditions were satisfied, namely that it enabled competitors to be identified and that it facilitated retaliation. Owing to the incomplete nature of the information disseminated, the system could not prevent 'hidden competition'; furthermore, there is no evidence that it facilitated retaliation.

75 In conclusion, the applicant considers that it has adduced sufficient evidence to prove that the Commission has committed a manifest error of appraisal in its analysis of the United Kingdom agricultural tractor market. On the basis of Professor Albach's opinions, and based on its own findings, the applicant concludes that the relevant market is a wide oligopoly with heterogeneous products in which the aggregate market shares of the principal suppliers have declined and in which new entrants have appeared. The market is one in which price competition is 'fierce' and in which there is substantial competitive pressure from customers owing to increasing exports from non-Community manufacturers. The Commission has moreover failed to contest a large part of the applicant's conclusions in that regard.

76 The Commission contends that, although transparency between buyer and seller can benefit competition, that is not the case with the information exchange system

in question. In the present case, the purpose of the information exchange system is not to increase transparency of relations between buyer and seller, but transparency between sellers. That assessment is justified both with regard to the circumstances of the present case and also with regard to legal and economic theory and practice. The applicant reaches an analysis of the operation of the market which is different from that of the Commission, because it fails to distinguish between transparency with regard to consumers and transparency between suppliers. In actual fact, the United Kingdom agricultural tractor market is not a mass market. It is really a stagnant or declining market as well as being a highly concentrated market. The applicant has in no way shown that the Commission committed a manifest error in its assessment of the market conditions.

77 The Commission contends that the restrictive effect on competition resulting from the agreement has been sufficiently established, so that it was not necessary to demonstrate the existence of conscious parallel conduct in order to establish that the agreement restricted competition. All in all the Commission considers that the applicant cannot claim that the agreement and the Data System carry out more economically a function which the parties could carry out individually.

Findings of the Court

78 On the question of appraising the relevant market as oligopolistic, the applicant's criticisms of the Commission's conclusion that the market is dominated by four undertakings representing between 75 and 80% of the market must be rejected, since Table 2 annexed to the expert opinion of Professor Neumann showing the changes in the market shares of the various traders, which the applicants themselves submitted as Annex 17 to their application, indicates consistency in the principal characteristic of the market, namely its highly oligopolistic nature. It is apparent from that document that the aggregate market share of the four main suppliers amounted to 77.7% in 1990 compared with 69.2% in 1975. Moreover, close scrutiny of that document shows, contrary to the applicants' claim, the relative stability of the main traders' individual positions if the applicant itself is left out of

account, it having tripled its market share during that period. However, as the Commission has correctly stated, this isolated case of market penetration by a powerful United States manufacturer is not sufficient to weaken the Commission's conclusion that the market is characterized by relative stability of the competitors' positions and by high barriers to entry.

79 Those barriers are due in particular to the need for a new competitor to have a sufficiently dense distribution network. Moreover, it is apparent from the investigation of this case that, as the Decision indicates, in particular in points 35, 38 and 51, imports into the United Kingdom of agricultural tractors with a horsepower above 30 hp are limited, which is also confirmed both by a report entitled 'European Community Farm Equipment Sector', submitted to the Court by the Commission in reply to a written question from the Court. Finally, that conclusion is not affected by examination of the structure of residual supply, the extremely atomized nature of which reinforces the positions held by the largest undertakings, contrary to what is claimed by the applicant.

80 All in all, the Court considers that there is no manifest error in the Commission's assessment, which, having regard to the extent to which the products were sufficiently homogenous, rightly defined the relevant market as the agricultural tractor market in the United Kingdom, displaying the characteristics of a closed oligopoly, and in this regard the applicant cannot profitably rely on the *Fifteenth Report on Competition Policy,* cited above, in which the Commission merely held, when it analyzed the financial transactions performed in 1984-1985, that there is no automatic relationship between the level of concentration and the intensity of competition.

81 Secondly, with regard to the type of information exchanged, the Court considers that, contrary to the applicant's contention, the information concerned, which relates in particular to sales made in the territory of each of the dealerships in the

distribution network, is in the nature of business secrets. Indeed, this is admitted by the members of the agreement themselves, who strictly defined the conditions under which the information received could be disseminated to third parties, especially to members of their distribution network. The Court also observes that, as stated above (in paragraph 51), having regard to its frequency and systematic nature the exchange of information in question makes the conduct of a given trader's competitors all the more foreseeable for it in view of the characteristics of the relevant market as analyzed above, since it reduces, or even removes, the degree of uncertainty regarding the operation of the market, which would have existed in the absence of such an exchange of information, and in this regard the applicant cannot profitably rely on the fact that the information exchanged does not concern prices or relate to past sales. Accordingly, the first part of the plea, to the effect that there is no restriction of competition as a result of alleged 'prevention of hidden competition', must be dismissed.

Second part: there is no restriction of competition through alleged increased barriers to market entry for manufacturers who are not members of the agreement

— Arguments of the parties

82 According to the applicant, the Commission's assertion that the information exchange system in question also restricts competition between those manufacturers who are members and those who are not, because it enables the members to prevent non-members' from entering the market, is incorrect. The system is open, without discrimination, to any manufacturer or importer selling new tractors in the United Kingdom. The increase in the number of traders and the positions which certain of them have acquired show that the market is actually an open market.

Furthermore, detailed information concerning the operation of the market is valuable for a new entrant. The example of the applicant is sufficient to show that, contrary to the Commission's claims, a small trader can attack the larger traders.

83 The Commission submits that the opinion of Professor Neumann shows that the increase in the number of traders entering the market, on which the applicant relies in order to dispute the Commission's analysis that access to the relevant market is difficult, proves nothing by itself. The important question is whether the new entrants are able to remain on the market and able to acquire a significant market share. That is not the case.

— Findings of the Court

84 The Court considers that, contrary to the applicant's assessment, the Commission correctly contends at points 44 to 48 of the Decision that whatever decision is adopted by a trader wishing to penetrate the United Kingdom agricultural tractor market and whether or not it becomes a member of the agreement, the agreement is necessarily disadvantageous for it, regardless of whether, having regard to its modest cost and its membership rules, the information exchange system is in principle open to all. Either the trader concerned does not become a member of the information exchange agreement and, unlike its competitors, it then forgoes the information exchanged and a particularly reliable source of market knowledge; or it becomes a member of the agreement and its business strategy is then immediately revealed to all its competitors by means of the information which they receive (see point 52 above). In that regard, it is not significant that the number of traders entering the relevant market is in fact high. Accordingly, the second part of the plea, to the effect that the information exchange system at issue does not discriminate against new competitors wishing to penetrate the United Kingdom agriculture tractor market, must be dismissed.

Third part: no restrictions of competition arise within AEA meetings

Arguments of the parties

85 The applicant claims that the Commission's allegation that the AEA provides its members with a forum for contacts facilitating a high price policy is incorrect. That is purely an allegation which is not based on any materially established facts and is contrary to the Commission's interpretation set out in its Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises, cited above. The meetings between the members of the AEA are held solely in order to discuss the technical and administrative problems associated with the operation of the information exchange system at issue; secondly, the Commission has not taken account of the fact that the members of the AEA have decided that in future they will no longer hold meetings relating to the information exchange system, apart from *ad hoc* meetings for the purpose of resolving purely administrative problems regarding its operation.

86 For an assessment of the correctness of this last part of the plea the Commission merely refers the Court to the history of the agreement and to the documents cited in point 22 of the Decision. It recognizes that the Data System has provided for the holding of *ad hoc* meetings to resolve administrative questions concerning the operation of the system, rather than a system of regular meetings.

— Findings of the Court

87 The Court notes that in point 35 of the Decision the Commission explains that in assessing the lawfulness under Article 85 of the Treaty of the information exchange system at issue it took account of 'the fact that the members meet regularly within the AEA committee which gives them a forum for contacts' and that at point 52 of the Decision it explains that 'by increasing the transparency in a highly concentrated market and by strengthening the cohesion between the major suppliers in that market through regular and secret contacts, it is possible to maintain a general high price level in the market concerned in spite of price differences between the various products offered on the market'. As has previously been stated (see points 51 and 65 above), the Court considers that the provision to suppliers of information collected upon the registration of every vehicle presupposes the existence of an institutional framework enabling information to be exchanged between traders through the trade association to which they belong. By acting in concert in that way, the traders participating in the information exchange system on the United Kingdom agricultural tractor market have necessarily restricted their ability to make independent decisions in ways which are likely to have influenced competition between them. That being so, the applicant cannot argue that the members of the information exchange agreement did not agree, within the trade association to which they belong, on certain organizational rules for the information exchange at issue, and such an assessment does not in any way contradict the principles set out in the Commission's Notice on agreements, decisions and concerted practices concerning cooperation between enterprises, cited above. It should, however, be pointed out that every contact made within the AEA is not necessarily to be considered as contrary to Article 85(1) of the Treaty and that the Commission has never argued the contrary.

88 It follows that the third part of the plea, to the effect that there is no concertation within the AEA, must be dismissed and that the plea that competition is not affected by dissemination of the data concerning each competitor's sales must itself be dismissed.

Third plea: no restriction of competition results from dissemination of data concerning the sales of each member's dealers

89 This plea has two parts. First, the applicant disputes that it is possible, by means of the information exchange system at issue, to identify the sales of a competitor. Second, it claims that the information exchange system at issue cannot obstruct dealers' activities or parallel imports.

First part: there is no risk of a competitor's sales being identified

— Arguments of the parties

90 According to the applicant, the Decision maintains that, below a minimum number of ten units sold, a simple comparison between the sales in the geographical sector considered and those of the undertakings concerned can enable the volume of sales made by different competitors to be determined. That figure of ten units is incomprehensible and the Decision has not established how the information exchange system in question falls within the scope of Article 85(1) of the Treaty. Referring to the judgment in *Société Technique Minière*, cited above, the applicant considers that, in assessing the lawfulness under Article 85 of the Treaty of the system for exchanging information on the agricultural tractor market, only the effects on competition actually resulting from the information exchange system should be taken into account, and not purely potential effects. The Decision has not found such actual effects. The applicant adds that the Commission's statement that the data concerning own dealer sales enables the sales of each competitor to be identified is incorrect. It claims that the Commission's assertion that data on dealer sales enables pressure to be put on dealers shows a misunderstanding of the commercial rules applicable.

91 The Commission states that the applicant's criticism purports to show that the criterion of ten units sold applied in point 54 of the Decision is incomprehensible. It explains that its attention was attracted by the very detailed information available, concerning short periods of time and relating to competitors' retail sales by product and by geographical sector. Contrary to the applicant's contention, point 61 of the Decision does not state that a mere risk of identification of the vehicles sold is sufficient to prohibit the dissemination of data relating to the own sales of each member of the agreement, since the effect of the agreement is to be judged by a reference to the competition which would occur in its absence.

— Findings of the Court

92 Article 85 of the Treaty prohibits agreements, decisions and concerted practices which have an anti-competitive object or effect. In the present case it is not contended that the information exchange system in question has an anti-competitive object. Accordingly, any objection to it can be based only on its effects on the market (see, *a contrario*, the judgment of the Court of Justice in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299. According to settled case-law, in such a case any anti-competitive effects of the agreement should be assessed by reference to the competition which would in fact occur 'in the absence of the agreement in dispute' (judgment in *Société Technique Minière* v *Maschinenbau Ulm,* cited above. In that regard, the fact that the Commission is not able to demonstrate that the information exchange system at issue produces an actual anti-competitive effect on the United Kingdom agricultural tractor market does not affect 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. That is the case here, having regard to the characteristics of the market as previously analyzed (see paragraphs 78 and 80, above), the kind of information exchanged (see paragraph 81 above) and the fact that, in certain cases, the information disseminated is not sufficiently aggregated, so that it enables sales to be identified. The applicant is therefore not justified in claiming that the Commission, which, without committing any manifest error of assessment, was entitled to set at ten units the number of vehicles sold in a given dealer

territory as the figure below which it is possible to identify sales made by each of the competitors, has not sufficiently demonstrated that to that extent the information exchange system at issue falls foul of Article 85(1) of the Treaty.

93 It follows that the first part of the plea, to the effect that there is no risk of each competitor's sales being identified, must be dismissed.

Second part: there is no risk of dealers' activities or parallel imports being restricted

— Arguments of the parties

94 According to the applicant, the Decision claims that the information obtained from SIL concerning sales made by each member of the agreement enables manufacturers to exercise pressure on dealers, thereby making possible a reduction of intra-brand competition. The Commission's arguments are therefore based on the possibility that the information disseminated by SIL concerning the sales of each competitor may be used for the wrong purpose. There is no evidence of any actual abuse. In reality, the information disseminated enables the activity of dealers to be evaluated, targets to be set for them and compliance with those targets to be monitored. Similarly, the Decision incorrectly claims that the information received is used to monitor parallel imports. Given that, since 1988, SIL no longer sends a copy of Form V55/5 to the members of the agreement, the Commission's assessment therefore relates to a past period. However, when assessing the lawfulness of the information exchange system, the Commission misused its powers by taking into account the effects of sending Form V55/5, when it has not been sent since 1 September 1988.

95 The Commission replies that, with regard to inter-brand competition the information exchange system at issue enabled sales of each competitor to be identified. Furthermore, with regard to intra-brand competition, the hearing before the Commission had shown how the territory of a dealer could be rationalized in order to reduce sales made in that territory by other dealers. It also rejects the complaint that it misused its powers: it considered that the information concerning the chassis number of the vehicle and the date of registration of each tractor sold was not indispensable to enable warranty or bonus claims to be checked; such information helped the origin and destination of each tractor to be identified.

— Findings of the Court

96 Firstly, as regards assessment of the effects of the information exchange system at issue on intra-brand competition, the Court considers that, irrespective whether one or more of the members participating in the information exchange agreement actually used the system at issue in order to monitor the activity of their distribution network, the Commission was entitled to conclude, without committing an error of law or a manifest error of appraisal of the facts, that the information exchange system at issue, which makes it possible to monitor such activity by periodically providing the manufacturer with detailed information on all sales made in the territory of each of its dealers, was to that extent contrary to Article 85(1) of the Treaty since it would, in the context of the agreement as a whole, make it possible for them to confer absolute territorial protection on each of their dealers.

97 Secondly, as regards assessment of the effects of the information system at issue on parallel imports of agricultural tractors into the United Kingdom, the Court considers that the Commission is right in stating in points 55 and 56 of the Decision that, at least until 1 September 1988, the date on which SIL stopped sending a copy of Form V55/5 to the undertakings, the information exchange system at issue

enabled such imports to be monitored by means of the chassis number of the vehicle, which was previously entered on Form V55/5 by the manufacturer. Consequently, contrary to the applicant's contention, it has not been established that the Commission used its powers for a purpose other than that for which they were granted and this complaint must be dismissed.

98 It follows that the argument that there was no risk of restriction of the activity of dealers or of restriction of parallel imports must be rejected and that therefore the plea that dissemination of data on the sales of the dealers of each member does not affect competition must itself be dismissed.

Fourth plea: there is no effect on trade between Member States

Arguments of the parties

99 The applicant claims that the Decision wrongly states that by lessening competition the information exchange system at issue necessarily influences the volume of imports into the United Kingdom. The Commission has not taken into consideration the fact that the absence of parallel imports is explained by the fact that prices charged in the United Kingdom are lower than those charged on the Continent. It follows that the mere possibility of interfering with the activities of dealers and with parallel imports is not capable of affecting intra-Community trade to a sufficiently appreciable extent. The Commission's pure speculation regarding the effects of a possible effect on intra-Community trade is out of line with the requirements

laid down by case-law in that regard. Nor is it entitled to infer from the mere fact that the applicant does not manufacture tractors in the United Kingdom that its membership of the information exchange system affects intra-Community trade.

100 The Commission refers the Court to points 57 and 58 of the Decision, in which it demonstrates that John Deere Limited imports all the tractors it sells in the United Kingdom. Other members of the information exchange agreement also import a large proportion of their sales. That situation entitles the Commission to conclude that a restriction of competition caused by a system for the exchange of information on registrations necessarily has an effect on patterns of trade between the United Kingdom and the rest of the common market.

Findings of the Court

101 The Court considers that, having regard to the characteristics of the relevant market, as previously analyzed (see paragraph 78 above), and also the fact that the main suppliers on that market operate throughout the common market, the Commission correctly found in point 57 of the Decision that 'An exchange of information identifying in great detail the exact retail sales volume and the market shares of 88% of the suppliers of a national market ... is liable to substantially affect trade between Member States because the lessening of competition resulting from this exchange necessarily influences the volume of imports to the United Kingdom' (see the judgment of the Court of First Instance in Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211). The documents before the Court in no way corroborate the applicant's argument that the limited imports of agricultural tractors into the

United Kingdom are explained by the more competitive prices on the domestic market. In particular, although it was not possible to establish in the pre-trial inquiry that, as the Decision claims, the practice at issue may have helped to maintain higher prices on the domestic market, the documents before the Court, in particular the price lists produced by the applicant as Annex 20 to its application, likewise do not show that the prices of agricultural tractors on the United Kingdom market have in fact been lower than those charged on the continental markets.

102 It follows that the plea that there is no appreciable effect on intra-Community trade must be dismissed.

Fifth plea: wrongful refusal to apply Article 85(3) of the Treaty

Arguments of the parties

103 According to the applicant, even if it is admitted that the agreement falls within the scope of Article 85(1) of the Treaty, the Decision wrongly refuses to apply Article 85(3), since the information exchange system at issue provides considerable pro-competitive benefits. In that regard, the applicant states, first, that the Commission has accepted that the information exchange system in question contributes to an improvement in production and distribution; secondly, that the consumer obtains a fair share of the benefit resulting from that system; thirdly, that the system does not give rise to any restriction of competition which is not indispensable, since in the absence of such an exchange system it would be possible to gather the information only at a much higher cost and it would therefore be available only to large undertakings; fourthly and finally, the applicant states that the system at issue does not eliminate all competition between the undertakings. According to the applicant,

the information exchange system therefore satisfies the conditions for the grant of an exemption. The applicant therefore considers that the Commission's assessment is manifestly incorrect.

104 The Commission considers that there is no evidence which enables it to be concluded that its assessment regarding the inapplicability to this case of Article 85(3) of the Treaty is manifestly incorrect. The applicant's argument that the Commission has acknowledged certain benefits from the agreement is based on a misreading of point 60 of the Decision. Far from being for the benefit of consumers, the information exchange system to which it objects exclusively benefits suppliers. It points out that the Decision indicates that, by circulating information on the market shares of the various manufacturers, the members of the agreement reduce the margin of uncertainty which exists regarding the operation of the market. That knowledge of the market makes it possible for each member of the information exchange agreement to neutralize any initiative made by one of the others. The Commission has never accepted either that exchanges of recent and detailed information are indispensable to achieve the commercial objectives of the members of the agreement or that such exchanges offer advantages, in particular, for third parties, which would compensate for their restrictive effects on competition. The Decision does not maintain that the agreement eliminates all competition. However, it considers that the agreement reduces the uncertainty as to the exact target, strength and extent of competitors' attacks. The Commission considers that the information required to plan the activities of a trader operating on the United Kingdom agricultural tractor market can be derived from the information relating to the undertaking itself and from aggregate data relating to the industry, which does not necessarily need to be as detailed as the reports which would still continue to be sent under the Data System.

Findings of the Court

105 The Court observes, first, that it has been consistently held that the four conditions laid down in Article 85(3) of the Treaty for an individual exemption to be granted

in respect of an agreement properly notified to the Commission are cumulative, so that if one of them is not satisfied the Commission may lawfully reject the application made to it. Furthermore, it is primarily for the undertakings notifying an agreement for an exemption to present to the Commission the evidence to show that the conditions laid down in Article 85(3) of the Treaty are fulfilled (judgment of the Court of Justice in Case 43/82 *VBVB and VBBB* v *Commission* [1984] ECR 19; judgment of the Court of First Instance in Case T-66/89 *Publishers Association* v *Commission* [1992] ECR I-1995). In the present case, the Decision finds that the restrictions of competition resulting from the exchange of information are not indispensable, since 'own company data and aggregate industry data are sufficient to operate in the agricultural tractor market' in the United Kingdom. That finding in point 62 of the Decision regarding the first notification is made again in point 65 with regard to the second notification. The applicant does not show that the restrictions of competition resulting from the information exchange system, as previously analyzed (see in particular paragraphs 93, 97 and 98 above) are indispensable, particularly with regard to the objectives of contributing to economic progress and equitable distribution of benefits. Furthermore, the applicant cannot profitably argue that, in the absence of the system at issue, information equivalent to that provided by the system at issue could be obtained by traders active on the agricultural tractor market in the United Kingdom from market research producing information which would be in particular out of date, isolated and not as frequent as the information provided by the system at issue, it not even being necessary in this regard to take into consideration the costs of gaining access to such information. Consequently, the information exchange system, which does not, in particular, fulfil the third of the four conditions laid down in Article 85(3) of the Treaty, does not satisfy that article.

106 It follows that the plea that the Commission wrongly rejected the individual application for an exemption submitted to it must be dismissed and this action must itself be dismissed.

Costs

107 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleading. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Briët Barrington

Saggio Biancarelli

Delivered in open court in Luxembourg on 27 October 1994.

H. Jung J. L. Cruz Vilaça

Registrar President