

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
13 January 2004 *

In Case T-67/01,

JCB Service, established in Rocester, Staffordshire (United Kingdom), represented by R. Fowler, QC, R. Anderson, barrister, L. Carstensen, solicitor, and initially by M. Israel, and, subsequently, by S. Smith, solicitors, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by A. Whelan and S. Rating, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION, as a principal claim, for annulment of Commission Decision 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP.F.1/35.918 — JCB) (OJ 2002 L 69, p. 1), and, in the alternative, for partial annulment of that decision and corresponding reduction of the fine imposed on JCB Service,

* Language of the case: English.

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

composed of: B. Vesterdorf, President, J. Azizi and H. Legal, Judges,
Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 22 January
2003,

gives the following

Judgment

Legal background

1 Article 81 of the EC Treaty provides:

‘1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

- (b) limit or control production, markets, technical development, or investment;

- (c) share markets or sources of supply;

- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings;

— any decision or category of decisions by associations of undertakings;

— any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

2 Article 15, relating to fines, of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

‘...

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business

year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) or Article [82] of the Treaty, or

(b) they commit a breach of any obligation imposed pursuant to Article 8(1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

...

5. The fines provided for in paragraph 2(a) shall not be imposed in respect of acts taking place:

(a) after notification to the Commission and before its decision in application of Article [81](3) of the Treaty, provided they fall within the limits of the activity described in the notification ...'

Facts and administrative procedure

- 3 JCB Service is a company incorporated under English law and set up in 1956 by Joseph Cyril Bamford with its registered office in Rocester, Staffordshire (United Kingdom). JCB Service is held by Transmissions and Engineering Services Netherlands BV and owns and controls directly or indirectly the companies of the JCB Group ('JCB'), which comprises 28 companies, including inter alia JCBamford Excavators, JCB Sales, JCB SA, JCB Germany and JCB Spain. JCB manufactures and markets construction site machinery, earthmoving and construction equipment and agricultural machinery as well as the spare parts for those various products.
- 4 JCB had a turnover of EUR 1 400 million in 2000 for construction equipment and ranked fifth among manufacturers worldwide; it exports more than 70 % of its production through a network of more than 400 distributors and agents. Caterpillar is its highest-ranking competitor, with a turnover of EUR 12 629 million. JCB estimates its market share for construction and earthmoving equipment at 8.5 % in Europe and 4.4 % worldwide. In 1995 and 1996, JCB had a market share of 13 to 14 % in volume (8.9 % in value) of all construction and earthmoving machines sold in the Community (36.8 % in volume and 23.7 % in value in the United Kingdom). Backhoe loaders are the group's leading product, in which JCB had a market share of more than 23 % in value worldwide and nearly 60 % in the United Kingdom in 1995.
- 5 JCB's distribution network is structured on a national basis with one subsidiary per country (in Germany, Belgium, Spain, France, Holland and Italy) or one exclusive importer.
- 6 Two companies in the JCB Group notified the Commission in 1973, using form A/B drawn up pursuant to Regulation No 17, of eight standard distribution

agreements for JCB products, to be concluded with the distributors or main dealers linked to the group, five of which concerned countries in the common market, namely the United Kingdom (including the Channel Isles) and Ireland (notified by JCB Sales) and Germany, Benelux, Denmark and Italy (notified by JCBamford Excavators). The agreements were registered by the Commission's departments on 30 June 1973.

- 7 The Commission (Directorate-General (DG) for Competition) informed JCB Sales, by letter of 27 October 1975, that the agreements notified entailed several restrictions in breach of the provisions of Article 85 of the EC Treaty (now Article 81 EC). It required their amendment and put various questions to the company. The Commission focused on the five agreements concerning the common market, stating that the other three did not seem likely to affect trade between the Member States.

- 8 Revised standard agreements concerning JCB Sales and applicable in the United Kingdom and Ireland (the Distributor Agreement-Export, the UK Distributor Agreement and the UK Main Dealer Agreement) were sent to the Commission on 18 December 1975.

- 9 By letter of 13 January 1976, the Commission acknowledged receipt of those new versions, informed JCB Sales that certain problems previously raised had been resolved while others remained and sought clarification of several provisions.

- 10 JCB Sales answered those points by letter of 11 March 1976 and provided detailed information regarding the remaining problems alleged to exist by the Commission in its letter of 13 January 1976.

- 11 Subsequently, there were no developments on the JCB notification file until 1980.

- 12 On 6 March 1980, JCB Sales sent the Commission the standard UK Distributor Agreement replacing the agreement notified in 1975, which had expired, and, according to the applicant, containing only minor changes. On its expiry, JCB Sales sent the Commission the agreement which replaced the 1980 agreement by letter of 29 December 1995. The Commission did not reply to the letters sent by JCB in 1980 and 1995.

- 13 A judgment of the Tribunal de Commerce de Paris (Commercial Court, Paris) of 11 December 1995 partially dismissed the action for unfair competition brought on 28 November 1990 by JCB's subsidiary in France, JCB SA, as exclusive importer of JCB products in France, against Central Parts SA, which obtained JCB spare parts from the United Kingdom in order to resell them in France. JCB SA had accused Central Parts of using the JCB sign and the description 'distributeur agréé' (authorised distributor) unlawfully.

- 14 On 15 February 1996, Central Parts lodged a complaint with the Commission about the commercial practices of 'JCB Grande Bretagne' in relation to the distribution of its products.

- 15 On 5 November 1996 the Commission undertook an inspection at the premises of JCB SA, and of two of its distributors in the United Kingdom, Gunn JCB Ltd and Watling JCB Ltd.

- 16 On 24 March 1998, the Commission sent a first statement of objections to JCBamford Excavators overlooking the relevance of the notification sent in 1973 (see paragraph 6 above). JCB pointed out that omission on 6 July 1998 in its written observations in response to the statement of objections and again at its hearing by the Commission's departments on 16 October 1998.
- 17 In the meantime, on 8 April 1998, the Cour d'appel de Paris (Court of Appeal, Paris) delivered a judgment overturning the judgment of the Tribunal de commerce de Paris of 11 December 1995, holding that Central Parts had engaged in unfair competition with JCB SA.
- 18 A second statement of objections taking account of the 1973 notification was sent to JCB Service (JCBamford Excavators) on 30 July 1999, to which JCBamford Excavators replied on 13 December 1999. JCBamford Excavators was heard again on 16 January 2000.
- 19 In the course of the administrative procedure, JCB had access to its file, at its request, three times, on 24 April 1998, 22 October 1999 and 16 May 2000, with the exception of documents deemed by the Commission to be non-accessible, a classification confirmed by the Hearing Officer acting in the internal procedure for processing requests for access to files laid down by the Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 3).

20 On 21 December 2000 the Commission adopted Decision 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP.F.1/35.918 — JCB) (OJ 2002 L 69, p. 1, ‘the contested decision’), Article 1 of which reads as follows:

‘JCB Service and its subsidiaries have infringed Article 81 of the Treaty by entering into agreements or concerted practices with authorised distributors, the object of which is to restrict competition within the common market in order to partition national markets and provide absolute protection in exclusive territories outside which authorised distributors are prevented from making active sales and which include the following:

- (a) restrictions on passive sales by authorised distributors in the United Kingdom, Ireland, France and Italy, which include sales to unauthorised distributors, end-users or authorised distributors located outside exclusive territories and, in particular, in other Member States;
- (b) restrictions on sources of supply regarding purchases of contract goods by authorised distributors located in France and Italy, which prevent cross-supplies between distributors;
- (c) fixing of discounts or resale prices applicable by authorised distributors in the United Kingdom and France;
- (d) imposition of service support fees on sales to other Member States effected by authorised distributors outside exclusive territories in the United Kingdom on

the initiative of and according to fixed scales set forth by JCBamford Excavators Ltd or other subsidiaries of JCB Service, thereby making distributors' remuneration dependent on the geographic destination of sales;

(e) withdrawal of allowances depending on whether sales in the United Kingdom are made within or outside exclusive territories or whether authorised distributors, in the territory of whom contractual products are used, reach an agreement with authorised selling distributors, thereby making distributors' remuneration dependent on the geographic destination of sales.'

21 Article 2 of the contested decision rejects the application for exemption submitted by JCBamford Excavators on 30 June 1973. Article 3 orders JCB Service and its subsidiaries to bring to an end the infringements established and Article 4 imposes a fine of EUR 39 614 000 on JCB Service in respect of those infringements.

Pre-litigation procedure and forms of order sought

22 By application lodged at the Registry of the Court of First Instance on 22 March 2001 JCB Service brought the present action under Article 230 EC for annulment of the contested decision.

23 By a separate document, lodged the same day, the applicant brought an application under Articles 242 EC and 243 EC for suspension of operation of Articles 1(d), 2 and 3(a) to (f) of the contested decision, and, in the alternative, for such further or other relief as the Court considered just and appropriate. Those

proceedings, registered as Case T-67/01 R, were concluded by an order for removal from the register of 10 May 2001, once the applicant had declared itself satisfied, at the hearing of 8 May 2001, with the explanations given by the Commission regarding the interpretation of the operative part of the contested decision.

24 By another document, also lodged on 22 March 2001, JCB Service asked the Court to order measures of organisation of procedure and/or measures of inquiry under Articles 64 and 65 of the Rules of Procedure of the Court of First Instance, to the effect that the Commission provide it with the documents it had numbered 1 to 19 to which it did not have access during the administrative procedure.

25 The applicant claims that the Court should:

- as its principal claim, annul the contested decision;

- in the alternative, annul the contested decision in part and reduce the fine imposed accordingly;

- order the Commission to provide it with copies of documents on the file declared not communicable, any document in existence recording telephone or other contact, and all other documents or information not disclosed to the applicant;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action in its entirety; and

— order the applicant to pay the costs.

27 By a measure of organisation of procedure notified on 18 November 2002, the Court of First Instance asked the Commission to produce confidential and non-confidential versions of the documents on the file not disclosed to JCB during the administrative procedure and numbered 14 to 19 in the applicant's list, to indicate the method used to determine the amount of the fine, providing data to enable a comparison to be made with similar cases, and to reply to the complaint that there is a contradiction in the operative part of the decision.

28 On 4 December 2002, the Commission sent the Court of First Instance non-confidential versions of the documents requested and answered the questions put.

29 The parties presented oral argument and replied to the questions put to them orally by the Court at the hearing on 22 January 2003.

- 30 On the day of the hearing the Commission produced to the Court the confidential versions of documents Nos 14 to 19 to allow the court to assess whether confidentiality had been opposed justifiably. Further, it was decided at the hearing that the Commission should disclose to the Court and to JCB's counsel documents Nos 1 to 13. The Commission made the disclosure requested and the applicant's counsel submitted written observations on all the documents on 13 February 2003.

Law

- 31 The application contains pleas relating to the procedure by which JCB Service alleges that the Commission, throughout the procedure under Article 81 EC, breached essential procedural requirements and disregarded the fundamental rights of the defence. It also contains pleas concerning the merits of the contested decision.

1. *The procedure*

The first plea: the Commission's failure to act within a reasonable period

Arguments of the parties

- 32 JCB submits that the Commission failed to fulfil its obligation to act within a reasonable time which derives both from a general principle of Community law enshrined in the case-law and from Article 6(1) of the European Convention for

the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950 (Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, paragraphs 56 and 57).

- 33 First, JCB notified the agreements concerning its distribution arrangements on 30 June 1973 and the Commission closed that procedure 27 years later in rejecting, in Article 2 of the contested decision, the request for exemption under Article 81(3) EC made in 1973. Second, the procedure initiated following the complaint by Central Parts on 15 February 1996 lasted nearly five years.
- 34 The Commission disputes the applicability of Article 6(1) of the ECHR to administrative procedures in competition law since that convention is not part of Community law as such (Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729, paragraph 59).
- 35 Moreover, the Commission contends that it did not breach its duty to act within a reasonable time. First, JCB, without ever seeking a formal decision from the Commission, implemented a system of contracts different from that notified in 1973 and did not notify all the agreements, given that the letters sent in 1980 and 1975 did not constitute notifications within the meaning of Regulation No 17. Secondly, the infringement procedure was not excessively long, given the complexity of the file, the checks it required and the fact that changes made at the same time to Community law on dealership agreements caused certain points in the first statement of objections to be reconsidered. Moreover, of the 33 months of the infringement procedure, JCB was responsible for a delay of more than seven months.

Findings of the Court

- 36 The need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of Community law whose observance is ensured by the Community judicature (Case C-282/95 P *Guérin automobiles v Commission* [1997] ECR I-1503, paragraphs 36 and 37; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *LVM v Commission* [2002] ECR I-8375, paragraphs 167 to 171, and *SCK and FNK*, cited above, paragraphs 55 and 56), and which is incorporated, as an element of the right to good administration, in Article 41(1) of the Charter of fundamental rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1). Accordingly, while it is not necessary to rule on the applicability as such of Article 6(1) of the ECHR to administrative proceedings before the Commission relating to competition policy, it must be considered whether, in the present case, the Commission has breached the general principle of Community law that decisions must be adopted within a reasonable time in the procedure leading to the adoption of the contested decision.
- 37 In considering this plea, a distinction must be made between the two sets of administrative proceedings at issue, namely, first, consideration of the agreements notified in 1973, which was concluded by the rejection, in Article 2 of the contested decision, of the application for exemption, and, second, investigation of the complaint made in 1996, the conclusions of which are set out in the other articles of the operative part of the contested decision relating to the infringement.
- 38 As regards the proceedings which followed notification in 1973, according to the documents on the file, the Commission filed the notified agreements in 1992 without taking a decision and it was only JCB's reply to the first statement of objections which led the defendant to reconsider those agreements in the course of the investigation of the complaint. It is abundantly clear that the fact that those proceedings lasted 27 years breaches the obligation of the administration to adopt a position and close proceedings, once opened, within a reasonable time.

However, regrettable as such a breach is, it cannot have affected either the lawfulness of the rejection of the application for exemption or the proper conduct of the proceedings to establish that there was an infringement.

- 39 As regards the rejection of an application for exemption, which is a separate decision from that finding that there was an infringement, it is settled case-law that the mere fact of not having been adopted within a reasonable time cannot render unlawful a decision taken by the Commission following notification of an agreement (see, to that effect, Case T-26/99 *Trabisco v Commission* [2001] ECR II-633, paragraph 52, and Case T-62/99 *Sodima v Commission* [2001] ECR II-655, paragraph 94).
- 40 Infringement of the principle that the Commission must act within a reasonable time, if established, would justify the annulment of a decision taken following administrative proceedings in competition matters only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure (see Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM v Commission* [1999] ECR II-931, paragraph 122, not overturned on that point by the judgment on appeal of 15 October 2002 in *LVM v Commission*, cited above, paragraphs 176 and 177).
- 41 As regards the decision finding an infringement, suffice it to note that care is taken in that decision not to base findings on matters which were notified and to establish that the practices of which JCB is accused are different from those stipulated by the notified agreements. Consequently, the fact that the agreements were notified long ago cannot affect the lawfulness of the infringement proceedings relating to matters other than those notified.

- 42 Moreover, JCB Service does not argue that the length of time which elapsed resulted in any particular procedural irregularity and confines itself to submitting that the Commission's conduct reveals poor management of the file. No inference of relevance to the consideration of the claims for annulment can therefore be drawn from the length of time which has elapsed since the notifications made in 1973.
- 43 As regards the investigation of the complaint referred to the Commission on 15 February 1996, the total duration of the procedure, 4 years, 10 months and 6 days, does not appear excessive given the complexity of the case, which involves several Member States and covers five heads of infringement, and the need to draw up a second statement of objections, referred to in paragraphs 16 and 18 above.
- 44 Even if that length of time were held excessive, that finding would be such as to entail the annulment of the relevant articles of the contested decision only if it were established that it gave rise to an infringement of the rights of defence (see the judgment of 20 April 1999 in *LVM v Commission*, cited above, paragraph 122, not overturned on that point by the judgment of 15 October 2002 in *LVM v Commission*).
- 45 However, it must be noted that the applicant does not argue that the Commission's alleged failure to act within a reasonable time in investigating the complaint gave rise, in the present case, to an infringement of the rights of defence. As was confirmed at the hearing, JCB Service confines itself to arguing that the length of the procedure reveals the Commission's partiality and mismanagement of the file and thereby demonstrates the unlawfulness of the contested decision. Against that background, and without it being necessary to rule on the alleged excessive length of the investigation of the complaint, it must be held that the plea as it is argued cannot entail the total or partial annulment of the operative part of the contested decision.

- 46 It follows from the foregoing observations that the plea, which is not such as to affect the lawfulness of the contested decision, either with regard to the application for exemption or with regard to the infringement, must be rejected as inoperative.

The second plea: breach of the principle of the presumption of innocence

Arguments of the parties

- 47 JCB Service submits that the Commission did not allow it a fair hearing and did not observe the principle of the presumption of innocence which applies to the procedures relating to infringements of the competition rules that may result in the imposition of fines on undertakings (Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150). The Commission thus failed to observe its duty of impartiality, in considering the facts with partiality, failing to take account of evidence in its favour and presuming its guilt, in breach of the principle of the benefit of the doubt (Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 269, and the Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, II-869, II-954 and II-956).
- 48 JCB alleges that the Commission had adopted a negative attitude towards it from the start, without having ascertained whether the distribution agreements had been notified, and then, once it had the complete file before it, had adhered to its original position, presuming the guilt of the undertaking. The applicant takes the view, citing examples in support of that view, that the Commission did not consider, or destroyed, evidence in its favour and misinterpreted the documents and the facts of the case.

49 The Commission contends that the procedure was conducted fairly as JCBamford Excavators was given two hearings and had prior access to the file. The Commission adds that it adopted a second statement of objections because the applicant's written and oral observations led it to examine the 1973 notification thoroughly and reconsider its assessment. The Commission therefore disputes that it acted partially.

Findings of the Court

50 The plea is in two parts. The first concerns observance of the right to be heard, which is governed, as regards the application of Articles 81 EC and 82 EC, by the provisions of Article 19(1) of Regulation No 17 and by those of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition, 1963-1964 p. 47). Those provisions require that undertakings concerned by a proceeding for the establishment of infringements are afforded the opportunity, in the course of the administrative procedure, of effectively making known their views on all the objections dealt with in the decision (Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 9, and *SCK and FNK v Commission*, cited above, paragraph 65). In the second, the applicant relies on the principle of the presumption of innocence which is part of the Community legal order and applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case *Hüls v Commission*, cited above, paragraphs 149 and 150, and Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176).

51 As regards respect for the rights of the defence, as pointed out in paragraphs 16 and 18 above, JCBamford Excavators was given an opportunity to submit its observations and was heard by the Commission following each of the statements of objections.

- 52 The preparation of a second statement of objections was made necessary by the observations made in response to the first statement of objections, which pointed out, in particular, that agreements had been notified. The Commission was obliged to reconsider its objections in the light of those agreements since Article 15(5) of Regulation No 17 prohibited it from imposing a fine on JCB in respect of notified clauses. Far from infringing the right to be heard, reconsideration of the infringement in the light of such new evidence and the adoption of the second statement of objections were intended to correct the original deficiencies in the procedure and the errors of assessment liable to arise as a result (see Case 51/69 *Bayer v Commission* [1972] ECR 745, paragraph 11). From that point of view, the procedure followed did not show signs of any irregularity or failure to have regard to the rights of the defence.
- 53 As regards the principle of the presumption of innocence, the mere fact that the Commission adopted two successive statements of objections cannot suffice to establish that that principle was breached. Moreover, a general presumption of the guilt of the undertaking concerned can be attributed to the Commission only if the findings of fact it made in the decision were not supported by the evidence it furnished.
- 54 As an example of the Commission's alleged partiality, JCB Service mentions, first, a memorandum of 16 May 1995 from the Sales Development Director, sent to the managers of the companies in the group, which states that the prohibition of parallel imports is contrary to the decisions of the Commission and the case-law of the Court of Justice. It alleges that the Commission used that document as evidence that JCB was aware of Community law, which constitutes an aggravating factor. However JCB cannot claim that it was unaware of the requirements of Community competition law, as, moreover, attested by its notification of its agreements as soon as the United Kingdom of Great Britain and Northern Ireland joined the European Community. JCB's concern over the compatibility of its agreements and practices with Community law, which emerges from the memorandum mentioned above, is an objective finding of fact,

which is, moreover, not disputed by the applicant. The fact that the Commission has taken account of the document in question and the conduct which it records does not therefore reveal partiality on its part.

- 55 JCB submits, second, that the Commission misinterpreted the letter of 13 April 1995 from Berkeley JCB to JCB Sales mentioned in recital 89 of the contested decision. That correspondence records the fact that that distributor might be approached 'by both end users and agents'. Even if the Commission had misinterpreted that part of the sentence in stating in recital 143 of the contested decision that 'overseas end-users and their duly appointed agents' were referred to, that possible inaccuracy did not in itself demonstrate partiality but, at worst, betrayed a poor understanding of the document.
- 56 Third, JCB takes the view that, in any event, the Commission assumed its guilt. It complains, for instance, that it did not take account of the judgment of the Cour d'appel de Paris of 8 April 1998, which was in its favour. That judgment, which held that Central Parts used the JCB sign without authorisation and deleted the serial numbers from JCB machines, concluded that Central Parts had engaged in acts of unfair competition against JCB. The Commission also misinterpreted the 'Rouvière dispute', named after a customer of Central Parts, an unauthorised dealer who bought a JCB machine from Central Parts and subsequently repaired it badly. The fact that the author of a complaint in a procedure applying Regulation No 17 might have engaged in misconduct for which it was sentenced by a court is irrelevant to the infringements actually alleged against JCB which are, moreover, separate.
- 57 JCB Service submits, fourth, that the transcript of the interview held on 6 November 1996 on the premises of the authorised distributor, Watling JCB,

between officials of the ‘Competition DG’ and the distributor’s representatives made by staff of that directorate constituted exculpatory evidence which the Commission was wrong not to take into account.

- 58 According to the transcript of that interview, which was placed on the court file during these proceedings, as indicated in paragraphs 27, 28 and 30 above, the information given to the Commission by Watling JCB during that interview concerns, *inter alia*, the way in which restrictions imposed on out-of territory sales were implemented, relations between the applicant and the JCB Dealer Association, service support fees and the drawing up of retail price lists. In the picture of relations between the JCB group and one of its distributors which emerges from that interview, no element can be clearly pinpointed as evidence as to whether or not the practices of the distribution network constitute infringements. It seems, therefore, that it cannot be argued that the Commission excluded the document from its examination of the elements of the infringement in order to suppress exculpatory evidence. Moreover, the Commission states that it excluded that document because it had doubts about the lawfulness of the circumstances in which it was obtained, which seems a plausible explanation here.
- 59 Accordingly, in the light of the circumstances described above and the content of the transcript in question, the Commission’s decision to exclude that document from the file is not sufficient to prove the allegation of partiality made against the Commission in dealing with the case.
- 60 In conclusion, there is nothing in the conduct of the administrative procedure to indicate that the Commission interpreted the documents and the facts in a tendentious or biased manner or exhibited partiality in its conduct towards JCB. The plea of breach of the principle of the presumption of innocence in consideration of the evidence must therefore be rejected.

- 61 It follows from the foregoing that the right to be heard and the principle of the presumption of innocence were not breached.

The third plea: breach of the right of access to the file

Arguments of the parties

- 62 JCB Service alleges that the Commission disregarded its right to have access to the documents placed on the file which, it argues, were relevant to its defence and were not internal Commission documents which the Commission could declare non-accessible (documents 1 to 19 mentioned in paragraph 24 above).
- 63 The Commission contends that JCB had access to all the documents on the file which were not confidential. As regards the documents numbered 6 to 10, the Commission points out that it did not use them as evidence of the infringement and that they therefore could not have been of any use to the undertaking's defence.

Findings of the Court

- 64 Access to the file is one of the procedural guarantees intended to safeguard the rights of the defence. Infringement of the right of access to the Commission's file during the procedure prior to adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have

been infringed. In such a case, the infringement committed is not remedied by the mere fact that access was made possible during the court proceedings relating to an action in which annulment of the contested decision is sought. Where access has been granted at that stage, the undertaking concerned does not have to show that, if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defence (judgment of 15 October 2002 in *LVM v Commission*, paragraphs 316 to 318).

65 In accordance with those principles, it must be considered whether the Commission's refusal to allow JCB access to the documents at issue, which were only disclosed in the course of the court proceedings, prevented the applicant from taking cognisance of documents which were liable to be of use to it in its defence and thereby infringed the rights of the defence.

66 The document numbered 1 by the applicant is a list of JCB's authorised distributors for Benelux, based on an official publication by JCB, which Central Parts disclosed to the Commission in the course of the investigation of its complaint. The information contained in that document, in the form of a simple list of addresses, was clearly familiar to JCB and the applicant does not even allege that its rights were infringed as a result of the failure to disclose that document to it.

67 The documents numbered 2, 11, 12, 13, 14, 15, 16 and 17 are requests for information sent to Central Parts, Gunn JCB and Watling JCB by the Commission in the exercise of its powers of investigation under Article 14 of Regulation No 17. As mere requests for information they contain nothing useful to JCB's defence. The refusal to disclose them thus did not prejudice the rights of the defence.

- 68 The documents numbered 3, 18 and 19 are replies to the requests for information mentioned in paragraph 67 above, the first under Article 14 and the two others under Article 11 of Regulation No 17. They could compromise the Commission's sources of information. In those circumstances the Commission was entitled to invoke confidentiality and refuse to allow JCB access to those documents on the file during the administrative procedure.
- 69 Finally, the documents numbered 6, 7, 8, 9 and 10 concern the interview between officials of the 'Competition' DG and representatives of Watling JCB which took place on the premises of Watling JCB on 6 November 1996 (see paragraphs 57 and 58 above). Although it includes witness statements concerning the operation in practice of JCB's distribution network from the point of view of the dealers, that interview cannot be considered to have had the potential to be useful to the defence of the undertaking in question.
- 70 First, the matters brought to light by those interviewed are all referred to in other documents on the file on which the undertaking was given an opportunity to put its view, whether on out-of-territory sales, relations between the applicant and the JCB Dealer Association, service support fees or the drawing up of retail price lists. As held in paragraph 58 above, the transcript of the interview contains nothing which can be clearly pinpointed as evidence as to whether or not the practices of the distribution network constitute infringements. The contested decision is, moreover, based on those documents and not on the content of the interview, which is precisely what JCB, in this plea, accuses the Commission of not taking into account.
- 71 Second, the circumstances of the case make it legitimate to assume that JCB was aware, through its distributor, Watling JCB, of the content of the interview before the adoption of the contested decision. In particular, the facts set out in paragraph 4.59 of the application imply that JCB received a copy of the document through Watling JCB before the decision was adopted. Moreover, JCB

Service itself accepts that it was informed by Watling JCB of the inspection conducted by the Commission at its premises and the interview recorded on the second day of that inspection. It does not specify when it received that information but, whilst it complains that the Commission did not allow it access to the document, it does not allege that it was unaware of its content during the procedure.

- 72 It follows from the foregoing that the plea of breach of the right of access to the file and the resulting breach of the rights of the defence must be rejected.
- 73 Moreover, there is no need to adjudicate on the claims for production of certain documents on the file to which JCB was refused access during the administrative procedure, given that those documents were disclosed in full to the applicant in the course of proceedings before the Court of First Instance.

2. The merits of the contested decision

The plea of failure to establish the infringement

- 74 The Commission identified five counts of infringement of the provisions of Article 81 EC, set out in paragraph 20 above.

Preliminary observations of the parties on notification

- 75 JCB Service submits that, having notified its agreements as long ago as 1973, amended them in the light of the Commission's observations and submitted revised agreements in 1975, and then amendments to them in 1980 and 1995, it was entitled to assume, in the absence of any communication from the administration until the lodging of the complaint by Central Parts in 1996, that its agreements, as amended and, in its view, properly notified, were consistent with Community law and tacitly approved by the Commission.
- 76 The Commission states that only the distribution agreements properly notified using form A/B on 30 June 1973, relating to all the then Member States of the Community, apart from the French Republic, and the agreements sent on 18 December 1975 amending some of the previous ones, can be considered to have been properly notified. However, the contracts sent in 1980 and 1995, not having been notified using the requisite form A/B, were not, in the defendant's view, validly notified. It points out that Community law and, in particular, Regulation No 17, do not allow the interpretation relied on by JCB Service based on tacit approval or presumption of lawfulness.

Findings of the Court

- 77 The question thus raised by the parties is whether, regardless of the submission in 1975 of agreements amended following the Commission's observations, which the Commission accepts fall within the terms of notification, as indicated in paragraph 76 above, the documents subsequently sent in 1980 and 1995 may be considered to have been properly notified in the light of the requirements of Regulation No 17 and of Regulation No 27 of the Commission of 3 May 1962, First Regulation implementing Council Regulation No 17 (OJ, English Special Edition, 1959-1962, p. 132), as amended by Regulation (EEC) No 1133/68 of the Commission of 26 July 1968 (OJ, English Special Edition, 1968, (II) p. 400), and replaced by Commission Regulation (EC) No 3385/94 of 21 December 1994 on

the form, content and other details of applications and notifications provided for in Council Regulation No 17 (OJ 1994 L 377, p. 28), which entered into force on 1 March 1995.

- 78 The documents sent by JCB in 1980 and 1995 relate to the agreement with the United Kingdom distributors and the question of their lawfulness is likely to be relevant to the examination of the first element of the infringement regarding the restrictions imposed on passive sales by United Kingdom dealers (see paragraphs 86 to 89 below).
- 79 According to settled case-law, the objects of notification are achieved solely by notification of contracts in identical terms concluded by one and the same undertaking (Case 1/70 *Rochas* [1970] ECR 515, paragraph 5). The use of that form is therefore mandatory and is an essential prior condition for the validity of the notification (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125, paragraphs 61 and 62), and a fresh notification must be made in the event of any reinforcement or extension of the restrictions and, *a fortiori*, any introduction of new restrictions (Case C-39/96 *Free Record Shop* [1997] ECR I-2303, paragraph 15). An undertaking cannot maintain that exclusivity clauses in a notified agreement have expired if it has not notified, in the form required by Regulation No 17, the amendments alleged to have been made (Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, paragraph 8). It is only in the specific case of renewal of a request for exemption that the Court has held that a mere request for renewal with amendments is sufficient (Case 75/84 *Metro v Commission* [1986] ECR 3021, paragraphs 29 to 31).
- 80 Furthermore, as the Commission is right to observe, on the specific subject of the system of notification provided for by Regulation No 17, Community competition law makes no provision for tacit approval of agreements notified in that way.

81 In the present case, the 1980 agreement contains new clauses concerning, *inter alia*, intellectual property rights and the procedure to be followed to terminate contractual relationships. It has some additions concerning the obligations of the distributor. Clause 4, which limits the freedom of distributors with regard to wholesale sales, has been amended in the new agreement. In the 1995 version, Clause 4 was rewritten as regards the exceptions to the restrictions imposed on distributors. Further obligations for distributors were also introduced.

82 Given the substantial amendments thus made to its agreements and the new clauses inserted in them, JCB should have notified them using the form provided for that purpose when it sent them in 1980 and 1995, in order to enable the Commission to carry out the review incumbent upon it effectively. Accordingly, only the agreements notified in 1973 and amended in 1975 in response to the Commission's observations must be regarded as properly notified.

The first element of the infringement, relating to restrictions on passive sales by distributors in the United Kingdom, Ireland, France and Italy, to unauthorised distributors, end-users or distributors located outside exclusive territories and, in particular, in other Member States

Arguments of the parties

83 JCB Service considers that the Commission has not adduced evidence for its claim that restrictions on passive sales had been imposed on authorised distributors in the United Kingdom, Ireland, France and Italy, prohibiting them from exporting even to end-users and authorised distributors outside their exclusive territory, and, in particular, to the other Member States and that the only express prohibition in those agreements concerns sales to unauthorised distributors. The

applicant stresses that most of the documents on which the Commission relies relate to the implementation of Clause 4 of the notified agreements. JCB Service maintains further, that its policy on ‘grey exports’ was directed at parallel traders outside its network and that the documents mentioned in the contested decision in that regard are not relevant to the establishment of the infringement complained of.

- 84 The Commission contends that JCB effectively imposed restrictions on the passive out-of-territory sales allocated to each authorised agent, by interfering in the export sales of its distributors in the United Kingdom, by obliging its Italian distributors to sell only within the allocated territory, by making supplies by its Irish distributors outside the allocated territory subject to its approval and by participating, through its French subsidiary, in the negotiation of service support fees in France. The Commission adds that Clause 4 of the notified agreements was implemented in a different and more restrictive way than was provided for by the wording of the notified clause. The defendant also takes the view that JCB actively discouraged all sales abroad whether by its authorised agents or by unauthorised agents in the case of parallel exports.

Findings of the Court

- 85 The element of the infringement described by Article 1(a) of the contested decision concerns a restriction imposed on passive sales by authorised distributors in the United Kingdom, Ireland, France and Italy, prohibiting or deterring them from selling not only to unauthorised distributors, but also to authorised distributors out-of-territory or to end-users. A restriction of that nature, which has as its object and effect the limiting and sharing of markets, is prohibited by Article 81(1)(b) and (c) EC (see Case 86/82 *Hasselblad v Commission* [1984] ECR 883, paragraph 46).

— The United Kingdom

86 The notified agreements concerning distributors and main dealers in the United Kingdom (registered under numbers IV 28696 and IV 28697 respectively) contain, in the version amended in 1975 in response to the Commission's observations, a Clause 4 which provides, as regards distributors, '[t]he distributor hereby agrees not to sell JCB products wholesale for resale except to an approved sub-dealer or in the case of B products to a main dealer', and as regards main dealers, '[t]he main dealer hereby agrees not to sell JCB products wholesale for resale except to an approved sub-dealer'. Those clauses, which lay down a prohibition on selling to unauthorised agents, did not contain a general prohibition on selling to final dealers or to authorised agents outside the territory allocated. The Commission contends that the clause in question has been interpreted as entailing a general prohibition on out-of-territory sales.

87 JCB Service submits that the documents on which the Commission based its conclusion in recitals 143 and 144 of the contested decision that the restrictions were established do not support that conclusion.

88 In that connection, in a letter sent on 26 October 1992 by Watling JCB to the secretary of the Queen's Award Office applying for a Queen's Award for Export Achievements, it expressly states that its distribution agreement prohibits it from selling new machines or parts for export. According to a letter of 13 April 1995 from Berkeley JCB to JCB Sales, that authorised distributor considers itself bound by a clause prohibiting it from selling outside its territory and undertakes to consult JCB in the event of doubtful requests from both end users and agents. In a letter of 21 November 1995, TC Harrison JCB, another authorised distributor, explains to Central Parts that it is not allowed to export. A letter of 30 November 1992 from Gunn JCB to JCB Sales, in which that authorised distributor defends its sale of a new machine in France, confirms that JCB Sales ensures territorial exclusivity is respected by its agents. Those documents all show that the distributors believed that their contract with JCB bound them to restrictive

commercial practices and acted accordingly; going beyond the prohibition on selling to unauthorised agents contained in Clause 4, they behaved as though they were subject to a more general prohibition on selling outside their territory, in particular for export.

- ⁸⁹ It follows from the foregoing that, in the United Kingdom, restrictive practices going beyond the provisions of the notified agreements were implemented. The element of the infringement relating to passive sales by authorised distributors and end users outside their territory is therefore established.

— Ireland

- ⁹⁰ The standard distribution-export agreements notified in 1973 and 1975 concerning, *inter alia*, Ireland and naming Blackwood Hodge as the contractor for that country (registered as number IV 28695), contained no clause prohibiting wholesale sales to unauthorised agents like those considered in the case of the United Kingdom in paragraph 86 above. However, the agreement concluded in 1992 by JCB Sales with Earthmover Commercial Industrial (ECI) JCB, its distributor for Ireland, contains a Clause 4, concerning wholesale sales, comparable to the Clause 4 in the 1975 versions of the United Kingdom distributor and main dealer agreements. The clause in the 1992 agreement provides that '[t]he distributor hereby agrees not to sell JCB products wholesale for resale except to an approved sub-dealer'. As the agreement was not notified, Clause 4, which concerns both passive and active sales, can therefore serve as evidence of the infringement.

- 91 As regards the implementation of the agreement in respect of passive sales, JCB Service casts doubt on the probative force of the documents mentioned in recital 122 of the contested decision on which the Commission relies to establish the infringement.
- 92 According to a fax of 31 January 1995 from JCB Sales to JCB SA and two other faxes of 31 January and 30 March 1995 from ECI JCB to JCB Sales, concerning attempts by Central Parts to obtain spare parts from ECI JCB's depot in Cork, the Irish distributor evaded Central Parts' requests by claiming it had enough to do on its own market, and at the same time asked JCB Sales whether it should meet requests for supplies from France. Given that the contractual provisions are identical to those for the United Kingdom but not notified, those facts, in conjunction with the general strategy of limiting out-of-territory sales in the rest of JCB's distribution network, are sufficient to establish this element of the infringement, that is to say, restrictions imposed on passive out-of-territory sales.
- 93 The fact that the Irish Competition Authority granted ECI JCB a block exemption by decision of 5 November 1993 for its exclusive distribution agreement with JCB Sales, without raising any objection to Clause 4, is irrelevant to the exercise by the Commission of the powers conferred on it by Community law in the area of competition. Moreover, the decision of the Irish Competition Authority, taken under the Competition Act 1991, grants the exemption subject to Article 81(1) EC and Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1). It is settled case-law that any similarity there may be between the legislation of a Member State in the field of competition and the rules laid down in Articles 81 EC and 82 EC certainly cannot serve to restrict the Commission's freedom of action in applying those Articles so as to compel it to adopt the same assessment as the authorities responsible for implementing the national legislation (Case 298/83 *CICCE v Commission* [1985] ECR 1105, paragraph 27).

- 94 In any event, the decision of the Irish Competition Authority is based on Clause 4 as it appears in the 1992 agreement referred to in paragraph 90 above, concluded between JCB Sales and ECI JCB, which was not notified to the Commission.
- 95 It follows from the foregoing that the element of the infringement relating to Ireland is also established as regards passive sales.

— France

- 96 The standard dealership contract between JCB SA and JCB Service and each dealer, dating from 1991, includes, in Article 2, a reciprocal exclusivity clause which prohibits the dealer from, *inter alia*, selling, distributing or promoting directly or indirectly JCB products and parts outside the territory allocated. That agreement, which was not notified and can, therefore, be taken into account as evidence of the infringement, prohibits active sales and also expressly lays down a prohibition on passive sales outside the territory allocated.
- 97 JCB Service none the less submits that the documents on which the Commission relies, in recitals 111, 113 and 134 of its decision, do not prove the existence of the restrictions complained of.
- 98 In that regard, it appears that a fax of 21 June 1988 from JCB SA to an authorised dealer advises that dealer that sales outside the territory allocated are not eligible for assistance or discounts and will have an 8 % penalty applied for service support. In a letter of 10 January 1995 to one of its dealers, Philippe MPT, JCB SA, referring to incidents involving that agent and client companies concerning ‘out-of-sector sales or proposals’, reminds the dealer of its contractual

obligations. In a letter of 31 January 1996 to JCB SA, a dealer in Toulouse, Pinault équipement, complains of competition from JCB Île de France (a subsidiary of JCB SA) on its territory and from parallel networks of Central Parts and Renault agricole. It calls on JCB SA to intervene forcefully to ensure that requests for parts in the Aquitaine region are passed on to it. Those documents confirm to a great extent the restrictive practices and partitioning of markets provided for by the standard dealership agreement.

99 JCB Service cites the decision of the French competition council, given on 20 July 2001, which, it alleges, establishes that there was no restriction on passive sales. That decision is, however, irrelevant to the present dispute. It appears that it concerns an agreement, denounced by JCB dealers in France, between the JCB Group and Renault agricole on the distribution of agricultural equipment. Such equipment is expressly excluded by Article 1 of the standard dealership agreement at issue here and is, moreover, covered by a separate distribution network.

100 It follows from the foregoing that the element of the infringement relating to restrictions on passive sales is established in respect of France.

— Italy

101 The standard 1993 distribution contract between JCB SpA, JCB's Italian subsidiary, and each distributor provides that distributors are to undertake to sell JCB products only on the allocated territory (Clause 4). That provision of the agreement, which was not notified and may therefore be taken into account in establishing the infringement, prohibits all sales outside the allocated territory. That restrictive clause, therefore entails a prohibition on export sales and is thus intended to partition the market.

102 Furthermore, two communications from JCB Sales to JCB SpA, dated 24 March 1994 and 14 February 1996 respectively, referred to in recitals 108 and 124 of the contested decision, reveal that Sofim, a distributor in Italy, was subject to criticism for selling JCB machines in Slovenia where Terra is the local agent, in the first case, and aggressively promoting JCB products in Southern Austria at lower prices than those of local agents, in the second. JCB Service maintains that Clause 4 concerned active sales only and that passive out-of-territory sales were common. The applicant describes how, for a period from 1990 to 1999, JCB machines were sold on the respective territories of two authorised distributors, Somi (territory of Rome) and Vames (territory of Turin) by authorised distributors for other territories (Rimac and Stella, on the one hand, and Panero and Meta, on the other). It appears that an average of 25 % of the sales made on the territories of Somi and Vames were made by distributors authorised for other territories.

103 JCB Service thus proves that sales between the territories of the distributors in Italy took place and the practice was thus not as strict as the agreement required. However, the criticism which Sofim's conduct attracted shows the inflexibility of JCB's distribution system as regards export sales and confirms that the objective was the partitioning of national markets. In any event, however the agreements were implemented in practice, Article 81(1) EC prohibits the existence, in distribution contracts, of clauses having the object or effect of restricting sales. They constitute a restriction on competition which may be subject to a penalty under Article 81(1) EC if they are capable of affecting trade between Member States (Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 14 and 15). The fact that a clause in an agreement between undertakings, the object of which is to restrict competition, has not been implemented by the contracting parties is not sufficient to remove it from the ambit of the prohibition laid down in Article 81(1) EC (Case *Hasselblad v Commission*, cited above, paragraph 46, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ablström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 175, and Case T-77/92 *Parker Pen v Commission* [1994] ECR II-549, paragraph 55).

104 It follows from the foregoing that the element of the infringement relating to passive sales is established in respect of Italy.

— Parallel exports on the whole of the geographic market concerned

105 JCB Service submits that the documents referred to in recitals 93, 118 and 119 of the contested decision, relating to parallel exports intended for traders not belonging to its distribution network, do not serve to establish the infringement complained of.

106 In that regard, in a letter of 2 June 1992, which JCB Sales sent to Watling JCB, JCB sets out its position, which is unchanged as regards parallel exports and is to actively discourage the sale of any new machine abroad, whether through a United Kingdom distributor or an external equipment hire company. Two faxes, of 11 and 15 May 1995, also set out the complaints of the German subsidiary, JCB Germany, to JCB Sales on the subject of sales made by Berkeley JCB, a United Kingdom distributor, and by an equipment hire company to a local competitor.

107 The documents analysed above show that JCB has a policy of partitioning the territories of its distributors and national markets which leads it to prohibit generally any out-of-territory sale, particularly abroad, whether it is a case of parallel exports outside its distribution network or not. Such conduct reinforces the restrictions imposed on passive sales.

- 108 It follows from all the foregoing that the Commission was right to take the view that JCB, by its agreements and practices, has contrived to preserve its distributors' exclusivity in the territory allocated to them, partitioned markets and deterred or prohibited exports. The applicant's arguments relating to the first element of the infringement must therefore be dismissed.

The second element of the infringement, relating to restrictions on sources of supply imposed on distributors located in France and Italy, which prevent cross-supplies between distributors

Arguments of the parties

- 109 JCB Service submits that the allegation that the agreements gave rise to restrictions on the sources of supply of authorised distributors in France and in Italy, obliging them to obtain supplies solely from the national JCB subsidiary and prohibiting cross-supplies between authorised distributors, is based on a misinterpretation of those agreements by the Commission, the purpose of the clauses at issue being merely to ensure that distributors market only JCB products. The applicant also complains that the Commission did not investigate whether the contested clauses had actually been implemented.
- 110 The Commission contends that the restrictions imposed on French and Italian distributors derive from the terms of the contracts at issue, without there being any need to ascertain whether they were actually implemented. It adds that JCB never reported those restrictions, which have the effect of reinforcing those which were notified.

Findings of the Court

- 111 The sharing of sources of supply is prohibited by Article 81(1)(c) EC. The element of the infringement set out in Article 1(b) of the contested decision relates to restrictions alleged to have been imposed on distributors in France and in Italy regarding their sources of supply for contract goods, preventing cross-supplies between those distributors.
- 112 In France, Article 2 of the standard dealership agreement requires, as an essential condition of the contract, that supplies of JCB products and parts be obtained exclusively from the French subsidiary, JCB SA, and from JCB Service. In Italy, the standard distribution contract prohibits distributors from selling or from being involved, directly or indirectly, in the sale of products other than JCB products (Article 4) and requires them to obtain supplies of spare parts and other subsidiary products used for the repair of JCB products exclusively from JCB SpA (Article 6), unless they have prior written agreement from JCB, in the cases covered by those two articles.
- 113 The clauses of those agreements, which were not notified and can serve as evidence of this element of the infringement, have a restrictive purpose.
- 114 JCB Service disputes that the documents to which the Commission refers in recital 110 of the contested decision have any probative value.
- 115 In relation to those documents, it must be observed that, as regards France, a letter dated 21 June 1996, sent by JCB SA to Sem-Cedima, one of its dealers, announces that the dealership contract is to be terminated by the French subsidiary with two dealers, Sem Cedima and K. Malecot, because of their

purchasing policy, under which they bought new machines and spare parts not from the companies of the JCB group in France, but from English companies, a practice of which JCB disapproves. Another letter, of 10 February 1999, from an authorised dealer in France, whose identity is concealed, responding to a request for information from the ‘Competition’ DG, describes a prohibition on purchasing JCB spare parts and equipment from elsewhere than the JCB SA sources of supply and pressure exerted on the JCB distribution network and on that company in that regard. The dealer is critical of that conduct, which is provided for by Article 2 of the contract, denounces the parallel distribution networks for agricultural industrial and public works equipment, and explains that the principal advantage in obtaining supplies in the United Kingdom is the difference in prices. Those documents confirm that the agreements were implemented and that there were restrictions in France on the sources of supply of JCB authorised agents.

116 As regards Italy, in concluding that this element of the infringement was established, the Commission relied on no evidence other than the provisions of the contract. JCB Service submits that the Commission cannot impose a penalty on it for clauses which were not rigorously interpreted and implemented, without investigating and proving whether they were actually implemented.

117 As stated in paragraph 103 above, the fact that the clauses restricting competition were not rigorously interpreted and applied is irrelevant to the establishment or otherwise of the alleged infringement. The absence of any analysis of the effects of the agreement in the contested decision does not, therefore, in itself constitute a defect in that decision (Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; see also judgment of 6 April 1995 in Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, paragraphs 30 and 31, upheld by the judgment of the Court of Justice of 17 July 1997 in Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraphs 13, 14 and 15), given that the anti-competitive object or effect of an agreement must be

taken into account as alternative, not cumulative, requirements (Case 56/65 *Société technique minière* [1966] ECR 235; see also, judgment of 6 April 1995 in *Ferriere Nord v Commission*, cited above, paragraphs 30 and 31).

- 118 It follows from the foregoing that the Commission was right to take the view that the element of the infringement relating to restrictions on sources of supply as regards purchases of contract goods by dealers operating in France and in Italy was established. The arguments of the applicant on that point must therefore be dismissed.

The third element of the infringement, relating to the fixing of discounts or resale prices applicable by authorised distributors in the United Kingdom and France

Arguments of the parties

- 119 JCB Service denies that it fixed discounts or resale prices applicable by its authorised distributors in the United Kingdom and in France. The applicant submits that the Commission has adduced no evidence of reprehensible practices in that regard. It submits that the documents on which the Commission based its assessment merely reflect its attempts to increase its own sale prices to its distributors, attest to normal preoccupations and ordinary commercial relations within a distribution network or relate to the establishment of a new distribution network for agricultural products.

- 120 The Commission alleges that JCB was involved in the fixing of discounts and resale prices for its distributors in the United Kingdom and in France and that its involvement entailed a degree of coercion. The Commission takes the view that the documents on which it based its assessment, concerning relations between JCB and the JCB Dealer Association, show that JCB, by its instructions and its price reviews, which were passed on within the Dealer Association, necessarily influenced the price policy of its distributors in the United Kingdom. The defendant alleges, moreover, that JCB also fixed prices in France through JCB SA, the price restrictions being in addition to the territorial restrictions. Finally, it contends that, in the contractual relations defining the vertical distribution agreements in this sector, there is evidence that there was an anti-competitive strategy.

Findings of the Court

- 121 Agreements or concerted practices which directly or indirectly fix purchase or selling prices or any other trading conditions are prohibited by Article 81(1)(a) EC.
- 122 The agreements, notified in respect of the United Kingdom in 1973 and 1975 and not notified in respect of France, contain provisions to the effect that JCB determines the 'ex-works' invoice price for dealers and retailers of its products by applying a discount to the recommended retail price. The applicant has admitted, in its reply to the second statement of objections, that it drew up lists of retail prices for dealers and lists of recommended retail prices.

- 123 As regards the United Kingdom, according to the notified agreements, relating to distributors and main dealers, the prices paid by those agents for the spare parts were the same as JCB's recommended retail selling price, reduced by a discount which varied according to the product. Following the 1973 notification, the Commission, in its letter of 27 October 1975, had criticised those clauses, pointing out, in particular, that they might be used to fix selling prices.
- 124 The distributor agreement, sent in 1980, is identical to the previous ones. The agreement sent in 1995, which replaced it, changes the method of calculation, the prices paid, corresponding, in the case of machines, to the 'ex-works price list' and for spare parts to the stock order price, but retains the reference to recommended retail prices and entitles JCB to modify unilaterally its discounts and its prices.
- 125 Similarly, as regards France, the 1992 standard dealership contract between JCB Service and JCB SA, on the one hand, and the dealer, on the other, provides that the prices invoiced to the dealer are, in the case of machines, the prices fixed by applying a discount to the 'recommended maximum prices' and, in the case of spare parts, the prices appearing in the 'JCB distributor catalogue'.
- 126 Those contractual provisions show that JCB Sales, by drawing up lists of recommended retail selling prices for its products and determining invoice prices internal to its network according to those expected retail prices, exercised an influence over the fixing of retail prices. However, there is a difference between the establishment of recommended prices and the fixing of retail prices. It is, moreover, for the supplier to determine the 'ex-works' price at which it will invoice its products. The contractual documents as such are not therefore sufficient, in the present case, to establish that retail prices were fixed directly or indirectly.

127 The Commission based its conclusion that the prohibited conduct was established, in the case of the United Kingdom, on documents concerning relations between JCB and its Dealer Association and, in France, on circumstances involving JCB SA, according to recitals 128 to 133 and 168 to 171 of the contested decision.

128 As regards the United Kingdom, the documents discussed between the parties (referred to in recitals 131 and 132 of the contested decision) show that JCB was concerned about the level of retail prices which it felt were too low and that studies and discussions were conducted on that subject within the JCB Dealer Association at the request of the applicant. The correspondence from the secretary of the British Dealer Association of 11 and 20 January 1993 can be interpreted, according to the applicant, as attempts to increase its own selling price to its distributors. The letter of 16 July 1991 from JCB Service to the secretary of the association also reveals that the applicant intended to increase the average gross dealer margin for spare parts by 2 %. It can be inferred from those documents that the members of the distribution network conferred with one another and were encouraged to do so, or even that JCB directed and influenced the conduct of members of the association. However, they do not show that they were subject to a strict body of rules on retail prices. The Commission's conclusion that those documents show that horizontal price agreements covering the whole of the United Kingdom had been accepted by all dealers is therefore unwarranted in the light of the factual evidence adduced in support of it.

129 As regards France, several faxes (mentioned in recital 133 of the contested decision) were admitted by the Commission in evidence of JCB's anti-competitive conduct. Faxes sent to JCB SA by dealers, dated 18 July 1994 and 23 October 1995, reveal the existence of commercial negotiations between the national distributor and dealers who asked JCB SA to supply them at a lower price because of rates agreed with customers. The facts described appear rather to reflect the usual commercial dialogue between a wholesaler and a retailer, but do not support the conclusion that there was a strict practice of fixing retail prices. Another fax of 10 June 1996 from JCB SA to JCB Sales reveals coordination on

prices for spare parts but that single piece of information is not sufficient to support the conclusion that there was systematic fixing of the retail prices imposed by JCB Sales in that area. Those documents show in any event that it was not rare for dealers to sell below the suggested price and ask the supplier to invoice them at a lower price to take account of that and so as not to reduce the anticipated profit margin by too much. On the other hand, those documents do not in any way show that JCB Sales was obliged to grant that request.

130 In short, according to the documents on the file, JCB's actions amounted to the fixing of its own prices 'ex-works', details of which were negotiable, and the drawing up of suggested scales for retail prices. The influence of JCB on retail sale prices was therefore significant, but essentially that of a manufacturer who draws up suggested lists of retail sale prices and fixes invoicing prices internal to its network according to the retail sale prices desired. Moreover, the retail sale price scales, although strongly indicative, were none the less not binding. There is nothing to indicate that JCB's efforts to influence dealers and discourage them from agreeing to sale prices considered to be too low involved coercion.

131 According to the case-law, which allows justification of distribution systems, some limitation in price competition is inherent in any selective distribution system (Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 42). Dealers cannot lawfully have undertakings with regard to prices imposed on them (*AEG v Commission*, cited above, paragraph 43), but the Court has held, as regards relations between franchiser and franchisee, that, so long as there is no concerted practice for the application of guide prices, the communication of such prices is not restrictive of competition (Case 161/84 *Promptia* [1986] ECR 353, paragraph 25), and nor is an adequate profit margin for dealers (*Metro v Commission*, cited above, paragraph 45). On the other hand, an increase in the

rigidity of the price structure (Case *Metro v Commission*, paragraph 44) liable to impede effective competition on prices (Case T-88/92 *Leclerc v Commission* [1996] ECR II-1961, paragraph 171) must be condemned.

- 132 That case-law can be applied, by analogy, to the present case, in so far as it concerns a distribution system which is hybrid but very similar to a selective distribution system (see paragraphs 165 to 167 below).
- 133 Accordingly, in the absence of unequivocal evidence establishing the fixing of or a strict set of rules regarding retail prices and discounts, the applicant's submissions on this point must be allowed and it must be held that the third element of the infringement is not sufficiently established in law.

The fourth element of the infringement, relating to the imposition of service support fees on sales to other Member States by distributors in the United Kingdom according to fixed scales set by JCB

Arguments of the parties

- 134 JCB Service submits that the service support fees on out-of-territory sales by authorised UK distributors are based on a reasonable estimate of actual cost and have no deterrent effect on exports. Contrary to the Commission's analysis they are neither uniform nor set according to a fixed scale and imposed by JCB. The applicant makes clear that its participation in the negotiation of the fees, provided for by the notified agreements, benefited small distributors and that the Commission had made no objection to it. The arrangement set up did not entail any breach of Article 81 EC.

135 The Commission contends that the system of service support fees, set in advance and on a flat-rate basis, is rigid and restricts the autonomy of distributors, that the participation of JCB in the fixing of those fees from the outset and before any disagreement can have been established, prevents any negotiation between distributors. The defendant adds that, in conjunction with other terms, this arrangement disadvantages export sales financially, having a deterrent effect on them.

Findings of the Court

136 A clause entitled 'service support fee: sales outside the region or territory' was inserted in the amended agreements notified in 1975, registered under numbers IV 28696 and IV 28697, concerning United Kingdom distributors and United Kingdom main dealers respectively. That clause stipulated that the distributor or main dealer undertook, in the event of a sale outside the allocated territory, to pay to the distributor responsible for that territory a service support fee the amount of which was to be agreed between the two distributors and in default of agreement JCB was to determine the amount having regard to all the circumstances of the case, the cost of the service carried out and a reasonable profit element (Clause 5 of agreements No IV 28696 and No IV 28697).

137 That arrangement is not open to criticism in the light of competition law and the Commission does not question the principle of it. However, it contends that the amended clause was not applied in accordance with its terms and that JCB was always involved in the negotiation of the fee, imposing a predetermined flat rate in excess of real costs and, therefore, having a deterrent effect on exports.

- 138 The application of an arrangement liable to affect trade between Member States, particularly by directly or indirectly fixing purchase or selling prices or other trading conditions, or limiting or controlling production or markets, particularly for export, is prohibited by Article 81 EC. If the practices described by the Commission were proven, the element of the infringement at issue here would be established.
- 139 JCB Service submits that the documents on which the Commission based its assessment of the infringement, referred to in recitals 123 to 127 of the contested decision, are not convincing.
- 140 In the case of France, a fax from JCB SA, of 21 June 1988, indicated that sales outside a sector would not receive multiple deal trading support and would have an 8 % penalty imposed for provision of service support. Three documents, a fax of 9 February 1995 from JCB Sales to Watling JCB, a fax of 29 May 1996 from JCB SA to Gunn JCB, produced by the applicant as an annex to its reply, and a letter of 5 June 1996 from JCB SA to a dealer in the Hérault, make reference to a sum of FRF 10 000, which was the amount of the service support fee for a backhoe loader. As regards Spain, according to a fax of 22 July 1994 from JCB Spain to JCB Sales, the service support fee is to be negotiated at around 5 % of the dealer's purchase price and JCB will decide in the absence of agreement. As regards Germany, a fax of 15 May 1995 from JCB Sales to JCB Germany indicates that the service support fee is normally 4 % of the price paid by the local client, that it is to be paid to the United Kingdom distributor and that JCB will decide in the absence of agreement. As regards Ireland, a fax of 29 February 1996 records the sale of seven machines in the South of Ireland for which the service support fee is GBP 850 in all cases but one, where it is GBP 1 700.

- 141 According to those documents the service support fees applied were at a pre-determined flat rate or were determined on the basis of a guide price and JCB was to intervene in the absence of agreement between its agents. Since the notified agreements made provision for JCB to intervene in cases of disagreement between the distributors concerned, the prior fixing of a guide price to be used in the absence of agreement between those distributors could be considered to constitute a reasonable application of the relevant clause.
- 142 However, it is important to know whether the fee fixed on the basis of those prior calculations reflects a realistic assessment of the cost of after-sales service increased by a reasonable profit margin (see paragraph 136 above) or whether it was set at an unreasonable level and therefore could have had the object or effect of deterring exports.
- 143 JCBamford Excavators set out the details of the calculation of service support fees, in particular for France, in Annex 1 to its reply to the second statement of objections. The applicant distinguishes four categories of cost, which are: checking before delivery (5 hours work), installation (4 hours work), service after 100 hours of use (3 hours work) and costs not covered by the guarantee (distances, travel) and calculates each of those costs, by type of machine, according to the labour costs. In France, that calculation yields a fee of FRF 10 000 for a backhoe loader.
- 144 The Commission has yet to prove that this method of calculation, which is based on objective criteria, does not reflect real costs or that it cannot take account of risks covered during the period of the guarantee. Moreover, there is nothing to indicate that it had the object or effect of preventing sales outside the territory allocated to the distributor, in particular for export. The documents referred to in paragraph 140 above attest to the existence of such sales, which are, it seems, in

no way exceptional. And the existence of clear guidelines as to the fee payable by the seller to the distributor responsible for a territory may, by preventing unstructured negotiations between the two dealers concerned, have the effect of making out-of-territory sales easier, contrary to the Commission's contention.

- 145 The applicant's submissions on the rules applied as regards service support fees must be allowed and it must be held that the fourth element of the infringement is not sufficiently established in law.

The fifth element of the infringement, relating to withdrawal of multiple deal trading support for agents in the United Kingdom in the case of outside sales thereby making distributors' remuneration dependent on the geographic destination of sales

Arguments of the parties

- 146 JCB Service submits that the Commission has made an incorrect analysis of its arrangement for multiple deal trading support. It constitutes financial aid granted, with no condition as to the geographical destination of the sale, to its authorised agents who make multiple sales to end-users, aid being withdrawn only if the purchaser is not an end-user. JCB Service points out that this arrangement is intended to improve the competitive position of its agents.
- 147 The Commission considers that the system of commercial support for multiple operations is open to criticism, not as regards the principle, but because of the way JCB implemented it in refusing to grant it in the case of sales outside the

territory allocated to the distributor and making it subject to an agreement between distributors on the sharing of that support with dealers in the territories in which the machines would be used. This results in further partitioning of the market.

Findings of the Court

- 148 According to the documents on the court file, in 1977 JCB set up an arrangement for multiple deal trading support in order to deal with competition which had become fiercer in the United Kingdom from the 1970s onwards and to enable its agents to sell at competitive prices. That arrangement, which was not provided for by the notified agreements, was therefore not examined by the Commission in the course of the notification procedure. Under that system, United Kingdom distributors and dealers receive financial support from JCB in the shape of a reduction in 'ex-works' prices where they are making multiple sales to a single end-user. According to information provided by JCBamford Excavators during the administrative procedure, in particular in its reply of 6 July 1998 to the first statement of objections (see Annex 12 thereto), the support represents 4 to 5 % of the ex-works price for a backhoe loader and 3 to 4 % of the ex-works price for the other products. Moreover, again according to that reply, support is ruled out from the start or its repayment is required after the event, as the case may be, where the commercial operation carried out by the distributor is not a retail sale to an end-user.
- 149 An arrangement for multiple deal trading support for agents in a distribution network intended only to assist sales to end-users, does not, in itself, entail any anti-competitive effect. However, if it were to prove that the arrangement had as its effect the limitation of markets or market sharing, it would constitute a practice prohibited by Article 81(1)(b) and (c) EC.

150 JCB Service submits that its arrangement was not linked to the geographical destination of sales but merely required that the purchaser should be an end-user wishing to acquire several machines and not a dealer. The Commission disputes that claim and contends that the arrangement has had a restrictive effect and compounded the other market partitioning elements inherent in JCB's distribution system.

151 Four documents referred to in recitals 102 to 105 of the contested decision are the subject of dispute between the parties. In a letter sent on 18 March 1992 to its dealers in the United Kingdom, on the subject of operations on the Scottish market, JCB Sales states that it is not in its interest to support deals that may go into another distributor's territory, either in the United Kingdom or overseas, and whether they are sales to unauthorised dealers or on contract hire. A fax of 12 May 1992 from JCB Sales to Gunn JCB, a United Kingdom distributor, points to the existence of a request for repayment of trade support received by Gunn JCB, as the machines were subsequently supplied to an unauthorised dealer for export. In a letter sent to Watling JCB on 2 June 1992, JCB Sales addressed the question of contract hire, in other words, sales to a hire company of machines which are then the subject of hire contracts. JCB Sales states that the machines are eligible for support only if they are used on the territory of the selling distributor, unless a tripartite agreement has been reached between that distributor, the authorised agent for the territory where the machine is used and JCB. Finally, a report of 1 July 1994 by Kroll Associates UK Ltd, private detective, commissioned by JCBamford Excavators, indicates that Gunn JCB fraudulently received multiple deal trading support.

152 That evidence demonstrates that support was withdrawn from operations consisting in the sale of several machines which were then found either on the second hand market or on the hire-purchase market, or with unauthorised distributors and, in general, outside the territory of the distributor, or even exported. The sale for which support was withdrawn was both a sale not intended for an end-user and, in some cases, an out-of-territory sale, but the decisive ground for refusal, from the point of view of JCB Service, seems to relate to the first aspect. The support arrangement could relate to sales intended for

purchasers abroad or outside the territory allocated to the distributor, the support being dependent in that case only on an agreement between the dealer making the sale and the dealer responsible for the territory. JCB Service submits that the agreement in question was intended to relate to the amount of the service support fee, which appears plausible in the circumstances of the case.

153 According to the court file, multiple deal trading support, the sole object of which was sales to end-users, was refused or withdrawn, in the cases considered, because the purchaser was not an end-user. The mere fact that the purchaser was not an end-user justified the refusal or withdrawal of the support regardless of the geographical location of the purchaser. It is thus not established that the application of the multiple deal trading support system had the effect alleged of reinforcing the partitioning of markets.

154 The applicant's submissions on that point must be allowed and it must be held that the fifth element of the infringement is not sufficiently established in law.

155 It follows from all the foregoing considerations that the first and second elements of the infringement, relating to passive sales and sources of supply must be held to be established but that, as regards the third, fourth and fifth elements, relating to fixing of retail prices, the imposition of service support fees and the withdrawal of multiple deal trading support, the Commission has not sufficiently established the alleged infringement in law. Article 1(c), (d) and (e) and Article 3(d) and (e) of the contested decision should therefore be annulled.

The plea relating to the application for exemption

Arguments of the parties

156 JCB Service submits that its application for exemption under Article 81(3) EC was justified because the combination of territorial exclusivity and the selectivity of dealers in its distribution system was not inconsistent with Community law. In particular it did not prejudice consumers but entailed certain advantages which that Article was intended to achieve, such as the improvement of product distribution. Its distribution agreements thus fulfilled the conditions for an individual exemption. The applicant submits that the Commission has put forward no valid reason for rejecting its application for exemption.

157 JCB Service adds that the Commission granted individual exemptions in the case of distribution systems combining exclusivity and selectivity (Commission Decision 75/73/EEC of 13 December 1974 relating to a proceeding under Article [81] of the EEC Treaty (IV/14.650 — Bayerische Motoren Werke AG) (OJ 1975 L 29, p. 1), Commission Decision 85/559/EEC of 27 November 1985 relating to a proceeding under Article [81] of the EEC Treaty (IV/30.846 — Ivoclar) (OJ 1985 L 369, p. 1), and Commission Notice 93/C 275/03 pursuant to Article 19(3) of Council Regulation No 17 — Case No IV/34.084 — Sony España SA (OJ 1993 C 275, p. 3)) and that Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L 145, p. 25), which introduced block exemption in motor vehicle distribution, was applicable to its machines or, at least, that the arguments underlying it were applicable by analogy.

158 The Commission states that the applicant's distribution system, viewed overall, appears to be a collection of different restrictions including elements of

exclusivity and selectivity and that it has never granted an individual exemption in that type of case, bearing in mind that there cannot be an exemption where notification is incomplete. It adds to the complaints set out above the fact that the applicant did not establish that the restrictions at issue were justified to guarantee the safety of the products distributed.

- 159 The Commission argues that JCB cannot claim a block exemption either on the basis of Regulation No 1475/95, which concerns motor vehicles which the construction site equipment manufactured by the applicant cannot be deemed to be, or under Regulation No 1983/83, the requirements of which JCB does not fulfil.

Findings of the Court

- 160 According to the contested decision, the Commission refused the application for exemption made in 1973 on the grounds that consideration of that application required an understanding of the whole of JCB's distribution system, which was impossible given the incomplete nature of the notifications and because JCB's agreements and practices entailed restrictions on competition and did not fulfil the cumulative conditions laid down by Article 81(3) EC to qualify for exemption. It should be made clear that that application related only to the standard distribution-export agreement for Ireland, Sweden and the Channel Islands, registered under number IV 28695, and was made by JCB Sales, not JCBamford Excavators as Article 2 of the contested decision incorrectly states.

- 161 In the proceedings before the Court, the parties discussed the general question whether JCB's distribution system could be the subject of a decision under Article 81(3) EC. That question is dealt with in recitals 201 to 222 of the

contested decision. It is for the Commission, where a complaint is referred to it, to consider, where appropriate, whether the agreements or practices in question may be the subject of a decision under Article 81(3) EC or are covered by an existing block exemption. However, in the present case, an exemption could, in any event, be granted only in respect of the properly notified agreement for which it had been requested. Moreover, the claims in the application seek only annulment of Article 2 of the contested decision which rejects the application made in 1973. Accordingly, the merits of the application for exemption must be assessed in the light only of the agreement referred to in paragraph 160 above, without it being necessary for the Court of First Instance to consider whether such an exemption could have been granted for all the agreements sent by JCB to the Commission.

162 It is incumbent on the applicant undertaking to submit all the evidence necessary to substantiate the economic justification for an exemption and to prove that it satisfies each of the four conditions laid down in Article 81(3) EC, which are cumulative (*VBVB and VBBB v Commission*, cited above, paragraphs 52 and 61, and Case T-66/89 *Publishers Association v Commission* [1992] ECR II-1995, paragraph 69). Similarly, it is for that undertaking to show that the restrictions of competition in question meet the objectives referred to by Article 81(3) EC and that those objectives could not be attained without the introduction of those restrictions (Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011, paragraph 381).

163 As regards, first of all, the question whether the agreement at issue could be covered by the block exemption regime provided for by Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), replaced by Regulation No 1475/95, JCB submits that its machines can be used and are intended to be used as both road vehicles and non-road vehicles.

164 However, according to the wording of its Article 1 in the 1984 version, that regulation concerns: 'certain motor vehicles intended for use on public roads and having three or more road wheels', and the 1995 Regulation stipulates additionally that such vehicles must be new. Moreover, regulations on block exemption must be interpreted narrowly (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 36, 37 and 46). It is clear that the construction site machinery produced by JCB is intended for earthmoving and construction and that, although it may be used on public roads it is not intended for such use within the meaning of the exemption regulation in question. The products manufactured by JCB are therefore not covered by that regulation which cannot be applied by analogy to categories of vehicles other than those to which it relates. The applicant's claim that its agreement could be covered by an exemption under that agreement is therefore not founded.

165 As regards the question whether the agreement at issue could be covered by an individual exemption under Article 81(3) EC, it must be observed that that possibility is available where the agreements or practices at issue contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In the contested decision the Commission took the view that the combination of selectivity and exclusivity in JCB's distribution system entailed cumulative restrictions which were not indispensable, without those restrictions being offset by benefits, *inter alia*, for consumers.

166 First, JCB Service confines itself to stating generally that the distribution agreements fulfil the requirements for the grant of an exemption without indicating what precise advantages the agreement at issue here entails which would qualify it for such a decision. The applicant merely asserts that the agreement does not disadvantage consumers and that the Commission has not

established that it has no advantages, but at no stage indicates what the advantages of the restrictions set up are and how they are justified. Finally, in the light of the grounds for the Commission's rejection of the application for exemption, referred to in paragraph 165 above, JCB Service cannot validly claim that the Commission did not state the reasons for its decision on that application.

¹⁶⁷ Second, although JCB Service cites decisions, referred to in paragraph 157 above, by which the Commission granted individual exemptions for distribution systems with features in common with that at issue here, the defendant has established that the situations are not comparable. The Commission contends, without being properly contradicted, that, in the BMW case, active out-of-territory sales were not prohibited, still less passive sales and supplies within the network, that, as regards the Ivoclar distribution system, a choice had subsequently to be made between an exclusive model and a selective model and that Sony España had only one restrictive aspect in common with the JCB system. Moreover, although in those three cases there were certain elements of restriction which were also found in JCB's arrangement, they were not cumulative in those cases. The decisions made in those cases thus cannot be transposed to the JCB distribution system.

¹⁶⁸ Thus, JCB Service has not proved that its agreement could be covered by the system of block exemption under Regulation No 123/85, replaced by Regulation No 1475/95. Nor has it proved that it could qualify for an individual exemption under Article 81(3) EC.

¹⁶⁹ It follows from the foregoing that JCB's claim for annulment of Article 2 of the contested decision rejecting its application for exemption is not founded.

The pleas relating to the amount of the fine

Arguments of the parties

170 JCB Service disputes both the principle and the amount of the fine imposed. It submits that most if not all of the facts were erroneously considered to constitute a breach of Article 81 EC and that they related, moreover, to notified agreements and could not therefore be subject to a fine by virtue of Article 15(5)(a) of Regulation No 17. The applicant points out that the agreements notified from 1973 onwards were notified in the correct form and that the subsequent regulations, Regulation No 27 and Regulation No 3385/94, on the details of notifications, did not require the submission of amended versions of agreements previously notified using a new form A/B. It adds that the agreements not notified were comparable to those notified previously, of which it could assume tacit approval. JCB Service takes the view that, contrary to the statement made in the contested decision, the Commission fined it because of Clause 4 of the agreement with the United Kingdom dealers which prohibits main dealers from selling JCB products wholesale for resale, except to an authorised sub-dealer. It believes its view is corroborated by the high amount of the fine.

171 JCB Service submits that the fine is disproportionate, especially in comparison with the fines imposed under the same procedure on undertakings like Volkswagen and Opel (Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article [81] of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60), and Commission Decision 2001/146/EC of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.653 — Opel) (OJ 2001 L 59, p. 1)). It alleges that the Commission exaggerated the gravity of the infringement and did not take account of the actual effect of the practices complained of in the light of JCB's position on the national markets in question or investigate the extent to which restrictions were actually implemented. It distorted the facts so as to extend the duration of the infringements without taking account of their varying intensity over time while the five elements of the infringement identified by the contested decision were present at the same time only for five years at most. The Commission did not take

account of mitigating circumstances such as the individual exemption granted by the Irish Competition Authority for its exclusive distribution agreement in Ireland or the favourable judgment of the Cour d'appel de Paris of 8 April 1998, in the litigation between its French subsidiary, JCB SA, and the complainant, Central Parts.

- 172 The Commission states that none of the clauses in the notified agreements attracted a fine. It contends that it took account of the varying intensity of the infringement and that the increase imposed of 55 % could, under its guidelines, have been as high as 100 % in the light of the 11 year duration of the infringement and the fact that the reprisals taken by JCB against its co-contractors are viewed as aggravating circumstances.
- 173 The Commission points out that, when fixing the amount of the fine it looked at the infringement as a whole and that it was not certain that breaking it down into its different components would have resulted in a lower amount. It points out, finally, that it has a margin of discretion and cannot be obliged to apply a precise mathematical formula (Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 119).

Findings of the Court

- 174 The dispute between the parties concerns the question whether the Commission imposed a fine on JCB Service in respect, *inter alia*, of the clauses in the notified agreements and whether it fixed that fine at a disproportionate amount, in particular in comparison with similar cases, without taking account of its position on the national markets, of whether or not the infringement actually occurred or of mitigating circumstances.

175 Under Article 15(5)(a) of Regulation No 17, fines are not to be imposed in respect of acts taking place after notification provided they fall within the limits of the activity described in the notification.

176 The Commission could not impose a fine on JCB Service in respect of the agreements notified in 1973 and 1975 without being in breach of that provision of Regulation No 17. The lawfulness of its decision in that respect must be examined solely by reference to the elements of the infringement covered by the notification and which the Court of First Instance holds to be established. Those elements are the restrictions imposed on passive sales referred to in Article 1(a) of the contested decision. Those restrictions are included in the agreements notified in respect of the United Kingdom. They are covered, in particular, by Clause 4, concerning wholesale sales for retail resale, of the distributor agreement and the same clause of the main dealer agreement examined in paragraph 86 above. The other element of the infringement which is held to be established, that is to say, the second element, relating to restrictions on sources of supply, referred to in Article 1(b) of the contested decision, is not covered by the notification.

177 As observed in paragraph 88 above, Clause 4 was applied in a way which diverged from its terms, its scope being extended to cover a more general prohibition for distributors on selling outside their territory, especially for export. In so far as the practices which attracted the fine did not remain within the limits of the provisions of the notified agreements, as the Court of First Instance found in its analysis of the element of the infringement at issue, the plea of breach of the above provisions of Regulation No 17 must be rejected.

178 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings or associations of undertakings fines of from EUR 1 000 to EUR 1 000 000 or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe

Article 81(1) EC. The amount of the fine is determined with regard both to the gravity and to the duration of the infringement.

179 According to settled case-law, the amount of a fine must be fixed at a level which takes account of the circumstances and the gravity of the infringement and, in order to fix its amount, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (Case 41/69 *Chemiefarma v Commission* [1970] ECR 661, paragraph 176; *Parker Pen v Commission*, cited above, paragraph 92, and *SCK and FNK v Commission*, cited above, paragraph 246). Although the choice of the amount of the fine is an instrument of the Commission's competition policy aimed at directing the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli v Commission* [1995] ECR II-1165, paragraph 59, and Case T-49/95 *Van Megen Sports v Commission* [1996] ECR II-1799, paragraph 53), it is nevertheless for the Court to verify whether the amount of the fine imposed is in proportion to the duration and gravity of the infringement (Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689, paragraph 127). The Court must, in particular, weigh the seriousness of the infringement against the circumstances invoked by the applicant (Case C-333/94 *P Tetra Pak v Commission* [1996] ECR I-5951, paragraph 48).

180 Applying the provisions of Regulation No 17 set out in paragraph 178 above and following the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3), the Commission fixed the amount of the fine imposed on JCB Service, having regard to the gravity and duration of the infringement, at EUR 38 750 000. An amount of EUR 25 000 000 was set in the light of the gravity of the infringement and an amount of EUR 13 750 000 added in the light of the estimated duration of 11 years. The Commission applied a rate of increase of 55 % to the part of the fine imposed for the gravity of the infringement, which corresponds to 5 % per year. Adding EUR 864 000 for aggravating circumstances, the Commission set the total amount of the fine at EUR 39 614 000.

181 As the Court held in paragraph 155 above, the infringement cannot be considered to be established as regards three of its elements, that is to say, fixing of discounts and retail prices applicable by distributors established in the United Kingdom and in France, the imposition of service support fees on sales to other Member States made by distributors established outside the exclusive territories of the United Kingdom and the withdrawal of multiple deal trading support for certain geographical destinations of sales, as stated in paragraphs 133, 145 and 154 above.

182 The elements of the infringement which have been established concern the restrictions on passive sales by distributors established, first, in the United Kingdom, to authorised agents and final dealers established outside the exclusive territories, second, in Ireland, France and Italy, to unauthorised dealers, end-users or distributors established outside the exclusive territories, and particularly in other Member States. The existence of restrictions on sources of supply as regards purchases of products under contract by dealers established in France and in Italy is also established. Those two forms of anti-competitive practice constitute the essential elements of JCB's unlawful conduct. They may be held to be serious by reason of the damage they do to the smooth operation of the internal market, in particular by the partitioning of national markets which it is their object and effect to achieve. They therefore, in themselves, warrant a high fine.

183 As regards the gravity of the infringement in the light of the position of JCB on the national markets where the agreements and practices are implemented, according to the data set out in recitals 26 and 27 of the contested decision, which are not disputed by the applicant, in 1995 JCB ranked fifth among manufacturers worldwide, with a share of 7.9 % of total sales (23.1 % for backhoe loaders), and in 1995 to 1996, JCB had a share of some 13 % to 14 % in volume of all construction and earthmoving machines sold in the European Community. In terms of value, JCB estimates its own share at 8.9 % in the EC and 23.7 % in the United Kingdom. Although the applicant submits that it holds a relatively small share of the market in construction and earthmoving equipment in the European Union as a whole and alleges, as regards France and Italy, that the most recent figures are much lower, it adduces no evidence in support of its allegations. It is

clear from the above data regarding market shares that JCB is a relatively important undertaking in the European Community and the sector concerned. It does not therefore appear that the Commission made any error in its assessment of the impact of the infringement on the national markets concerned in setting the amount of the fine.

184 As regards the duration of the infringement, the Commission pointed to facts relating to the two elements of the infringement which are established, in respect of a period beginning at the start of 1989 and ending at the end of 1998, as regards the first element of the infringement, and in respect of a period beginning at the start of 1992 and ending at the end of 1996, as regards the second. Evidence, which has been considered previously, is included in the file concerning the whole period considered. The total period for which the infringement was committed was thus 10 years rather than 11.

185 Both elements of the infringement were present at the same time for half of that period. And JCB Service pointed out that it was only for a period of five years that all the elements of the infringement — now reduced to two — were present at the same time. However, the restrictions imposed on exports, which constitute the first element of the infringement and which are at the heart of JCB's distribution system, are of prime importance and give rise, logically, to the restrictions on sources of supply. In the circumstances of the case, given the major importance of the first element of the infringement, which relates to a central aspect of JCB's distribution system, there is no reason to consider that the duration of the infringement should have been put at less than 10 years.

186 As regards the attempted comparison with the fines imposed under the same procedure on undertakings such as Volkswagen and Opel (Decisions 98/273 and 2001/146), the Commission, when asked by the Court to explain the details of the calculation applied to JCB, stated that it followed the principles set out in its

guidelines and took account of the two decisions mentioned above. The defendant pointed out, *inter alia*, that the infringement condemned here was committed in four Member States whereas, in the other cases, only one country was involved and the 5 % annual rate of increase applied to JCB was lower or the same as that applied in the other cases. JCB, for its part, pointed out that the original fine imposed on Volkswagen (reduced to EUR 90 million by the judgment in *Volkswagen v Commission*, cited above, paragraph 348) was EUR 102 million which represented 0.5 % of the turnover of the undertaking and that imposed on Opel was EUR 43 million, representing 0.16 % of its turnover, whereas the fine imposed on it represented 4 % of its turnover.

- 187 Observance of the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified, is incumbent on the Commission when it imposes a fine on an undertaking for infringement of the competition rules, as it is on any institution in carrying out all its activities (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881, paragraph 240). Regardless of the comparisons the Commission found useful in setting the amount of the fine imposed on JCB Service, such matters can only give an indication, since the facts of the cases, such as markets, products, the undertakings and periods concerned, are not the same. As regards the comparisons made by JCB Service in terms of turnover, it must be observed that the differences are markedly less when they are considered in absolute terms, bearing in mind that they fall within the Commission's discretion (see *Martinelli v Commission*, cited above, paragraph 59). Furthermore, Article 15(2) of Regulation No 17 fixes a ceiling for the amount of fines, but does not entail that the Commission is bound, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned (Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 278).

- 188 The Commission assesses the gravity of infringements by reference to numerous factors, which are not based on a binding or exhaustive list of the criteria which must be applied (*Ferriere Nord v Commission*, cited above, paragraph 33, and *LR AF 1998 v Commission*, cited above, paragraphs 236 and 279). Its practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 (*LR AF 1998 v Commission*, cited above, paragraph 234). The Commission is not, moreover, bound to apply a precise mathematical formula, either for the total amount of the fine or where it is broken down into different elements (Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 119).
- 189 It follows from the foregoing that the fact that the fines imposed on Volkswagen, Opel and JCB Service amount to different percentages of their respective turnovers is not, in the present case, evidence of discriminatory treatment against the applicant.
- 190 The Commission refused to take account of mitigating circumstances in recital 257 of the contested decision. The applicant takes issue with this on several counts. However, it cannot validly claim that the Commission's failure to take a formal position on its agreements amounted to 'implied approval', such an approach being alien to Community competition law. Nor can it argue on the basis of the decision of the Irish Competition Authority, as stated in paragraph 93 above, or of the judgment of the Cour d'appel de Paris which does not concern the facts alleged against the applicant here. Similarly, as the rejection of its application for exemption was held well founded in paragraph 169 above, no mitigating circumstances on the basis of the purported compatibility of JCB's distribution system with the Community rules on competition can be acknowledged.
- 191 The Commission found that there were aggravating circumstances, considering the penalty, described as a retaliatory measure, imposed by JCB on JCB Gunn for breach of Clause 4 to be such. The Commission increased the amount of the fine

accordingly by EUR 864 000 as pointed out in paragraph 180 above. It is not disputed that Gunn JCB's conduct was contrary to its contractual commitments and that it was not entitled to multiple deal trading support. In its pleadings, the Commission described as 'retaliatory measures' the payment of GBP 288 721 required of Gunn's parent company, representing the loss of profits on sales of spare parts resulting for JCB from sales outside the territory allocated. Such sales were made by that distributor in breach of the contractual undertakings which bound it to JCB, and specifically of Clause 4 of the United Kingdom distributor agreement as amended in 1975. JCB imposed a penalty for breach of a contractual provision, the restrictive scope of which was analysed when the first element of the infringement in the United Kingdom was analysed in paragraphs 86 to 89 above. However, whether a clause is legal or illegal, where it appears in a notified agreement, it must enjoy immunity from fines under Article 15(5) of Regulation No 17.

192 Accordingly, the Commission could not lawfully impose a fine for conduct classified as an aggravating circumstance but linked to the application of a clause of a properly notified agreement. The Commission could not therefore increase the amount of the fine to take account of alleged aggravating circumstances.

193 It follows from all the foregoing considerations that the Commission incorrectly set the amount of the fine to be imposed on the applicant at EUR 39 614 000. First, as held in paragraph 192 above, the increase in the amount of the fine for aggravating circumstances was not justified and the amount of EUR 864 000 added on that basis must be deducted. Second, account must be taken of the elements of the infringement which were not sufficiently established in law (see paragraphs 133, 145 and 154 above). Although the first and second elements constituting the infringement, relating to the restrictions imposed on passive sales and those on sources of supply, are established and were pivotal to JCB's distribution system in operation for a period lasting 10 years as regards the first element, the lack of sufficient proof regarding the three other elements of the infringement found in the contested decision justifies a significant reduction of the amount of the fine imposed. A further reduction of EUR 8 750 000 must be made on that basis.

¹⁹⁴ The Court of First Instance, ruling in the exercise of its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17 therefore holds that there is justification for reducing the fine imposed by Article 4 of the contested decision to EUR 30 million.

Costs

¹⁹⁵ Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. As the action has been only partially successful, the Court considers it fair in the circumstances of the case to order the applicant to bear three quarters of its own costs and the Commission to bear its own costs and one quarter of the applicant's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. Annuls Article 1(c), (d) and (e) and Article 3(d) and (e) of Commission Decision 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP.F.1/35.918 — JCB);

2. Reduces the amount of the fine imposed on the applicant by Article 4 of Decision 2002/190 to EUR 30 million;

3. Declares that there is no need to adjudicate on the claims seeking the production of certain documents on the court file declared non accessible during the administrative procedure;

4. Dismisses the remainder of the application;

5. Orders the applicant to bear three quarters of its own costs;

6. Orders the Commission to bear its own costs and a quarter of the costs incurred by the applicant.

Vesterdorf

Azizi

Legal

Delivered in open court in Luxembourg on 13 January 2004.

H. Jung

Registrar

B. Vesterdorf

President