

JUDGMENT OF THE COURT (Fifth Chamber)
28 May 1998 *

In Case C-7/95 P,

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

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 27 October 1994 in Case T-35/92 *John Deere v Commission* [1994] ECR II-957, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, and Nicholas Forwood QC, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida, D. A. O. Edward, P. Jann and L. Sevón (Rapporteur), Judges,

* Language of the case: English.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 January 1995, John Deere Limited, a company incorporated in the United Kingdom, brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 27 October 1994 in Case T-35/92 *John Deere v Commission* [1994] ECR II-957 ('the contested judgment'), by which the Court of First Instance dismissed its application for annulment of Commission Decision 92/157/EEC of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.370 and 31.446 — UK Agricultural Tractor Registration Exchange, OJ 1992 L 68, p. 19, hereinafter 'the contested decision').

2 With regard to the facts giving rise to this appeal, the contested judgment states as follows:

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

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

(a) *The administrative procedure*

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

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

4 On 11 November 1988 the Commission issued a statement of objections to the AEA, to each of the eight members concerned by the first notification, and to Systematics International Group of Companies Limited (hereinafter "SIL"), a data-processing company with responsibility for the processing and handling of the data contained in Form V55 (see paragraph 6, below). On 24 November 1988 the members of the agreement decided to suspend it. During a hearing before the

Commission, the applicant, relying in particular on a study carried out by Professor Albach, a member of the Berlin Science Center, claimed that the information distributed had a beneficial effect on competition. On 12 March 1990 five members of the AEA, including the applicant, notified to the Commission a new agreement (hereinafter "the second notification") for the dissemination of information, called "the UK Tractor Registration Data System" (hereinafter "the Data System") and undertook not to implement the new system before receiving the Commission's response to their notification.

(...)

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

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

3 At paragraph 7 of the contested judgment, the Court of First Instance found that the parties disagreed on a number of factual questions concerning the information appearing on the form and the use of that information. Those matters of disagreement are summarised at paragraphs 8 to 18 of the contested judgment.

4 In the contested decision the Commission set out its legal assessment, under Article 85(1) of the Treaty, of the agreement, as it was applied before notification and as notified on 4 January 1988 (the first notification) and as it was notified on 12 March 1990 (the second notification).

- 5 First, with regard to the agreement which was the subject of the first notification, the Commission first examined, in points 35 to 52 of the contested decision, the part of the information exchange system which enables each competitor's sales to be identified. It took into account the structure of the market, the type of data supplied, the detailed nature of the information exchanged and the fact that the parties to the agreement regularly met in the AEA committee. The Commission took the view that the agreement had the effect of restricting competition by increasing transparency on a highly concentrated market and by raising the barriers to entry of non-members to the market.
- 6 In points 53 to 56 of the contested decision, the Commission then evaluated the information exchange system in relation to the distribution of data concerning the sales made by each member's dealers. Here, it pointed out that through those data it was possible to identify the sales of the various competitors within each territory where, for a given product and period, the total volume of sales on that territory was less than 10 units. Furthermore, it found that the activity of dealers or parallel importers might be obstructed.
- 7 In points 57 and 58 of the contested decision, the Commission set out its assessment of the effect of the information exchange system on trade between Member States.
- 8 In points 59 to 64, the Commission found that the agreement first notified was not indispensable and that it was therefore unnecessary to consider the four conditions for obtaining exemption under Article 85(3).
- 9 The Commission found, in particular, at point 65 of the contested decision, that its reasoning concerning the agreement first notified applied *mutatis mutandis* to the amended version of the agreement which was the subject of the second notification.

10 By the contested decision, the Commission accordingly:

- found that The UK Agricultural Tractor Registration Exchange, in both its original and its amended versions, infringed Article 85(1) of the Treaty ‘in so far as it gives rise to an exchange of information identifying sales of individual competitors, as well as information on dealer sales and imports of own products’ (Article 1);
- refused the application for an exemption under Article 85(3) of the Treaty (Article 2);
- ordered the AEA and the parties to the agreement to put an end to the infringement established, if they had not already done so, and in future to refrain from entering into any agreement or concerted practice that might have an identical or similar object or effect (Article 3).

11 On 7 May 1992 the appellant brought an action before the Court of First Instance for annulment of the contested decision and for an order requiring the Commission to pay the costs. In support of its action it put forward 11 pleas in law. The Court of First Instance divided the pleas into groups as follows:

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

- infringement of essential procedural requirements; and
- a contradiction between the grounds of its reasoning and its operative part

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

- the contested decision is based on materially incorrect facts;
- an information exchange system does not, by itself, constitute an infringement of Community competition rules, and that the contested decision is incompatible with Community competition policy and is therefore based on a misuse of powers;
- the practice in question does not constitute an infringement of Article 5 of the Treaty by the United Kingdom authorities;
- the contested decision fails to observe the rules concerning the burden of proof.

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

- the information exchange system at issue is not an agreement within the meaning of Article 85(1) of the Treaty;
- dissemination of information on the sales of each competitor does not weaken competition;
- the same argument applies to the dissemination of information on the sales of each member’s dealers;
- the information dissemination system in question does not affect trade between the Member States to a sufficiently material extent;

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

12 By the contested judgment the Court of First Instance rejected all those pleas and ordered the appellant to pay the costs.

13 By its appeal, the appellant asks the Court to quash the contested judgment, annul the contested decision and order the Commission to pay the costs of the appeal and of the proceedings before the Court of First Instance.

14 The Commission claims that the Court should dismiss the appeal as inadmissible or, in the alternative, as unfounded. It also claims that the appellant should be ordered to pay the costs.

15 The Court dismissed the appellant’s request for production of the complete minutes of the hearing of 16 March 1994 before the Court of First Instance in Case T-35/92. The Court Registry informed the parties of this decision by letter of 13 June 1995.

16 In support of its appeal, the appellant puts forward the following eight grounds of appeal:

— contradictory and insufficient reasoning;

— misapplication of Article 85(1) of the Treaty concerning the existence of an agreement within the meaning of that provision;

- incorrect characterisation of the United Kingdom tractor market as a closed oligopoly;
- misapplication of Article 85(1) in relation to the restriction of competition among producers;
- misapplication of Article 85(1) in relation to the AEA meetings;
- misapplication of Article 85(1) in relation to the restriction of intra-brand competition;
- misapplication of Article 85(1) in relation to the effect on trade between the United Kingdom and the other Member States;
- wrongful refusal to apply Article 85(3).

Scope of the Court's review when hearing an appeal

¹⁷ Before the grounds of appeal put forward by the appellant are examined, certain principles applying to appeals, and in particular to the extent of the Court's jurisdiction, should be recalled.

¹⁸ Article 168a of the EC Treaty and Article 51 of the EC Statute of the Court of Justice state that an appeal is to be limited to points of law and must be based on

the grounds of lack of competence of the Court of First Instance, breach of procedure before it which adversely affects the interests of the appellant or infringement of Community law by the Court of First Instance. Article 112(1)(c) of the Court's Rules of Procedure provides that an appeal must contain the pleas in law and legal arguments relied on.

- 19 It follows from those provisions that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see the order in Case C-19/95 P *San Marco v Commission* [1996] ECR I-4435, paragraph 37).
- 20 That requirement is not satisfied by an appeal confined to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that court; in so far as such an appeal does not contain any arguments specifically contesting the judgment appealed against, it amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which under Article 49 of the EC Statute the Court of Justice does not have jurisdiction to undertake (see, to this effect, in particular the order in *San Marco v Commission*, cited above, paragraph 38).
- 21 It also follows from the foregoing provisions that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the Treaty to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, in particular, the order in *San Marco v Commission*, cited above, paragraph 39).

22 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (see, in particular, the order in *San Marco v Commission*, cited above, paragraph 40). The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the evidence has been fundamentally misconstrued, a point of law which is subject, as such, to review by the Court of Justice (judgment in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, paragraph 42).

The first ground of appeal

23 The first ground of appeal is in three parts, which concern paragraphs 39, 40 and 92 of the contested judgment respectively. The appellant criticises the Court of First Instance for (i) considering that the contested decision could relate not only to the Data System (the second notification) but also to the first notification, (ii) considering the reasoning on which the contested decision was based to be sufficient with regard to the legality of the Data System and, (iii) failing to give sufficient reasoning for the contested judgment as regards the Commission's use of the 'units sold' criterion.

The first part of the first ground of appeal

24 At paragraph 39 of the contested judgment, the Court of First Instance found that the second notification was not made by all the signatories to the first notification and also that the notifying parties had not expressly declared that the first of those two notifications was withdrawn. The Court of First Instance concluded therefore that the contested decision could relate to the first notification as well.

25 The appellant maintains that, contrary to the finding of the Court of First Instance, it and other companies had unequivocally stated in the notification of the Data System that they had ceased participating in the earlier information exchange system.

26 The appellant's argument calls in question the findings of fact and the assessment of facts in the light of which the Court of First Instance concluded that the contested decision related to the first notification as well. The appellant does not put forward any argument to show the conclusion drawn by the Court of First Instance from certain facts was vitiated by an error in law.

27 This part of the first ground of appeal is therefore inadmissible.

The second part of the first ground of appeal

28 The appellant claims that the Court of First Instance erred in holding, at paragraph 40 of the contested judgment, that the contested decision contained sufficient reasoning as regards the Data System. The Commission, it alleges, merely declared that the observations concerning the information exchange system arising from the first notification applied *mutatis mutandis* to the Data System, without taking account of the significant differences between the two versions.

29 At paragraph 40 of the contested judgment the Court of First Instance examined the appellant's argument that the Commission's assessment was materially incorrect as regards comparison of the information communicated by the two information exchange systems. In its examination the Court of First Instance made findings of fact which the Court of Justice hearing an appeal does not have jurisdiction to review.

30 Consequently, the second part of the first ground of appeal is also inadmissible.

The third part of the first ground of appeal

- 31 The third part of the first ground of appeal concerns paragraph 92 of the contested judgment in which the Court of First Instance examined the plea alleging that there was no risk that a competitor's sales could be identified. Before the Court of First Instance, the appellant had criticised the Commission for setting at ten units sold on a given territory the total number of sales below which it would be possible to identify the sales made by each of the competitors simply by comparing total sales with those of the company concerned.
- 32 At paragraph 92 of the contested judgment, the Court of First Instance considered that the information exchange system produced anti-competitive effects, 'having regard to the characteristics of the market as previously analysed (...), the kind of information exchanged ... and the fact that, in certain cases, the information disseminated is not sufficiently aggregated, so that it enables sales to be identified'. The Court of First Instance concluded that the 'applicant is therefore not justified in claiming that the Commission, which, without committing any manifest error of assessment, was entitled to set at ten units the number of vehicles sold in a given dealer territory as the figure below which it is possible to identify sales made by each of the competitors, has not sufficiently demonstrated that to that extent the information exchange system at issue falls foul of Article 85(1) of the Treaty'.
- 33 In the third part of its first ground of appeal, the appellant claims that the Court of First Instance failed to give sufficient reasons for upholding the criterion of ten vehicles sold.
- 34 In this regard, it is appropriate to recall the case-law of the Court of Justice (see, in particular, Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62) according to which, although as a general rule the Community judicature undertakes a comprehensive review of the question

whether or not the conditions for the application of Article 85(1) are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

35 In this instance, the setting of the criterion preventing exact identification of competitors' sales is based on a complex economic appraisal of the market. The Court of First Instance therefore rightly undertook only a limited review of that aspect.

36 In those circumstances, it must be concluded that, in finding that the Commission had not committed any manifest error in using the criterion of ten units sold, having regard to the characteristics of the market and the kind of information exchanged, the Court of First Instance gave sufficient reasons for its appraisal.

37 The third part of the first ground of appeal is therefore unfounded.

38 It follows from those considerations that the first ground of appeal must be dismissed in its entirety.

The second ground of appeal

39 This ground of appeal concerns paragraph 66 of the contested judgment in which the Court of First Instance considered that the provision of information collected upon registration of every vehicle presupposed an agreement, or at any rate a tacit agreement, between the traders concerned to define the boundaries of dealer sales territories by reference to the United Kingdom postcode system, as well as an institutional framework enabling information to be exchanged between traders through the trade association to which they belonged.

40 The appellant submits that neither the Court of First Instance nor the Commission has found the slightest trace of evidence of an agreement intended to define the dealers' sales territories. It states that the sole purpose of redefining those territories was to make them conform to the postcode sectors so as to prevent one postcode sector from being part of two or more different dealer territories. It states that the parties to the agreement rearranged their dealer territories independently of one another after the postcode system was introduced into the United Kingdom. According to the appellant, this ground of appeal concerns a question of law since what is challenged is the Court of First Instance's legal characterisation of the facts.

41 It must be observed that, as is apparent from paragraph 63 of the contested judgment, the appellant is repeating the same argument as that which it had already put before the Court of First Instance and that it is in fact seeking re-examination of its argument without even attempting to adduce legal arguments specifically establishing that the Court of First Instance erred in law by concluding that the parceling out of dealers' sales territories by reference to the postcode system presupposed an agreement or at least a tacit agreement.

42 The second ground of appeal must therefore be dismissed as inadmissible.

The third ground of appeal

43 This ground of appeal is primarily concerned with paragraphs 78 to 80 of the contested judgment in which the Court of First Instance set out its views on the oligopolistic nature of the relevant market and reached the conclusion that there was no manifest error in the Commission's assessment. It then refers to paragraph 51 of the contested judgment and, more particularly, the analysis which the Court of First Instance made of competition on a highly concentrated oligopolistic market.

44 The appellant submits that the Court of First Instance's assessments are incorrect for five reasons.

The first part of the third ground of appeal

- 45 In the first part of its third ground, the appellant claims that the Court of First Instance failed to take account of all relevant factors for determining the conditions of competition on the United Kingdom agricultural tractor market. On this point it complains that the Court of First Instance left out these three factors: price competition, analysis of product development and the purchasing power of the tractor suppliers' customers.
- 46 The appellant adds that the Court of First Instance ought at least to have explained why it disagreed with the appellant's definition of the market and why it did not take account of those three factors.
- 47 It is apparent from the contested judgment, first of all, that the Court of First Instance summarised the appellant's arguments on that point at paragraphs 69 to 75 of the judgment and went on to set out, in paragraphs 78 to 80, its reasons for holding that the Commission had not committed a manifest error in basing its assessment on other aspects of the market in arriving at the conclusion that the market was a closed oligopoly. Finally, at paragraph 101 of the contested judgment, the Court of First Instance analysed the argument concerning price competition.
- 48 The ground of appeal put forward by the appellant consists of challenging the choice of relevant data for analysis of the market in question. Here it must be stated, first, that there is nothing to indicate that the observations made by the appellant to the Court of First Instance were disregarded by that court. Second, the appellant's argument does not in any way establish that the Court of First Instance erred in law by basing its assessment on the market shares of the main traders, the relative stability of those traders' individual positions, the high barriers to entry onto the market and the extent to which the products were sufficiently homogenous to conclude that the Commission's analysis of that market was not marred by any manifest error of assessment.

49 Finally, the Court of First Instance explained sufficiently the reasons which led it to that conclusion. Here it should be borne in mind that the Court of First Instance's assessment, at paragraphs 78 to 80 of the contested judgment, was undertaken in response to the appellant's argument challenging the entire approach adopted in the Commission's analysis of the market. In those circumstances, the Court of First Instance cannot be faulted for not expanding on the reasons for which it did not rely on the three factors put forward by the appellant in its appeal.

50 The first part of the third ground of appeal must therefore be dismissed as unfounded.

The second part of the third ground of appeal

51 The appellant alleges that the Court of First Instance failed to consider Professor Albach's economic analysis presented in his reports annexed to the pleadings it lodged and at the hearing before the Court of First Instance. It submits that the Court should not merely have summarised the expert's statements but should at the very least have explained why it did not take into consideration evidence which he had supplied or why it disagreed with his analysis.

52 Contrary to the appellant's allegations, the case-file does not show that the Court of First Instance failed to consider Professor Albach's economic analysis. In the first place, at paragraph 75 of the contested judgment it is stated that the appellant based its findings concerning the characterisation of the market on Professor Albach's opinions in particular. In the second place, at paragraphs 78 to 80 the Court of First Instance explained why it considered that the appellant's criticism did not call in question the Commission's analysis of the relevant market.

- 53 It is true that the Court of First Instance does not set out in detail the arguments contained in Professor Albach's expert report. Such an explanation of a piece of evidence cannot, however, be required for the purposes of making sure that the Court of First Instance took due account of it in its assessment. This applies *a fortiori* where, as in this case, the review carried out by the Court of First Instance was confined to determining that the Commission's assessment contained no manifest error.
- 54 It follows that the second part of the third ground of appeal must be dismissed as unfounded.

The third part of the third ground of appeal

- 55 By the third part of its third ground of appeal, the appellant maintains that the documentary evidence which it put before the Court of First Instance showed that the Court's findings concerning the characteristics of the United Kingdom tractor market are wrong as regards the relative stability of the competitors' positions, high barriers to entry and the extent to which the products are sufficiently homogeneous.
- 56 As pointed out in paragraphs 21 and 22 of this judgment, the Court of First Instance has exclusive jurisdiction, first, to establish the facts, save where the substantive inaccuracy of its findings is apparent from the documentary evidence submitted to it and, second, to assess those facts.
- 57 It is sufficient to observe here that in the present case the appellant has not put forward any specific argument to demonstrate, on the basis of the documents it has produced and without any need to weigh up all the evidence presented to the Court of First Instance on this subject, any substantive inaccuracy in the findings of fact made by the Court of First Instance.

58 If this part of the ground of appeal were to be understood as seeking review of the Court of First Instance's assessment of the facts, the Court would be bound to declare that such a review falls in any event outside its jurisdiction.

59 The third part of the third ground of appeal is therefore inadmissible.

The fourth part of the third ground of appeal

60 By the fourth part of the third ground of appeal, the appellant claims that the Court of First Instance erred in law in holding that the Commission correctly defined the relevant market as the agricultural tractor market in the United Kingdom. According to the appellant, by failing to carry out a comparison of the structure of the tractor market in the various Member States the Commission failed to fulfil its obligation to identify exactly the relevant geographic market.

61 It should be remembered here that, under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which came to light in the course of the procedure.

62 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would mean allowing that party to bring before the Court, whose jurisdiction in appeals is limited, a wider case than that heard by the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to examining the assessment by the Court of First Instance of the pleas argued before it (see, to that effect, Case C-136/92 P *Commission v Brazzelli Lualdi* [1994] ECR I-1981, paragraph 59).

- 63 As the Commission has pointed out, the argument put forward in the fourth part of the third ground of appeal has never been put forward until this appeal. It is apparent from the contested judgment and the documents before the Court of First Instance that this argument was not pleaded before the Court of First Instance.
- 64 It is true that, at paragraph 80, the contested judgment touches on the point raised by the appellant. However, it appears that it was mentioned in the context of the assessment of the plea that no restriction of competition arose as a result of the dissemination of data on each competitor's sales and that it does not constitute any response at all to an argument concerning the definition of the relevant market.
- 65 Consequently, this part of the third ground of appeal is inadmissible.

The fifth part of the third ground of appeal

- 66 The appellant maintains that the Court of First Instance was wrong to consider, at paragraph 51 of the contested judgment, that the fact that the market in question was 'highly concentrated' automatically meant that competition was 'greatly reduced'.
- 67 Paragraph 51 of the contested judgment, which forms part of the appraisal of the plea that the agreement did not infringe Community rules on competition, reads as follows:

'The Court observes that, as the applicant points out, the contested decision is the first in which the Commission has prohibited an information exchange system

concerning sufficiently homogeneous products which does not directly concern the prices of those products, but which does not underpin any other anti-competitive arrangement either. As the applicant correctly argues, on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition between suppliers, since in such a situation, the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of his competitors' conduct. On the other hand, the Court considers that, as the Commission argues this time, general use, as between main suppliers and, contrary to the applicant's contention, to their sole benefit and consequently to the exclusion of the other suppliers and of consumers, of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, on a highly concentrated oligopolistic market such as the market in question and on which competition is as a result already greatly reduced and exchange of information facilitated, likely to impair substantially the competition which exists between traders (see paragraph 81, below). In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors.'

68 It is apparent from that paragraph of the contested judgment that the statement in question is taken from part of a sentence relating to consideration of the effects of the information exchange system on competition. That statement, forming only part of a whole sentence, does not therefore lend itself to examination in isolation. When read in its context, it is clear that the Court of First Instance did not simply establish a straightforward correlation between the level of concentration and the intensity of competition, but took into account several factors particular to the circumstances of this case.

69 The fifth part of the third ground of appeal is therefore unfounded.

70 It follows that the third ground of appeal is in part inadmissible and in part unfounded and must, accordingly, be dismissed in its entirety.

The fourth ground of appeal

- 71 By its fourth ground of appeal, which is subdivided into three parts, the appellant argues that the Court of First Instance misapplied Article 85(1) of the Treaty in relation to the question of restriction of competition among manufacturers. First of all, it claims that the removal or reduction of uncertainty regarding the operation of the market has not restricted competition; second, that the information exchange system has not raised the barriers to entry to the market concerned and, finally, that Article 85(1) does not prohibit purely potential effects on competition. It is appropriate to begin the examination of this ground of appeal by considering the last part.

The third part of the fourth ground of appeal

- 72 The third part of the fourth ground concerns paragraphs 61 and 92 of the contested judgment in which the Court of First Instance held, *inter alia*, that Article 85(1) prohibited both actual and purely potential anti-competitive effects. Paragraph 61 is worded as follows:

‘The Court finds that, contrary to the applicant’s submission, the fact that the Commission is unable to establish that the practice at issue produces an actual anti-competitive effect on the market in question, which could be accounted for by the fact *inter alia* that the agreement in its general form has been in force since 1975, has no bearing on the outcome of the case since Article 85(1) of the Treaty prohibits both actual anti-competitive effects and purely potential effects, provided that they are sufficiently appreciable (judgment of the Court of Justice in Case 126/80 *Salonia v Poidomani and Others* [1981] ECR 1563; judgment of the Court of First Instance in Case T-2/89 *Petrofina v Commission* [1991] ECR II-1087), which they are in the present case, having regard to the characteristics of the market (see paragraph 78, below).’

73 At paragraph 92 of its judgment, the Court of First Instance repeats that interpretation.

74 The appellant claims that in that interpretation of Article 85(1) the Court of First Instance committed an error in that it confused effects on competition with effects on trade between Member States. According to the appellant, the two judgments on which the Court of First Instance relied do not provide arguments in support of its assessment.

75 In this regard, it must be stated first of all that the Court of First Instance was right to consider, at paragraph 92 of the contested judgment, that since it was not contended that the agreement had an anti-competitive object, the effects of the agreement had to be evaluated in order to determine whether it prevented, restricted or distorted competition to an appreciable degree.

76 According to the settled case-law of the Court, in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute (see, in particular, Case 56/65 *Société Technique Minière* [1966] ECR 337 and Case 31/80 *L'Oréal v De Nieuwe AMCK* [1980] ECR 3775, paragraph 19).

77 Article 85(1) does not restrict such an assessment to actual effects alone; it must also take account of the agreement's potential effects on competition within the common market (see, to this effect, Case 31/85 *ETA v DK Investment* [1985] ECR 3933, paragraph 12, and *BAT and Reynolds*, cited above, paragraph 54). As the Court of First Instance correctly reiterated, an agreement will, however, fall outside the prohibition in Article 85 if it has only an insignificant effect on the market (Case 5/69 *Völk v Vervaecke* [1969] ECR 295, paragraph 7).

78 Consequently, the Court of First Instance was right to hold that the fact that the Commission was unable to establish the existence of an actual anti-competitive effect had no bearing on the outcome of the case. In those circumstances, it is immaterial that the Court of First Instance referred to the judgments in *Salonia* and *Petrofina v Commission*, which were concerned more with the interpretation of the criterion of effect on trade between Member States.

79 The third part of the fourth ground of appeal is therefore unfounded.

The first part of the fourth ground of appeal

80 This relates in particular to paragraphs 51 and 81 of the contested judgment in which the Court of First Instance held, *inter alia*, that the effect of the information exchange system was to reduce, or even remove, the degree of uncertainty as to the foreseeable nature of competitors' conduct and that that consequence was likely to impair substantially the competition which existed between traders.

81 The appellant submits first of all that the Court of First Instance misinterpreted the words 'restriction ... of competition' used in Article 85(1). In its view, competition is restricted whenever undertakings cease to determine their market behaviour independently and thereby adversely affect competition. In this instance, those two conditions were not satisfied.

2 As regards the first condition, the appellant puts forward several arguments, referring in particular to the data which are not disclosed to members of the AEA through the information exchange system, the time-lag in disseminating certain

data and the conclusions which members can draw from such information. It follows, according to the appellant, from those arguments that the members of the information exchange system do not acquire information about their competitors' market strategies. It adds that the reasoning of the Court of First Instance, inasmuch as it is based on reduced uncertainty, is not compatible with the judgment in 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 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 64. That judgment makes it clear that the fact that an information exchange system lessens uncertainty is not sufficient for it to be considered to be restrictive of competition.

83 As regards the second condition, concerning adverse effects on competition, the appellant acknowledges that the information exchange system did affect competition on the United Kingdom tractor market. However, that fact alone is not sufficient to support a finding that the system is anti-competitive.

84 It should be stated first of all that that last argument is inadmissible so far as the appellant thereby challenges the findings as to, and the assessment of, the information disclosed by the information exchange system, since those are findings and assessments of fact.

85 It remains to be considered whether the Court of First Instance correctly applied Article 85(1) in considering that the exchange of information reduced or removed the degree of uncertainty regarding the operation of the relevant market, which entailed a restriction of competition between manufacturers.

86 First of all, according to the case-law of the Court (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suiker Unie v Commission* [1975] ECR 1663, paragraph 173, and Case 172/80 *Züchner v Bayerische Vereins-*

bank [1981] ECR 2021, paragraph 13), the criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual 'plan' to have been worked out, are to be understood in the light of the concept inherent in the Treaty provisions on competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers.

87 According to the same case-law (*Suiker Unie v Commission*, paragraph 174, and *Züchner*, paragraph 14), although it is correct to say that this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market.

88 In the present case, in reaching the conclusion that a reduced degree of uncertainty as to the operation of the market restricts undertakings' decision-making autonomy and is consequently liable to restrict competition within the meaning of Article 85(1), the Court of First Instance, at paragraph 51 of the contested judgment, held in particular that, in principle, where there is a truly competitive market, transparency between traders is likely to lead to intensification of competition between suppliers, since the fact that in such a situation a trader takes into account information on the operation of the market, made available to him under the information exchange system, in order to adjust his conduct on the market, is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders all uncertainty about the foreseeable nature of his competitors' conduct. The Court of First Instance considered, however, that on a highly concentrated oligopolistic market, such as the market in question, the exchange of information on the market was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

- 89 In making that assessment, the Court of First Instance took account of the nature of the information exchanged, the frequency with which it was disseminated and of the persons to whom it was disclosed. As regards, first, the nature of the information exchanged, particularly that relating to sales made in the territory of each of the dealerships in the distribution network, the Court of First Instance found, at paragraphs 51 and 81, that those were business secrets and allowed the undertakings which were parties to the agreement to know the sales made by their dealers within and beyond their allocated territory, and also the sales made by the other competing undertakings and their dealers who were parties to the agreement. Second, the Court of First Instance held, again at paragraphs 51 and 81, that the information on sales was disseminated systematically and at short intervals. Last, at paragraph 51, the Court of First Instance found that the information was shared between the main suppliers, for their sole benefit, to the exclusion of other suppliers and of consumers.
- 90 In view of that reasoning, the Court of First Instance must be considered to have concluded correctly that the information exchange system reduces or removes the degree of uncertainty as to the operation of the market and that the system is therefore liable to have an adverse influence on competition between manufacturers.
- 91 In addition, this assessment does not conflict with the judgment in *Ahlström Osakeyhtiö and Others v Commission*, cited above, and referred to by the appellant. It is true that in that judgment the Court held, at paragraph 64, that the system of quarterly price announcements on the wood pulp market did not in itself constitute an infringement of Article 85(1) of the Treaty. However the system of quarterly announcements of paper pulp sale prices set up by the manufacturers involved the communication of information of use to purchasers, whereas the information exchange system in question in the present case enables information to be shared only by the undertakings which are members to the agreement.
- 92 The first part of the fourth ground of appeal is therefore unfounded.

The second part of the fourth ground of appeal

93 The second part of the fourth ground of appeal concerns paragraphs 52 and 84 of the contested judgment. At paragraph 52, the Court of First Instance considered that ‘the Commission correctly contends, at points 44 to 48 of the Decision, that whatever decision is adopted by a trader wishing to penetrate the United Kingdom agricultural tractor market, and whether or not it becomes a member of the agreement, that agreement is necessarily disadvantageous for it. Either the trader concerned does not become a member of the information exchange agreement and, unlike its competitors, then forgoes the information exchanged and the market knowledge which it provides; or it becomes a member of the agreement and its business strategy is then immediately revealed to all its competitors by means of the information which they receive’. At paragraph 84 of the contested judgment, the Court of First Instance adds that ‘In that regard, it is not significant that the number of traders entering the relevant market is high’.

94 The appellant maintains that this finding of the Court of First Instance is wrong for two reasons.

95 First, it submits that new traders who do not join the information exchange system can determine their commercial strategy independently. There would only be a restriction if they were not allowed to join the information exchange system, which is not the case.

96 Second, the freedom of new entrants to the market which have joined the information exchange system to make independent decisions is not restricted and their commercial strategy is not immediately revealed to all their competitors.

- 97 The appellant asserts, furthermore, that by stating at paragraph 84 of the contested judgment that the number of new entrants is in fact high, the Court of First Instance took a position at variance with the Commission's finding at point 48 of the contested decision. The conclusion of the Court of First Instance and of the Commission, it says, is also rebutted by the fact that since the creation of the information exchange system new entrants on the United Kingdom tractor market have gained a market share of more than 30%.
- 98 With regard to those assertions, it must first be held that the Court of First Instance was right in concluding, at paragraphs 52 and 84, that a trader wishing to penetrate the United Kingdom tractor market is at a disadvantage compared with the members of the agreement if it does not join. Although it then retains its autonomy in deciding its commercial strategy, it forgoes the information exchanged under the agreement. In this respect, the fact that the market entrant could have joined the system is irrelevant since the issue is precisely to establish what the consequences are for a trader which does not join.
- 99 Second, the appellant's argument concerning the consequences of joining the information exchange system on a new trader's decision-making autonomy is, in substance, identical to the argument already considered in connection with the first part of this ground of appeal. It is sufficient in this regard to refer to paragraphs 80 to 91 of this judgment.
- 100 Finally, it must be held that it does not appear from the contested judgment that the Court of First Instance's statement concerning a high number of traders entering the market stands in contradiction to point 48 of the contested decision. That point contains no contrary assertion with regard to the number of traders.
- 101 The second part of the fourth ground of appeal is, in consequence, unfounded.

102 Since the fourth ground of appeal is in part inadmissible and in part unfounded, it must be dismissed in its entirety.

The fifth ground of appeal

103 This ground of appeal concerns paragraph 87 of the contested judgment. There, the Court of First Instance sets out its assessment of the AEA meetings as a factor to be taken into account in considering whether the information exchange system is lawful under Article 85(1).

104 The appellant complains that the Court of First Instance upheld the Commission's assertion that the regular meetings within the AEA committee gave the members a 'forum for contacts' facilitating a high price policy. According to the appellant, under the Data System, the members hold ad hoc meetings only in order to resolve purely administrative matters. Furthermore, the Commission failed to adduce the slightest evidence to show that the members maintained a general high price level on the market. Finally, it submits that the Court of First Instance was not entitled to make new findings replacing those of the Commission.

105 In this regard it must be stated that, as is apparent from paragraph 85 of the contested judgment, the appellant is adducing arguments identical to those which it has already put before the Court of First Instance. It advances no argument specifically challenging the legal rationale underlying paragraph 87. The objection that the Court of First Instance wrongly made new findings is too imprecisely worded for it to be considered.

106 Finally, it must be reiterated that the assessment of the evidence, unless it has been fundamentally misconstrued, is not a question of law subject to review by the Court of Justice.

107 It follows from those considerations that this ground of appeal must be declared inadmissible.

The sixth ground of appeal

108 This ground of appeal alleges misapplication of Article 85(1) as regards restriction of intra-brand competition. It challenges paragraphs 96 and 97 of the contested judgment and falls into two parts, one asserting that there is no absolute territorial protection and the other that there is no interference with parallel imports.

The first part of the sixth ground of appeal

109 The appellant maintains that the Court of First Instance erred in law in finding, at paragraph 96, that the information exchange system made it possible for the undertakings party to the agreement to 'confer absolute territorial protection on each of their dealers'. It claims that the information disclosed to manufacturers under the agreement did not enable them to put pressure on dealers selling tractors outside their territories. Moreover, the mere 'possibility' of monitoring the distribution network is not sufficient to confirm that competition is restricted within the meaning of Article 85(1).

110 On this point, it must be stated that, by denying that the information exchange system can confer absolute territorial protection on each dealer supplied by the members of the agreement, the appellant is putting forward an argument which is concerned only with the Court of First Instance's assessment of facts and which does not raise any question of law reviewable by the Court. The assertion that a mere possibility of monitoring the distribution network does not constitute a restriction of competition is an argument which is indistinguishable from the third part of the fourth ground of appeal to which reference is therefore made.

111 This part of the ground of appeal is therefore inadmissible

The second part of the sixth ground of appeal

112 The appellant claims that the Court of First Instance should have taken account of the fact that as from 1 September 1988 Form V55/5 was no longer forwarded to the members of the agreement. It states that at the very least it has not been possible since that date to allege that the previous information exchange system or the Data System enabled members of the agreement to interfere with parallel imports.

113 In this regard it must be stated that at paragraph 97 of the contested judgment the Court of First Instance specifically found that 'at least until 1 September 1988, the date on which SIL stopped sending a copy of Form V55/5 to the undertakings, the information exchange system at issue enabled such imports to be monitored by means of the chassis number of the vehicle, which was previously entered on Form V55/5 by the manufacturer'. Since the agreement, as applied since November 1975 and as notified on 4 January 1988, constitutes, like its amended version of 12 March 1990, the subject-matter of the contested decision, the Court of First Instance was entitled to take into account the effects of the agreement on parallel imports even if the effects had ceased as of 1 September 1988.

114 Consequently, the second part of the ground of appeal is unfounded.

115 It follows that the sixth ground of appeal must be rejected.

The seventh ground of appeal

- 116 The seventh ground of appeal alleges misapplication of Article 85(1) as regards the effect on trade between the United Kingdom and the other Member States. It relates to paragraph 101 of the contested judgment, which is worded as follows:

‘The Court considers that, having regard to the characteristics of the relevant market, as previously analysed ... and also the fact that the main suppliers on that market operate throughout the common market, the Commission correctly found in point 57 of the contested decision that “An exchange of information identifying in great detail the exact retail sales volume and the market shares of 88% of the suppliers of a national market ... is liable to substantially affect trade between Member States because the lessening of competition resulting from this exchange necessarily influences the volume of imports to the United Kingdom” (see the judgment of the Court of First Instance in Case T-38/92 *AWS Benelux v Commission* [1994] ECR II-211). The documents before the Court in no way corroborate the applicant’s argument that the limited imports of agricultural tractors into the United Kingdom are explained by the more competitive prices on the domestic market. In particular, although it was not possible to establish in the pre-trial inquiry that, as the Decision claims, the practice at issue may have helped to maintain higher prices on the domestic market, the documents before the Court, in particular the price lists produced by the applicant as Annex 20 to its application, likewise do not show that the prices of agricultural tractors on the United Kingdom market have in fact been lower than those charged on the continental markets.’

- 117 The appellant criticises the Court of First Instance for failing to question the lawfulness of the contested decision because the Commission was unable to provide evidence showing that the information exchange system might have helped to maintain high price levels on the United Kingdom market. Furthermore, it maintains that the Court of First Instance did not take account of evidence that, after 1984, tractor prices in the United Kingdom were lower than, or at the least equal to, prices for the same models in most of the Member States.

- 118 As regards that last point, it must be reiterated that it is for the Court of First Instance to assess definitively the value to be attached to the evidence submitted to it, save where that evidence has been fundamentally misconstrued. The appellant has not adduced any sound argument to support a claim that the Court of First Instance fundamentally misconstrued the evidence. In this respect, this ground of appeal is therefore inadmissible.
- 119 As regards the significance of the Court of First Instance's finding that the Commission had been unable to provide evidence that the information exchange system might have helped to maintain a high level of prices, the factors set out in paragraph 101 allow it to be affirmed with a sufficient degree of probability that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade in tractors between Member States so as to give rise to the fear that the realisation of a single market between Member States might be impeded (see in particular Case 54/65 *Société Technique Minière*, cited above, and Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 20). First, the Court of First Instance pointed out that even if the Commission was unable to provide evidence that the information exchange system might have helped to maintain a high level of prices, the appellant had likewise not demonstrated that the prices of agricultural tractors on the United Kingdom market were lower than those charged on continental markets. Second, in considering that the Commission had correctly found that the information exchange system necessarily influences the volume of imports into the United Kingdom, the Court of First Instance took into account the characteristics of the relevant market, and the fact that the main suppliers on that market also operated throughout the common market, and the large share (88%) of the relevant market controlled by the undertakings which were members of the agreement.
- 120 The second part of the seventh ground of appeal is therefore unfounded.
- 121 It follows that the seventh ground must be rejected in its entirety.

The eighth ground of appeal

122 The last ground of appeal concerns paragraph 105 of the contested judgment in which the Court of First Instance concluded that the information exchange system was not indispensable and that, in consequence, it did not fulfil the third of the four conditions laid down in Article 85(3) for the grant of an individual exemption.

123 After reiterating that those four conditions are cumulative and that it is primarily for the undertakings notifying an agreement to present evidence to show that the agreement fulfils those conditions, the Court of First Instance held:

‘In the present case, the Decision finds that the restrictions of competition resulting from the exchange of information are not indispensable, since “own company data and aggregate industry data are sufficient to operate in the agricultural tractor market” in the United Kingdom. That finding in point 62 of the Decision regarding the first notification is made again in point 65 with regard to the second notification. The applicant does not show that the restrictions of competition resulting from the information exchange system, as previously analysed ... are indispensable, particularly with regard to the objectives of contributing to economic progress and equitable distribution of benefits. Furthermore, the applicant cannot profitably argue that, in the absence of the system at issue, information equivalent to that provided by the system at issue could be obtained by traders active on the agricultural tractor market in the United Kingdom from market research producing information which would be in particular out of date, isolated and not as frequent as the information provided by the system at issue, it not even being necessary in this regard to take into consideration the costs of gaining access to such information.’

124 The appellant alleges that the Court of First Instance erred in law in concluding that the information exchange system and the Data System did not satisfy the conditions for the grant of an exemption under Article 85(3). It states that, contrary to the Court’s conclusion, it had explained why the information system did not contain any restrictions on competition which were not indispensable in order to achieve improvements in production and benefits for consumers.

- 125 In addition, the appellant complains that the Court of First Instance rejected, without giving reasons, its argument that if there were no information exchange system all the registration data exchanged might not be obtainable at the same level of quality and with the same frequency by individual market research or through a market research company.
- 126 It should be stated, first, that by arguing generally that if the Court of First Instance had accepted its arguments it would necessarily have reached a different conclusion, the appellant is merely challenging in general the findings of fact made by the Court of First Instance without attempting to establish any alleged error in law in the Court's reasoning. This part of that ground of appeal is therefore inadmissible.
- 127 As regards, second, the question to what extent traders might have been able to obtain the same information through means other than the information exchange system, it must be held that, as the Commission has pointed out, the arguments put to the Court of First Instance by the appellant were equivocal. The pleadings lodged by the appellant before the Court of First Instance clearly show that in essence it had maintained that, if there were no information exchange system, the undertakings could have acquired all the statistical data exchanged from independent sources by means of research work. In those circumstances, the appellant's criticism is irrelevant and must be dismissed.
- 128 The last ground of appeal must, consequently, be dismissed in its entirety.
- 129 It follows from all the foregoing considerations that the pleas raised by the appellant in support of its appeal are in part inadmissible and in part unfounded. The appeal must therefore be dismissed in its entirety.

Costs

130 Under Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful, it must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the appeal;
2. Orders John Deere Limited to pay the costs.

Gulmann

Moitinho de Almeida

Edward

Jann

Sevón

Delivered in open court in Luxembourg on 28 May 1998.

R. Grass

C. Gulmann

Registrar

President of the Fifth Chamber