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

Table of contents

* Language of the case: English.

In Case T-34/92,

Fiatagri UK Limited, a company governed by the laws of England and Wales, having its registered office in Basildon (United Kingdom), and

New Holland Ford Limited, a company governed by the laws of England and Wales, formerly Ford New Holland Limited, having its registered office in Basildon (United Kingdom),

represented by Mario Siragusa, of the Rome Bar, and Giuseppe Scassellati-Sforzolini, of the Bologna Bar, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 8-10 Rue Mathias Hardt,

applicants,

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: 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 members 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. The applicants are therefore both members of the AEA.

(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 individual exemption, an agreement relating to an information exchange 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

applicants, 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 applicants, 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. According to the applicants, the agreement was subsequently re-activated, but without dissemination of information enabling competitors' sales to be identified, whether individually or in aggregate. During a hearing before the Commission, they claimed, relying in particular on a study carried out by Professor Albach, a member of the Berlin Science Center, that the information distributed had a beneficial effect on competition. On 12 March 1990 five members of the agreement, including the applicants, notified to the Commission a new agreement (hereinafter 'the second notification') for 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. According to the applicants, the new agreement provides for a significant reduction in the amount and frequency of the information obtained under the agreement and also removes all the 'institutional' elements to which the Commission had objected in its abovementioned statement of objections.

5 In 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) (hereinafter referred to as 'the Decision') the Commission:

— held that the agreement on 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 United Kingdom legislation provides that all vehicles must be registered with the Department of Transport if they are to be used on public roads in the United Kingdom. The application for registration of a vehicle must be submitted on a special form, Form V55. Under an arrangement with the Department of Transport, that department sends to SIL some of the information which it receives upon registration of vehicles. According to the applicants, that arrangement is identical to the one made with manufacturers and importers of other categories of vehicles.

7 The parties do not agree on a number of factual questions concerning the information appearing on that form and the use of that information. Those matters of disagreement can be summarized as follows.

8 The applicants stress the fact that, having regard to the administrative source of the information disseminated to the members of the agreement and also to the fact that

dealers' stocks are limited, a considerable period of time can elapse between the date of an order for a tractor and the date of its delivery, which itself precedes the vehicle's entry into circulation on public roads and, consequently, the transmission of the information to the members of the agreement. There can therefore be a lengthy period between the date of the sale and that of registration and the applicants therefore consider that there is no 'instant picture' of the market, so that the information collected is only approximate in nature. SIL extracts information appearing on the administrative form, after which it is destroyed; it is not passed on directly to the members of the agreement.

9 The applicants acknowledge that there are various types of Form V55, numbered from V55/1 to V55/5. However, they state that only Form V55/1 is 'pre-completed'. Forms V55/2 and V55/4, which were used only by British Leyland, are no longer used, while Form V55/3, used when Form V55/1 is lost, is completed by hand. Finally, Form V55/5 is used by independent importers and when a second-hand vehicle is sold. A tractor is quite often registered after it has been used exclusively on private land and not on public roads. In all those cases, the members have no direct access to the forms.

10 According to the Commission, there are basically two versions of the form: Form V55/1 to V55/4, which is '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.

11 According to the Commission, the form contains the following information, certain aspects of which are disputed by the applicants:

— make (manufacturer);

— model, serial and chassis numbers, date of registration; 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. However, in the system which is the subject-matter of the first notification that information is no longer disseminated to the members of the agreement, it having been agreed since 1 September 1988 that SIL is no longer to send the vehicle registration form to the members of the agreement. According to the applicants, the manufacturers need that information to conduct their recall campaigns and to check the validity of warranty claims submitted to them; the applicants state that that is the reason why that information, whose transmission to the members is also provided for by the Data System, was sent to the members until September 1988;

— original and selling dealer (code number, name, address and postcode): according to the applicants, that information is not recorded by SIL;

— full postcode of the registered keeper of the vehicle: according to the applicants, only the first five digits of the postcode of the registered keeper are recorded by SIL to enable identification of the postcode area, and that number is sometimes reduced to three or four digits; at the meeting with the parties on 7 December 1993 SIL explained that if that postcode was not on the form, it used the nearest postcode to that of the end user, namely that of the selling dealer. In the absence of the latter code, it used the postcode of the original dealer and if that postcode was not on the form, it used the postcode of the Local Vehicle Licensing Office (hereinafter 'LVLO') with responsibility for the area. At the meeting, SIL explained that all the information had to be linked to a postcode area in order to enable dealer sales territories to be defined;

— name and address of the registered keeper of the vehicle: at the meeting with the parties on 7 December 1993 the applicants, whose statements were confirmed by SIL, stated that, although this information may appear on page 3 of the Form V55, which is the only sheet sent to SIL, it is in any event not recorded by it, so that it is not passed on to the members of the agreement.

12 The parties agree that the information sent to the members of the agreement by SIL can be placed into three categories, but they define those three categories differently.

13 According to the applicants, the three categories of information sent to them by SIL are as follows:

— industry data: they concern aggregate figures on registrations of tractors sold by the whole industry, subdivided according to time periods, horsepower, drive-line and postcode area of the registered keeper of the vehicle;

— identifying data: they concern registrations of tractors sold by each member of the agreement, subdivided according to the date of sale, the tractor model and the postcode area of the registered keeper of the vehicle;

— own data, released only to the member of the agreement concerned: they relate to sales of registered tractors made by each of the dealers belonging to that member's distribution network, to data relating to the two previous categories, with a geographical breakdown corresponding to the sales territories of that member's distribution network, to specific analyses requested by a given member, and also to registration figures for tractors sold by it.

14 According to the Commission, the three categories of information are as follows:

— aggregate industry information: overall industry sales, with or without a breakdown by horsepower or by drive-line; that information is provided for time periods broken down by year, quarter, month or week;

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

— data concerning sales by dealers belonging to the dealer network of each member, in particular the imports and exports of dealers in their respective territories. It is therefore possible to identify imports and exports between the various dealer territories and to compare those sales activities with the sales made by dealers in their own territories. As appears in particular from points 29, 30, 55 and 56 of the Decision, a manufacturer could, if he so wished, curtail the retail activity of dealers outside their allocated territories, both inside and outside the United Kingdom, by identifying the sales destination in that way. At the meeting with the parties on 7 December 1993 the applicants claimed that only a given manufacturer, but not any of its competitors, could compare the sales of its own dealers and that, contrary to the statements made in the Decision, the information exchange system did not enable the various manufacturers to compare the sales of dealers in a given distribution network.

15 The *applicants* stress the fact that that information on 'dealer-import' and 'dealer-export' does not form part of the agreement itself and is not communicated by SIL to members of the agreement except on the basis of individual arrangements concluded with SIL. That data, which is no longer available under the agreement which was the subject of the second notification, concerns sales made by a dealer outside his territory (dealer-export) and sales made by other United Kingdom dealers in the territory of a given dealer (dealer-import). It does not therefore relate to exports to other Member States or imports from such States.

16 According to the *Commission*, until 1988 SIL provided members of the agreement with copies of Form V55/5, which is used by independent importers. Since 1988 it provides members only with the information taken from that form, which is now destroyed after abstraction of data by SIL. The Commission contends that those registration documents permitted parallel imports to be identified, mainly through the serial number of the vehicle. With regard to the latter information, the Commission explained at the meeting with the parties on 7 December 1993 that in its opinion it was necessary to distinguish between Forms V55/1, 3 and 4, on the one hand, and Form V55/5 on the other. Forms V55/1, 3 and 4 are pre-completed by the manufacturer, so that the information relating to the serial number appears on the form which accompanies each vehicle, and there is therefore a perfect check of the destination of those tractors by the manufacturers. On the other hand, with regard to Form V55/5, SIL sent the form to the members until September 1988 and thus made it possible for them to trace the origin of a given vehicle. During that same meeting, the Commission nevertheless accepted that after 1 September 1988 the system did not enable the manufacturers to monitor parallel imports. At that meeting the *applicants* stated that, even before 1 September 1988, it was not possible for them to monitor parallel imports because the chassis number of the vehicle did not appear systematically on Form V55/5.

Forms of order sought by the parties

17 It is in those circumstances that the applicants brought the present action by application lodged at the Court Registry on 6 May 1992.

18 The *applicants* claim that the Court should:

(i) order production of the minutes of the meeting of the college of Commissioners at which Commission Decision C(92)271 of 17 February 1992 relating to

Case IV/B-2/31.370 and 31.446 (UK Agricultural Tractor Registration Exchange) was adopted, together with the text of the decision attached to those minutes; further, order production of the amendments made to those minutes by the Commission before they were sent to the Advisory Committee;

(ii) declare the Decision non-existent or, in the alternative, declare their action admissible and annul the Decision;

(iii) order the Commission to pay the costs.

19 In their reply, the applicants also requested that the case be joined with Case T-35/92 brought by John Deere Limited.

20 The *Commission* contends that the Court should:

(i) reject the application as unfounded;

(ii) reject the applicants' request for an order for production of the minutes of the meeting of the college of Commissioners at which Commission Decision 92/157/EEC of 17 February 1992 relating to Case IV/B-2/31.370 and 31.446 (UK Agricultural Tractor Registration Exchange) was adopted, together with the text of the decision attached to those minutes;

(iii) order the applicants to pay the costs of the proceedings.

21 In its rejoinder the Commission informed the Court that it did not object to the present case being joined with the proceedings brought by John Deere Limited in Case T-35/92 for the purposes of the oral procedure, provided that the two cases were made the subject of separate judgments. At the close of the written procedure the President of the Second Chamber of the Court of First Instance, by order dated 28 October 1993, ordered that the present case be joined with Case T-35/92 *John Deere Limited* v *Commission* for the purposes of the oral procedure, subject to certain parts of the application in Case T-35/92 and certain annexes thereto being confidential vis-à-vis the applicants in the present case.

22 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 parties to reply to certain written questions and to produce certain documents. The applicants and the defendant replied to those questions 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

23 The applicants claim that the Decision:

— was adopted pursuant to an unlawful procedure;

— fails to provide a sufficient statement of reasons;

— is based on a wrong definition of the product and of the relevant market;

— contains errors of fact in its examination of the information notified;

— is based on an error of law concerning the interpretation of Article 85(1) of the Treaty;

— wrongly fails to apply Article 85(3) of the Treaty to the present case.

The plea that the Decision was adopted pursuant to an unlawful procedure

24 In support of their claim that the Decision should be declared non-existent, the applicants submit, first, that it should be ascertained whether the Commission's Rules of Procedure have been followed and, secondly, whether the Commission unilaterally made certain amendments to the minutes of the hearing.

First part of the plea: infringement of the Commission's Rules of Procedure

25 The applicants consider that the text of the Decision as notified to them gives them reason to doubt that the formalities laid down in Article 12 of the Rules of Procedure 63/41/EEC of the Commission 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 (OJ 1967 L 147, p. 1), as last amended by Commission Decision 86/61/EEC, Euratom, ECSC of 8 January 1986 (JO 1986 L 72, p. 34), then in force, were observed in this case. They therefore request the Court to order the necessary measures of inquiry to investigate whether the correct procedure was followed and, if that is not the case, to declare the Decision non-existent (judgment of the

Court of First Instance in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315).

26 The Commission considers that the facts of this case are very different from those of the *BASF* case, cited above. In the present case, the Court has no reason to order production of the minutes of the meeting of the college of Commissioners and the applicants are not entitled to make such a claim.

27 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 applicants. Since the applicants have 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 affect 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 applicants were able to take full cognizance of the Decision and to assert their procedural rights to their full extent. In the present case, the applicants were 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 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*, not yet published in the ECR, paragraphs 24 and 25). Having regard to all those circumstances, the first part of the plea must therefore be dismissed.

Second part of the plea: irregularities in the minutes of the hearing

28 The applicants state that the Commission's letter of 14 October 1991 informing them of changes to the minutes of the hearing was sent to the undertakings themselves and not to their lawyers. They claim that after they had been notified of the Decision it became apparent to them that the Commission had unilaterally amended the minutes of the hearing before sending them to the Advisory Committee on Restrictive Practices and Dominant Positions. They request the Court to order the necessary measures of inquiry in order to ascertain whether the amendments made to the minutes caused their arguments to be misstated.

29 According to the Commission, the applicants' assertion that they were not informed of the amendments made to the minutes is incorrect. It refers in this regard to a letter sent to the applicants on 14 October 1991. In any event, the Commission considers that the amendments do not change the meaning of the statements made by the parties at the hearing.

30 The Court notes that, faced with the Commission's argument that the changes in question, made to the minutes of the hearing at which the Commission heard the applicants' case, were, contrary to their contention, made known to them by a letter from the Commission dated 14 October 1991, the applicants confine themselves to stating that that letter had been sent directly to the undertakings and not to their lawyers. That fact cannot call into question the validity of the information thereby brought to the attention of the undertakings. The Court also observes that the undertakings, duly informed in that way of the amendments made to the minutes, do not claim that those amendments changed the meaning of their statements or even that the amendments invalidate the opinion given by the Advisory Committee on Restrictive Practices and Dominant Positions. Consequently, and in accordance with settled case-law, the second part of the plea must also be dismissed,

without it being necessary to order measures of inquiry in this respect (judgments of the Court of Justice in Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraph 17; Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 31; Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229; judgments of the Court of First Instance in Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 45; Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraph 47; Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 47; Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 79; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 67; and Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, paragraph 76).

31 It follows from the foregoing that both parts of the first plea must be dismissed and that, consequently, the claim for a declaration that the Decision is non-existent must also be dismissed, without it being necessary for the Court to order production of the documents requested by the applicants.

The plea of insufficient reasoning

32 The applicants contend that the Decision does not contain a sufficient statement of reasons and that the reasoning in the Decision does not provide justification for its operative part, whose meaning is, in their view, unclear.

First part of the plea: the Commission's failure to take sufficient account of the applicants' arguments

33 The applicants claim, first, that the Commission's failure to take into account their arguments amounts to a lack of reasoning. In their view, a good illustration of such inadequate reasoning is the fact that the Commission set the threshold for sales

made by a member of the agreement in the territory of a given dealer at ten units, below which aggregate data could not be disseminated. The applicants claim that that figure is too high and does not take account of the real state of the market, which is extremely atomized. Similarly, the choice of year for the reference period is not acceptable. In this connection, point 61 of the Decision is so confused that the members of the agreement have been unable to find a common interpretation of it. The undertakings state, secondly, that, with the exception of a footnote, the Decision does not deal with the Data System, which amounts to a lack of reasoning with respect to that system. Thirdly, the applicants consider that the Decision does not take account of the fact that the laws of most Member States permit the dissemination of registration data to manufacturers. Fourthly and finally, they claim that in the judgment in the *Papiers Peints* case the Court of Justice held that the Commission was under a duty to supply more detailed reasons when, as in the present case, its decision goes 'appreciably further than its earlier decisions' (judgment of the Court of Justice in Case 73/74 *Papiers Peints de Belgique* v *Commission* [1975] ECR 1491, paragraph 33). In the applicants' view, the Commission has clearly failed to fulfil that duty in this case.

34 The Commission observes that information exchanges have been dealt with in a number of Commission decisions. Those decisions cannot be dismissed as precedents for this case merely because they do not concern durable goods. The applicants' statement that the Decision is the first to deal with an information exchange relating to past sales is likewise incorrect. In any event, the Decision contains a sufficient statement of reasons, so that the argument that the principles laid down in the judgment in *Papiers Peints de Belgique*, cited above, were not observed must be rejected. The Decision does not go further than the principles previously laid down, but merely applies those principles in the particular case of the relevant market. The Decision therefore contains an adequate statement of reasons satisfying the *Papiers Peints* judgment. In particular, the Decision clearly explains that the restrictions on competition resulting from the information exchange are not indispensable and that, since one of the conditions laid down by Article 85(3) of the Treaty is not fulfilled, the Commission could reject the application for exemption without considering the other conditions (judgment of the Court of Justice in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299).

35 The Court finds that the Commission, which at points 33 and 65 of the Decision found that the Data System was contrary to Article 85(1) of the Treaty on the ground that this information exchange system reproduced *mutatis mutandis* the previous system and that the information exchange did not fall within the scope of Article 85(3) of the Treaty because the restrictions of competition were not indispensable, provided sufficient reasons for its decision on this point, regardless of any appraisal, at this stage of examination of the case, of the correctness of those reasons. As regards the argument that the principles laid down by the Court of Justice in the *Papiers Peints* judgment have been disregarded, the Court observes that, according to that judgment, whilst the Commission may provide a summary statement of reasons for a decision which is in line with settled case-law, its obligation to provide a statement of reasons is broader where the decision adopted goes 'appreciably further' than the case-law existing at the date of the decision (paragraph 31 et seq.) In this case, the Court considers that, as the Commission correctly argues and as is explained below in the grounds of this judgment (see paragraph 90), the Decision simply applies principles laid down in the Commission's previous decisions to a particular market, namely that for agricultural tractors in the United Kingdom. Accordingly, and without its being necessary to examine the different legal systems of Member States, the applicants are not justified in claiming that the Commission has failed to observe the abovementioned principles laid down by the Court of Justice in its judgment in the *Papiers Peints* case.

Second part of the plea: imprecision in the operative part of the Decision

36 The applicants maintain that, contrary to case-law (judgment in *Consten and Grundig* v *Commission*, cited above), the precise holding of the operative part of the Decision is not clear from the preceding reasoning. In their view, Articles 1 and 2 of the operative part of the Decision are not only based on errors of fact and of law but are also unsupported by the reasoning of the Decision so that it is impossible for its addressees to comply with it. Furthermore, Article 2 of the operative part, concerning evaluation of the agreement under Article 85(3) of the Treaty, is irreconcilable with previous decisions of the Commission. When, as in this case, the Commission identifies provisions in an agreement which it cannot exempt, the principle of proportionality places it under an obligation to grant an exemption on

condition that those provisions are removed. Finally, the precise extent of the obligation to refrain from entering into any agreement that may have an object identical or similar to that of the information exchange in question, placed on the applicants by Article 3 of the Decision, could not be determined. The lack of clarity in the operative part of the Decision is such that the AEA was obliged to make a new notification.

37 The Commission considers that the reference to the judgment in the *Consten and Grundig* case, cited above, is not relevant. In the present case, it is the information exchange agreement which is in itself anti-competitive and not a particular provision of it. By setting out the conditions upon which it would not object to the agreement on the exchange of information, the Commission has complied with the requirements of the *Consten and Grundig* judgment, according to which the Commission must, where it does not state in the operative part of its decision which parts of an agreement fall within Article 85(1), set out in the preamble to its decision the reasons for which it considers that parts of the agreement are not severable from the whole agreement. Referring to the principle of interpretation of an operative part, as laid down by the Court of Justice in its judgment in *Suiker Unie and Others* v *Commission* (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 [1975] ECR 1663) the Commission considers that the operative part of the Decision is clear, in particular with regard to point 61 thereof.

38 The Court observes that in the *Consten and Grundig* case the Court of Justice held, with regard to the interpretation of Article 85(2) of the Treaty, that the nullity for which that provision provides is to be restricted to the provisions of an agreement which are anti-competitive under Article 85(1) of the Treaty, wherever those provisions are severable from the remainder of the agreement. According to the judgment relied on, it is only where an agreement is a unity in itself, such that the anti-competitive provisions cannot be severed from it, that the whole agreement must be declared contrary to Article 85(1) of the Treaty. On that occasion the Court of Justice stated that, in the latter situation, the Commission should 'set out in the preamble to the decision the reasons why those parts did not appear to it to be

severable from the whole agreement' (judgment in *Consten and Grundig* v *Commission* [1966] ECR, at p. 344). This Court therefore considers that the applicants' argument on this point is not well founded. First, it is clear from the terms of the Decision that, as the Commission submits, it is the information exchange system as a whole which is considered to be anti-competitive in this case and not the dissemination between undertakings of certain information carried out under an agreement providing for exchange of information between undertakings. Secondly, the Court considers that the case-law of the Court of Justice on the interpretation of Article 85(2) of the Treaty, as expressed in the *Consten and Grundig* judgment, is not in any event readily transposable to a case in which an application for exemption under Article 85(3) of the Treaty is being considered, since in the latter case it is for the Commission, when responding to the application submitted to it by the notifying undertakings, to reach its decision by reference to the agreement as notified to it, unless during its investigation of the matter it is able to obtain particular amendments to the agreement as notified.

39 As regards the contention that it is difficult to interpret Article 3 of the Decision, according to which the undertakings are to refrain from entering into any information exchange system having an object identical or similar to the agreement for which an exemption had been sought, the Court considers that that article is purely declaratory. Article 85(1) of the Treaty lays down a fundamental prohibition of agreements which are anti-competitive in character. That provision, adopted as a matter of public policy, is therefore binding on the applicant undertakings irrespective of any binding decision adopted by the Commission on this point, at least where, as it has done in this case, in points 16 and 61 of the Decision and in Article 1 of its operative part, cited above, it places the undertakings — which are entitled to enjoy legal certainty for transactions they enter into — in a position to ascertain the extent to which their information exchange system is lawful. It is clear in particular from point 50 of the Decision, which in no way contradicts its operative part, that knowledge of competitors' sales for 'historical' purposes is not unlawful. All in all, if the Commission wished to prohibit a different information exchange system involving the applicants, it could rely directly on Article 85(1) of the Treaty,

regardless of Article 3 of the Decision. As the Commission maintains, the operative part of the Decision, read in the light of the preceding grounds, in particular points 16 and 61, is therefore clear. The second part of the plea must therefore be dismissed.

40 It follows that the second plea must be dismissed.

The plea that the Decision is based on a wrong definition of the relevant product and of the relevant market

Arguments of the parties

41 According to the applicants, the section of the Decision describing the facts contains errors relating to the description of the product and to the analysis of the market. Those factual errors affect the lawfulness of the Decision, since they are at the very basis of the Commission's legal assessment.

42 The applicants consider that the Decision contains no description of the product and intends to convey an image of the market as being a concentrated market, whereas it is an open and competitive market. Firstly, with respect to demand, the Decision does not set out the characteristics of the market and draws the wrong conclusions from that finding. Since the market is a replacement market, only diversification and innovation enable demand to be stimulated, so that the absence of detailed information regarding that demand exposes manufacturers to investment risks. With respect to supply, the Decision misrepresents the market. The four major manufacturers, whose market shares change, hold less than 50% of the Community market, are confronted with significant restructuring operations and face

lively competition. The market shares of the main suppliers have decreased dramatically, whilst those of the other competitors have increased. The identity of those firms has changed, so that the undertakings which are in the 'leading' positions are not the same as those which held those positions when the information exchange system was created. The Commission's assertion that there are high barriers to entry into the market is incorrect. All in all, far from making the market rigid, the agreement contributes to its transparency.

43 With regard to the analysis of the product, the applicants contest the statement made in the Decision that the different types of product are broadly substitutable. They state that the agreement did not classify tractors only by horsepower and drive-line, but also and more importantly, by model. The applicants consider that the Commission has prohibited the practice to which it objects without making any genuine analysis of the conditions in which the market operates, so that the Commission has found a *per se* infringement, contrary to both the case-law of the Court of Justice and the Commission's previous decisions and policy, as set out in various 'notices' and in its annual reports on competition policy.

44 Finally, with regard to the geographic definition of the market, the applicants consider that the reference to the field of application of the relevant national legislation alone is a rather simplistic method of defining the geographic scope of the market. When Fiat acquired Ford New Holland Limited, the Commission in its decision of 8 February 1991 confirming its compatibility, which was adopted under Article 6(1)(b) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, revised version, OJ 1990 L 257, p. 13) took an attitude opposite to that taken in the present case, letting it be understood that national markets could no longer exist within the Community. In the present case, the definition of the relevant market becomes all the more important because the Decision assumes the existence of strong positions held by the main manufacturers and barriers to entry, two concepts which would not be relevant if the national character of the relevant market were not established. In fact, some evidence suggests that the market, if not world-wide, is at least European.

45 According to the Commission, the difference between the parties relates essentially to the nature of the market for tractors in the United Kingdom and the conclusions which should be drawn in Community competition law. In its opinion, the market is a narrow, highly concentrated market with high barriers to entry. The Commission observes that it is not required to reply to all issues of fact raised by the undertakings and that it was able to maintain its position set out in the statement of objections as long as it had considered all the evidence furnished by the applicants (Opinion of Advocate General Sir Gordon Slynn in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883). Furthermore, the Commission considers that the applicants' assertion that it did not carry out any analysis of the product is incorrect.

46 The Commission also contends that, contrary to the applicants' claims, it did analyse the market, but the conclusions it drew from that analysis were different from those of the applicants. With regard to the analysis of the product, the Commission rejects the criteria for differentiation proposed by the applicants. Nor does it accept the applicants' suggested analysis of the market as an open market. The market is essentially a replacement market characterized by imperfect competition, oligopolistic in nature and dominated by five undertakings, and on which brand loyalty is strong. Supply concerns substitutable products. The Commission does not dispute that the tractor is a 'heterogeneous' product, but it differs from the applicants with respect to the extent of that heterogeneity. Although supply is relatively diversified, that diversification must be appraised in the light of the nature of demand. The fact that the respective market shares of each of the principal competitors have changed is not necessarily explained by the intensity of competition on the relevant market.

47 The applicants' argument that suppliers are increasing their investments in order to adapt to stagnant demand does not correspond to the reality of a market in which the concentration ratio is increasing. Similarly, the Commission does not accept the applicants' conclusion that it has wrongly described the relevant market as a closed market with high barriers to entry. According to the Commission, a market in

which the four main manufacturers have a preponderant share and on which there is a large difference between that share and those held by the other traders is a market which has high barriers to entry.

48 Finally, with regard to the relevant geographic market, the Commission considers that it has correctly limited it to the United Kingdom market since the information exchange system in question has its origin in the collection of information gathered from an administrative form which is used solely within the territory of the United Kingdom. Finally, the Commission considers that, in view of brand loyalty, the elasticity of demand by reference to prices is low. The information exchange system thus enables members of the agreement to maintain a general high price level in the United Kingdom.

Findings of the Court

— The product market

49 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 in *Consten and Grundig*, cited above). In such a case, according to settled case-law, 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 of the Court of Justice in Case 56/65 *Société Technique Minière* v *Machinenbau Ulm* [1966] ECR 235).

50 The Court considers that in order to decide whether the Commission has taken account of the specific characteristics of the market in question in this case, it must first be assessed whether the definition of the product market is correct and, secondly, whether the description of the characteristics of the market contained in the Decision is accurate.

51 As regards the definition of the product market, it is first necessary to assess the degree of substitutability of the product. The Court considers that the applicants' argument that the Decision fails to make any analysis of the product market must be rejected since it is sufficiently apparent from the Decision that it is based on the assumption that the relevant market is that for agricultural tractors in the United Kingdom. Furthermore, since participation in the information exchange system at issue is subject only to the participant being a manufacturer or importer of agricultural tractors in the United Kingdom, and not of a particular category of agricultural tractors, the applicants are not justified in arguing that the definition of the product market is wrong and that the different types of agricultural tractors are not largely substitutable. The Court concludes from that fact that the undertakings themselves define their competitive position, in the context of the agreement, by reference to the general concept of agricultural tractor, as adopted by the Commission.

52 As regards the question of the oligopolistic nature of the relevant market, the applicants' criticisms of the Commission's conclusion that the market is dominated by four undertakings holding between 75 and 80% of the market must be rejected, since the table showing changes in the market, which the applicants themselves produced as Annex 10 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 was 82.4% for 1991 compared with 82.3% in 1979. Moreover, close scrutiny of that document shows that, contrary to the applicants' contention, the individual positions of the main traders are stable if John Deere, which doubled its market share

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

53 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; that 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, and also the information submitted by the applicants themselves, which shows that the imports concern products which are largely not substitutable, since, according to customs statistics, of 3 862 new vehicles imported in 1991, 2 212 have a power rating of less than 25 kw. Finally, that analysis 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 applicants.

54 All in all, the Court therefore considers that the Commission is correct in contending that the relevant market displays the characteristics of a closed oligopoly.

55 It follows that the applicants have not produced any significant evidence to show a manifest error of appraisal in the Commission's definition and analysis of the functioning of the relevant market.

— The geographic market

56 The Court considers that the relevant market may be defined geographically as the area in which conditions of competition, and in particular consumer demand, display sufficiently homogeneous characteristics (see, by analogy, the judgment of the Court of Justice in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 11). That being so, it is not ruled out that the agricultural tractor market must be characterized as a Community-wide market, as the Commission did in its decision of 8 February 1991, cited above. However, assuming that view to be admissible, it does not in any event preclude the relevant market on which the effects of the practice are to be measured from being defined as a national market where, as in the present case, the practice objected to is geographically limited to the territory of one of the Member States. In such a case, it is the suppliers themselves which, by the mere fact of their own conduct, have given that market the characteristics of a national market.

57 It follows that the applicants have not proved that the Commission committed a manifest error of appraisal in defining the relevant market and analysing how it functions and that this plea must therefore be dismissed.

The plea that the analysis of the information notified is factually inaccurate

Arguments of the parties

58 The applicants consider that, as far as the description of the agreement and the Data System are concerned, it is incorrect to state, as the Decision does, that the

agreement as notified in 1988 has existed since 1975. The system notified differs from the previous system. The assertion in points 14 and 15 of the Decision that Form V55 contains the name of the registered keeper of the vehicle and that that information is passed on to the members of the agreement is incorrect. According to the applicants, the administrative authority only requests dealers to include the postcode of the place where the purchaser resides, but that information does not enable the manufacturer to contact the purchaser. The applicants claim that SIL did not in fact extract from Form V55 the whole postcode of the registered keeper of the vehicle in order to process and send it to members of the agreement, but merely noted the four or five digits from that postcode which enable the place of registration to be located within postcode areas, numbering approximately 8 250, in the United Kingdom.

59 However, contrary to the suggestions in points 6 and 49 of the Decision, that division into territories is not improper. The dealer territories are determined independently by each manufacturer and are known only to it and to SIL, to which they are communicated in order to draw up the statistics. The applicants query the term 'dealer territory on the basis of [a] five-digit postcode' which, in their opinion, wrongly suggests that the dealer territory coincides with the territories covered by one postcode. They also contest the contention in the Decision that the information disseminated creates a fully transparent system, because, on a heterogeneous product market, where price competition is combined with non-price competition, information on past sales can create only very imperfect transparency.

60 The applicants state that the information exchanged relates to registrations and not to sales. Since no price information is exchanged, price competition is not affected and any reprisal would be impossible in the event of rebates or discounts being offered. The description, contained in point 26 of the Decision, of the data sent to members concerning sales made by their own dealers should be rectified, since the information gathered in that way is used solely in the context of the relationship between the manufacturer and its dealer, and not as an exchange of information between the various manufacturers.

61 Finally, with regard to the link which the Decision attempts to establish between the information exchange system and restrictions on parallel imports, the members of the AEA concerned have demonstrated that the information which they held regarding imports did not derive from the information exchange system at issue. The applicants consider that the Commission wrongly states that the changes resulting from the new notification are not significant, because the Commission failed to take into account the fact that, under the new system, the information on sales made by a manufacturer through its own dealers would relate only to sales made by a dealer in its own territory. They state that the list of modifications to the system made on the occasion of the second notification, as set out in the Commission's defence, omits to take account of the fact that the information on registration data for individual members would not be disseminated on a monthly basis, but rather on a quarterly basis.

62 According to the Commission, the applicants contest the interpretation of the information notified as regards the duration of the agreement, the relevance of postcodes in the operation of the agreement and, finally, the scope of the second notification.

63 With regard, first, to the duration of the agreement, the applicants' argument that it has not existed since 1975 is new. Prior to the lodging of the application originating the proceedings, the applicants had not made any distinction between the notified agreement and the information exchange system which existed previously.

64 Secondly, with regard to the significance of postcodes in the operation of the agreement, the Decision, and in particular its points 6 and 49, show that the Commission considered that the members of the agreement agreed on a system of organization of dealer territories which, whilst leaving it to each manufacturer to determine the organization of its network, contributed to the accuracy and

transparency of the information disseminated. Similarly, the arguments in the application concerning the name and address of the vehicle's registered keeper ought to be understood by reference to the use made of the postcode; the arguments in the application on this point are irrelevant. The agreement and the Data System thus provide a means of exchanging data on a standardized basis. They enable all members to know that information equivalent to the statistics to which they have access is also available to the other members of the agreement. According to the Commission, the effect of that system is to reduce uncertainty between competitors and to curb 'hidden competition', as defined in the first paragraph of point 37 of the Decision.

65 Thirdly, with regard to the scope of the second notification, the Commission considers that point 65 of the Decision explains the reasons why the Commission considered that the second notification did not contain any material difference in relation to the agreement. The Commission considers that the Data System, just as the system which was the subject of the first notification, enables competitors' sales to be identified and also sales made by a dealer outside his own territory. Although the Commission does not dispute that the second notification introduces certain positive changes in relation to the first notification, it was unable to grant an exemption under Article 85(3) of the Treaty for that second notification because the system notified continued to operate on the principle of a monthly exchange of information, including information broken down by model, enabling sales and the market share of each competitor to be identified on the basis of a geographical breakdown ranging from national or regional levels to dealer territory and postcode area levels. Referring to the second paragraph of point 61 of the Decision, the Commission states that the applicants are fully aware that the Commission's view is that they may not exchange information at local area level and also that the exchange of information for large geographical areas can only be made annually and relate to the year preceding the year in which the information is disseminated. In reply to a written question from the Court, the Commission refers to paragraphs B and C of Annex 2 to the second notification for the information identifying sales volumes and market shares of members and dealers for monthly periods.

Findings of the Court

— Interpretation of point 14 of the Decision

66 The Court first observes that at the informal meeting with the parties on 7 December 1993 the Commission expressly agreed that point 15 of the Decision, which states that the information referred to in point 14 is made available to the members of the agreement 'in the form of reports and analyses described hereafter', is to be interpreted as meaning that the information recorded by SIL is sent to the members of the agreement in the form of reports and analyses described in the subsequent paragraphs of the Decision and does not mean that all the information referred to in point 14 is sent to the members of the agreement after handling by SIL. The Court considers that that interpretation, even accepting that it might be regarded as a factual error, is not of such a nature as to affect the legality of the Decision, since points 18, 37, 38, 40, 41, 45, 55 and 63 of the Decision are in no way affected by this factual error. Point 18 of the Decision is contained in the section appraising the facts, whilst, contrary to what they argued at the hearing, the applicants have not established that the last sentence of point 37, the last clause of the third indent of point 38, the first sentence of point 40, the end of the sentence in the second indent of point 41, the second sentence of point 45, point 55, the last sentence of point 63 and the third sentence of point 65 are affected by the factual error which the Commission may have made in point 14 of the Decision.

67 More particularly, the statement contained in the last sentence of point 37 of the Decision, that '[t] his effect of neutralizing and thus stabilizing the market positions of the oligopolists is in this case likely to occur because there are no external competitive pressures on the members of the Exchange except parallel imports which are however also monitored as has been explained above', is not incorrect since, as stated above (in paragraph 52), it has been sufficiently demonstrated that the United Kingdom agricultural tractor market is in the nature of a closed oligopoly.

68 Similarly, the last clause of the third indent of point 38 of the Decision, which states that 'this information is also available from customers who inform the dealers of competitors' prices in a given territory', merely describes a probable way in which the market functions in view of its characteristics, as analysed previously, but in no event establishes a link between that mode of functioning of the market and the information exchange system at issue.

69 As regards the first sentence of point 40 of the Decision, which states that '[o] n the UK tractor market, therefore, the only difficult, but very important, market data to obtain is the exact volume of sales of each manufacturer/dealer so as to be able to notice instantly changes in sales volumes and market shares of each member of the oligopoly and of each dealer at the level of dealer territories', the applicants in no way demonstrate that, as they submitted at the hearing, that sentence is intended to refer to both dealers who are members of a distribution network and dealers of competitors' distribution networks.

70 As regards the end of the sentence in the second indent of point 41, which states that the information gathered enables each member 'to follow whether and to what extent any price or other marketing strategies of rivals are successful', it cannot be disputed that, by enabling each member to view its position on the market in relation to that of its competitors, the information exchange system at issue enables it at the same time to assess the effectiveness of its competitors' marketing strategy.

71 The second sentence of point 45 states that '[d] etailed knowledge of the sales pattern for tractors on the UK market improves the members' ability to defend their positions vis-à-vis non-members'. As will be demonstrated below (see point 91) there can be hardly any doubt that the information exchange system gives a competitive advantage to the members of the agreement and, contrary to the applicants'

contention, it is not necessary that for this purpose the members of the agreement should have information relating to manufacturers and dealers who are not members of the agreement.

72 Point 55 and the last sentence of point 63 of the Decision concern sales made in the territory of each dealer in a member's network. The applicants do not contest the assessment of the system as set out in points 55 and 63 of the Decision but merely observe that the information exchange system as described is the one based on the first notification and does not concern the Data System. Since the Decision in no way alleges that the system as described in points 55 and 63 of the Decision is also applicable to the Data System, the applicants in no way establish the alleged error.

73 It follows that, as is stated above (see paragraph 66), the applicants have not demonstrated, contrary to what they contend, that the factual errors which the Commission may have made in point 14 of the Decision are such as to affect its legality.

— The other alleged factual errors

74 With regard, first, to the processing by SIL of data concerning the postcode of the registered keeper of the vehicle, it is apparent from the very terms of point 14 of the Decision, which makes clear reference to a postcode to the fifth digit, that the applicants' contention that the Commission made a factual error in finding that SIL extracted from the V55 form the seven digits of the postcode of the registered keeper of the vehicle is unfounded in point of fact.

75 Secondly, with regard to the organization of the dealer territories, the applicants have not demonstrated the existence of any factual errors in the Commission's assessment, which found that those territories are determined by reference to post-code sectors, either individually or in groups.

76 Thirdly, the applicants' argument that the last indent of point 26 of the Decision ought to be interpreted to the effect that the manufacturers have organized an information exchange between themselves rather than an exchange of information regarding the relations between a given manufacturer and its dealers must be held to be unfounded in point of fact, since the Decision merely finds that the analysis of dealer sales 'permits manufacturers to identify the selling dealers in a particular postcode sector and to compare their respective sales with the industry sales in that given postcode sector'.

77 Fourthly and lastly, as regards the argument that in its analysis of the Data System the Commission failed to take account of the fact that that system reports on a quarterly basis the sales made by the dealers of a given manufacturer in the dealer territory of each dealer, the Court finds, having regard to paragraphs B and C of Annex 2 to the form notifying the Data System, that certain information relating to registrations of vehicles is sent to the members of the agreement on a monthly basis, whilst other information, in particular that concerning sales made by the respective dealers in their sales territory, is sent on a quarterly basis. Accordingly, the Commission's assessment set out in point 65 of the Decision, to the effect that the Data System 'continues ... to provide information identifying sales volumes and market shares of the members and dealers for monthly periods', is not marred by any error of fact.

78 It follows that the applicants' plea that the Commission's assessment is marred by certain errors of fact of such a kind as to affect the legality of the Decision must be dismissed.

The plea of misapplication of Article 85(1) of the Treaty

Arguments of the parties

79 The applicants contest the Commission's conclusion that the information revealing recent sales by competitors inevitably restricts competition by eliminating 'hidden competition' and by increasing entry barriers to the market. They also contest the Commission's claim that the information gathered regarding sales by their own dealers enables the members of the agreement to restrict the activity of dealers and parallel importers.

80 According to the applicants, the Decision does not expressly state that the agreement has an anti-competitive object. Where, as in this case, an agreement aims to benefit competition in order to improve supply, objections cannot be made to it on the basis of the effects which it produces until a precise analysis of those effects has been made. With regard to the assessment of the effects of the agreement, the applicants make two main complaints. They claim, first, that errors of law flow logically from errors of fact made by the Commission and, secondly, that the analysis of the effects of an agreement on an oligopolistic market is incorrect.

81 With regard to the first point, the applicants state essentially that the assumptions upon which point 35 et seq. of the Decision are based, in particular points 37, 40, 44 to 48, 49, 51 and 52, as well as the conclusions which the Decision reaches in points 56 and 57, are wholly or partially incorrect. Points 37 to 52 of the Decision present debatable, even incorrect, statements as if they were unassailable truths. Points 44 to 48 reveal a contradiction in the Commission's approach, because the Commission cannot claim at the same time that the agreement is open to all and that it constitutes a barrier to entry into the United Kingdom market.

82 With regard to the second point, the applicants, which rely in particular on experts' reports drawn up by Professor Albach, referred to in paragraph 4 above, claim that although the Commission contends that in an oligopolistic market an agreement such as the one in question necessarily stifles competition, the United Kingdom agricultural tractor market by no means displays such a characteristic. In any event, even if the oligopolistic nature of the market were admitted, the economic studies demonstrate the summary nature of the Commission's analysis. The applicants therefore consider that the Commission tends to give credit to the theory of a *per se* infringement, but has not in fact established the existence of a sufficiently appreciable impairment of competition resulting from the potential effects of the agreement. To do that, the Commission ought to have assessed the agreement by reference to the competition which would occur in its absence. Instead, it merely finds a *per se* infringement. The application of a rule of *per se* prohibition has no basis in case-law. The applicants claim that, far from being restricted, competition is sharpened by the information exchange in question. Since, as in this case, access to the information exchanged is open to any competitor, the information exchange system becomes a competitive tool.

83 The Decision receives no support from any precedent, either with respect to the method of analysis or the legal principles applied. It is rather the case that examination of the precedents contradicts the Commission's analysis of the information exchange system in this case. The applicants refer, in that respect, to the *Seventh Report on Competition Policy,* published in 1978. The Commission has not observed in this case the rule which it laid down for itself.

84 The applicants also claim that the information exchange agreements to which the Commission has objected concerned exchanges of information on either prices or homogeneous products. Only one Commission decision concerned an exchange of information concerning durable goods, precisely a case concerning tractors. It was Decision 83/361/EEC of 13 July 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.174 — *Vimpoltu*, OJ 1983 L 200, p. 44). However, in that case, the behaviour of the traders who had exchanged price information resembled that of the members of a cartel. Furthermore, the Commission cannot rely on its

Decision 87/69/EEC of 15 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.458 — *X/Open Group*, OJ 1987 L 35, p. 36) in which it gave a wide definition of the potential effects on competition arising from the exchange of information, which went beyond that accepted by the Court of Justice, and in which it granted an exemption for the information exchange. The Court of Justice has never been called on to consider a case which concerns exclusively exchanges of information. The Commission's statement that the question whether the relevant product is a homogeneous product or, on the contrary, a differentiated product is irrelevant, directly contradicts economic theory. It must therefore be concluded from that that the other aspects of that Decision are not relevant in this case. In summary, the applicants claim that not only is the Decision not supported by any precedent but also that the examination in their context of cases which have been the subject of a decision directly contradicts the approach adopted in the present case.

85 The Commission contends that the approach it adopted with regard to the information exchange system in question is precisely that advocated in the *Seventh Report on Competition Policy*. When examining the present case, it did not apply a *per se* prohibition with regard to information exchange systems. Referring in particular to point 51 of the Decision, the Commission states that the applicants cannot deny that the Decision contains a precise analysis of the conditions in which the market functions, even though they dispute that analysis. The claim that the Decision does not clearly state that the agreement had an anti-competitive object is based on the contention that that agreement was pro-competitive. There is no support for such a contention. The Commission therefore considers that there is no evidence which could lead the Court to find that there has been a manifest error or a misuse of powers. The applicants' contention that the Commission can investigate the anti-competitive effects of an agreement only where it has established that such an agreement has an anti-competitive object is inconsistent with the case-law of the Court of Justice and with the decisions adopted by the Commission. According to the judgment of the Court of Justice in Case 19/77 *Miller* v *Commission* [1978] ECR 131, in order to show the existence of potential effects on competition resulting from the agreement, the Commission must prove that the agreement is capable of having such effects, which is established in point 43 and the fourth indent of point 51 of the Decision. The applicants' contention disregards the fact that, when the Commission is considering whether to grant a negative

clearance or an individual exemption, the Commission must also take into account the potential negative effects of the agreement on future competition. In the present case, in a market which was oligopolistic and therefore characterized by imperfect competition, the Commission had refused to approve restrictions on competition resulting from the information exchange system between the principal economic operators.

Findings of the Court

86 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 access to the market, which thus face manufacturers who are not members of the agreement (points 44 to 48), on the other hand.

87 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, as previously described (see paragraphs 52 and 53 above), 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 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 not only are in a position of uncertainty as to the conduct of their competitors but will also have their conduct revealed immediately to their main competitors if, in order to overcome that handicap, they join the system.

88 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 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 and also of sales made by a dealer outside his territory, 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 possible negative effects which that may have on prices.

89 First, as regards the factual issues raised by the applicants and their possible effect on the legal characterization arrived at in the Decision, the Court observes that, as it has already found (see paragraphs 66 to 78, above), the applicants have not demonstrated, contrary to what they contend, that the factual errors which the Commission may have committed would affect the legality of the Decision.

90 Secondly, 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. 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 applicants have not established that in the Decision the Commission disregarded certain of the principles which it had undertaken to observe, in particular in its *Seventh Annual Report on Competition Policy.* As already found (see paragraph 35 above), the Decision therefore contains, in relation to the decisions previously adopted by the Commission, a sufficient statement of reasons and the applicants cannot claim that it disregarded the principles laid down by the Court of Justice in the *Papiers Peints* case, cited above.

91 However, the Court observes that, as the applicants point out, the Decision is the first in which the Commission has prohibited an information exchange system which does not directly concern prices, but which does not underpin any other anti-competitive arrangement either. As the applicants correctly argue, on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition 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, 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 (see paragraph 52, above) and on which competition is as a result already greatly reduced and exchange of information facilitated, likely to impair considerably the competition which exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors.

92 That assessment is not open to challenge on the ground that it is apparent from the pre-trial inquiry, and in particular from the explanations provided by SIL which have been accepted by the Commission, that since 1 September 1988 the members of the agreement no longer receive more than once a year an overall picture of the market broken down by make and by model, since the information disseminated to each member of the system between two annual series relates only to the position of a given manufacturer on the market as a whole. Provision of such information 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 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, regardless of whether, having regard to its modest cost and 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, then forgoes the information exchanged and the 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.

93 It follows that the applicants are wrong in arguing that the information exchange agreement at issue is likely to intensify competition on the market and that the Commission has not established to the requisite legal standard the anti-competitive nature of the agreement at issue. The fact that the Commission is not able to demonstrate the existence of an actual effect on the market (which could be accounted for by the fact *inter alia* that implementation of the agreement has been suspended since 24 November 1988) has no bearing on the outcome of this case since Article 85(1) of the Treaty prohibits both actual anti-competitive effects and purely potential effects, provided that these are sufficiently appreciable, as they are in this case, having regard to the characteristics of the market as described above (in paragraph

52). That being so, there is no need for the Court to consider the question whether the Commission is correct in contending that at the hearing several undertakings suggested that the suspension of the agreement had materially affected their ability to forecast market developments. Furthermore, the Commission is correct in contending in points 55 and 56 of the Decision that, at least until 1 September 1988, the date on which SIL ceased sending a copy of Form V55/5 to the undertakings, the information exchange system at issue enabled parallel imports of agricultural tractors into the United Kingdom to be monitored through identification of the vehicle chassis number, which was previously entered on the form by the manufacturer. Finally, the analysis of the anti-competitive effects of the agreement is not affected by the content of the second notification, made on 12 March 1990, since, as is argued in point 65 of the Decision and as follows furthermore from the information set out in Annex 2 to the notification form, the new 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. This latter information, like the V55/5 forms, permits the identification of the origin and destination of all tractors'.

94 It follows that the plea of misapplication of Article 85(1) of the Treaty must be dismissed.

The plea that application of Article 85(3) of the Treaty was wrongly refused

Arguments of the parties

95 The applicants claim that they have supplied the Commission with detailed proof of the advantages of the agreement. At point 60 of the Decision it is acknowledged

that the members use the information acquired in order to intensify competition, in particular in order to improve the distribution of products, but they are unable to compensate for the restrictions on competition which result from the agreements. They also claim that the main reason which led the Commission to adopt a negative attitude towards the information exchange agreement is that it enables competitors' actions to be detected immediately and parallel imports and dealers' sales outside their territories to be monitored. The Data System does not give its members that monitoring ability because it provides for identifying data to be frozen for a period of three months.

96 The applicants also claim that the new system ought in any event to qualify for an exemption under Article 85(3) of the Treaty, since the information disseminated regarding sales of their own dealers no longer enables the members of the agreement to identify and locate sales made by dealers outside their territory. Moreover, under the Data System, SIL would no longer send Form V55 to the members of the agreement. Information transmitted would henceforth be limited to the chassis number and the date of registration.

97 The Commission contends that the applicants' arguments are based on a misinterpretation of the Decision. It disputes that it has accepted that exchange of information has a positive influence on competition. Nothing leads to the conclusion that the assessment made by the Commission, which considered that one of the four conditions laid down in Article 85(3) was not satisfied, is manifestly wrong. Accordingly, its rejection of the application for exemption was correct. That assessment is not affected by the second notification, which only made minor amendments to the information exchange system, so that the assessment made following the first notification remains valid with regard to the evaluation of the second notification.

98 According to the Commission, when the 'voluntary statistical section' of Form V55 is completed, it contains the name and address of the registered keeper.

Under the Data System, SIL would extract from the V55 forms, and provide to the members of the agreement, detailed information regarding the chassis numbers and dates of registration of tractors sold. The Commission considers that such information enables the members of the agreement to identify the origin and destination of each tractor sold. Moreover, contrary to the applicants' claims, that information is not essential for checking warranty or bonus claims, as is apparent from points 59 to 65 of the Decision. Examination of bonus or warranty claims does not at all require that the manufacturers take part in an information exchange system with competitors, and each manufacturer could set up and operate an appropriate method of checking such claims on an individual basis.

Findings of the Court

99 The Court notes, first, that it is settled law that the four conditions laid down in Article 85(3) for the grant of an individual exemption to an agreement properly notified to the Commission are cumulative, so that if one of them is not satisfied the Commission may lawfully reject the application made to it. Furthermore, the Court observes that it is primarily for the undertakings notifying an agreement in order to obtain an exemption from the Commission to present to it the evidence to show that the agreement satisfies the conditions laid down in Article 85(3) of the Treaty (judgment of the Court of Justice in Joined Cases 43/82 and 63/82 *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 II-1995). In the present case, the Decision finds that the restrictions of competition which result 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, made in point 62 of the Decision with regard to the first notification, is repeated in point 65 with regard to the second notification. The Court considers that the Commission correctly finds that the

observations set out with regard to the first notification are valid, *mutatis mutandis*, with regard to the second, since, as has been previously observed, the Data System 'continues to provide monthly data regarding the sales volume and market shares of members and dealers'. As emerged at the meeting with the parties on 7 December 1993, the Commission thus intended to argue that, in order to achieve the objectives contended for, it is not indispensable to have information available which identifies individual sales by competitors over short periods of time. The applicants, which merely state that the information gathered is necessary to ensure after-sales or warranty services, do not establish that the restrictions of competition resulting from the information exchange system, as previously analysed (see paragraph 91, above), are indispensable, in particular in the light of the alleged objectives. It is clear that an after-sales or warranty service can be carried out perfectly well without any information exchange system of the type in question. Consequently, the information exchange system, as set out in both the first notification and in the second notification dated 12 March 1990, does not satisfy the conditions laid down in Article 85(3) of the Treaty.

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

Costs

101 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have failed in their submissions, they 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 applicants jointly and severally 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