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

In Case C-8/95 P,

New Holland Ford Ltd, a company governed by the laws of England and Wales, established in Basildon (United Kingdom), represented by Mario Siragusa, of the Rome Bar, Giuseppe Scassellati-Sforzolini and Francesca Moretti, of the Bologna Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Preussen, Côte d'Eich,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 27 October 1994 in Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, 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 Leonard Hawkes, Solicitor, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: English.

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,

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 Registry of the Court of Justice on 13 January 1995, New Holland Ford Ltd, a company governed by the law of England and Wales, 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-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905 ('the contested judgment'), by which the Court of First Instance dismissed the application which it, together with Fiatagri UK Ltd, had brought 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, 'the contested decision').

2 As regards 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. The applicants are therefore both members of the AEA.

(a) *The administrative procedure*

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

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

4 On 11 November 1988 the Commission issued a statement of objections to the AEA, to each of the eight members concerned by the first notification, and to Systematics International Group of Companies Limited (hereinafter "SIL"), a data-processing company with responsibility for the processing and handling of the data contained in Form V55 (see paragraph 6, below). On 24 November 1988 the members of the agreement decided to suspend it. According to the applicants, the agreement was subsequently re-activated, but without dissemination of information enabling competitors' sales to be identified, whether individually or in aggregate. During a hearing before the Commission, they claimed, relying in particular on a study carried out by Professor Albach, a member of the Berlin Science Center, that the information distributed had a beneficial effect on competition. On 12 March 1990 five members of the agreement, including the applicants, notified to the Commission a new agreement (hereinafter "the second notification") for dissemination of information, called the "UK Tractor Registration Data System" (hereinafter "the Data System") and undertook not to implement the new system before receiving the Commission's response to their notification. According to the applicants, the new agreement provides for a significant reduction in the amount and frequency of the information obtained under the agreement and also removes all the "institutional" elements to which the Commission had objected in its abovementioned statement of objections.

...

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

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

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 16 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 of the contested decision, 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 to grant an 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 6 May 1992, the appellant and Fiatagri UK Ltd brought an action before the Court of First Instance for a declaration that the contested decision was non-existent or, in the alternative, for its annulment, and for an order requiring the Commission to pay the costs (paragraph 18 of the contested judgment). In support of their action, the two applicants claimed that the contested decision:

— was adopted pursuant to an unlawful procedure;

— failed to provide a sufficient statement of reasons;

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

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

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

— wrongly failed to apply Article 85(3) of the Treaty (paragraph 23 of the contested judgment).

12 By the contested judgment the Court of First Instance dismissed all those pleas in law and ordered the applicants to pay the costs.

13 In its appeal, the appellant claims that the Court of Justice should declare that its appeal was brought in time and is admissible, set aside the contested judgment in its entirety and annul the contested decision in its entirety or, in the alternative, refer the case back to the Court of First Instance and order the Commission to pay the costs.

14 The appellant states that, following restructuring, it is now responsible for the distribution of agricultural tractors bearing the Ford or Fiatagri trade names in the United Kingdom and that, in this appeal, it represents the common interests of both applicants in Case T-34/92.

15 The Commission challenges the admissibility of the appeal *in toto* and, in the alternative, contends that the Court should dismiss each of the grounds supporting it as inadmissible or, in the further alternative, as unfounded; in addition, it asks the Court to order the appellant to pay the costs.

16 By decision of 6 June 1995, the Court dismissed the appellant's request, contained in the appeal, for production of the complete transcript of the hearing of 16 March 1994 before the Court of First Instance in Case T-34/92. In its reply, lodged at the Court Registry on 5 July 1995, the appellant repeated its request, which was rejected by order of the Court of 12 June 1997.

17 In support of its appeal, the appellant puts forward, first, two grounds alleging breaches of procedural rules, namely infringement of the obligation to give sufficient reasons for the contested judgment and failure to address all the significant errors of fact which, in its view, vitiated the contested decision, and their impact on the lawfulness of that act. Second, it puts forward three grounds of appeal alleging substantive errors, namely misapplication of the three paragraphs of Article 85 of the Treaty.

Admissibility of the entire appeal

18 The Commission's principal argument is that the appeal is inadmissible *in toto* so that it is not necessary or even possible to consider each ground of appeal in detail.

19 In this regard, the Commission claims first that the entire first part of the appeal is concerned with matters of fact or seeks to reopen the proceedings on the basis of arguments already taken into consideration and rejected by the Court of First Instance. The same applies to many of the grounds set out in the second part of the appeal.

20 Second, the Commission maintains that, by expressly linking its legal arguments to a factual context other than that established by the contested judgment, the appellant has not raised any legal arguments capable of leading to the setting aside of that judgment.

21 Third, the Commission observes that while the appellant sets out certain legal propositions in the second part of its appeal, it does not do so with sufficient clarity and precision to make it possible to identify either the parts of the contested judgment which are challenged or the arguments in law which are relied upon.

22 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.

23 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).

24 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).

25 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).

26 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 that evidence has been fundamentally distorted, 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).

27 In the present case, it must be stated that the first part of the appeal, headed 'Essential Facts', does not propound precisely the arguments raised against the contested judgment and raises only a general challenge to the facts established by the Court of First Instance. Since the first part of the appeal does not satisfy the requirements laid down in case-law concerning appeals, as reiterated above, it must be rejected as inadmissible.

28 As regards the grounds of appeal put forward by the appellant in the second part of its appeal, it should be noted, first, that the appellant gives some information, in particular in its reply, concerning the parts of the contested judgment which it challenges and, second, that the Commission sets out its arguments in relation to every plea in law dismissed by the Court of First Instance. That part of the appeal can therefore be examined ground by ground.

The first ground of appeal

29 By its first ground, the appellant contends first of all that the Court of First Instance confined itself to a formalistic review of the contested decision, without taking into account the appellant's argument that the decision contained numerous manifest errors. It claims that the Court of First Instance therefore failed to fulfil its obligation to state its reasons for rejecting a complaint laid before it.

30 According to the appellant, the Court of First Instance also failed to take into account evidence which it had presented during the written and oral procedures and that the contested judgment stands in contradiction to what the Court of First Instance allowed to be understood in regard to several issues during the oral procedure.

31 The appellant also claims that the Court of First Instance took no account of the fact that the Commission agreed with the appellant on a number of points, thus contradicting the contested decision.

32 Finally, the appellant points out four passages in the contested judgment in which the Court of First Instance failed, in its view, to fulfil its obligation to state its reasons.

33 First, at paragraph 35 which contains the Court's assessment of the plea in law relating to lack of reasoning in the contested decision, the Court of First Instance

failed to address two of the arguments presented and went on to dismiss the other two without giving clear reasons.

34 Second, the appellant claims that paragraph 38 of the contested judgment is imprecise, inasmuch as it does not state the reasons for which the Court of First Instance upheld the Commission's conclusion that the information exchange system as a whole was anti-competitive. Furthermore, it alleges that paragraph 39 of the contested judgment, in which the Court of First Instance considered that the operative part of the contested decision, read in the light of its grounds and, in particular, of points 16 and 61, was clear, contains a contradiction, since the Court of First Instance, on the one hand, required the parties to the agreement to ascertain themselves to what extent the information exchange system was lawful and, on the other hand, acknowledged the requirement of legal certainty.

35 Third, the appellant considers that the contested judgment does not provide sufficient reasons in relation to the definition of the relevant product and relevant market since, notwithstanding the arguments it put forward, the Court of First Instance merely indicated, at paragraph 51 of the contested judgment, that it endorsed the Commission's definition.

36 Fourth, the appellant claims that in the contested judgment the term 'dominance' was used improperly, and not in accordance with Article 86 of the Treaty, so that paragraph 52 is not adequately reasoned.

37 Here, it must be held first of all that the appellant's argument supporting the first part of this ground of appeal is not sufficiently precise. Moreover, that requirement of precision is not satisfied by mentioning, by way of example, certain paragraphs in the Court of First Instance's judgment. This part of the ground of appeal is therefore inadmissible.

38 It is appropriate to consider next the second part of this ground of appeal in which the appellant indicates those paragraphs of the judgment which it contests.

Paragraph 35 of the contested judgment

39 At paragraph 35 of the contested judgment, the Court of First Instance rejected the part of the plea alleging that the contested decision was insufficiently reasoned.

40 At paragraph 33 of the contested judgment, the Court of First Instance had broken down the first part of the plea into four arguments.

41 The first of those was that the Commission's failure to take sufficiently into account the appellant's arguments amounted to a lack of reasoning. That was the case with point 61 of the contested decision, which concerned *inter alia* the setting at ten units of the threshold for sales made by a party to the agreement in the territory of a given dealer below which aggregate data could not be disseminated, and the choice of year for the reference period.

42 The second argument was that the contested decision did not deal sufficiently with the Data System, which amounted to a lack of reasoning.

43 The third was that the contested decision did not take account of the fact that the laws of most Member States permit registration data to be passed on to manufacturers.

44 The appellant's fourth argument was that the Commission failed to follow the principles laid down in the judgment in Case 73/74 *Papiers Peints de Belgique* v *Commission* [1975] ECR 1491, paragraph 33, as regards the extent of the Commission's duty to state reasons.

45 So far as the first two arguments are concerned, it should be recalled that in the first sentence of paragraph 35 of the contested judgment the Court of First Instance found that 'the Commission, which at points 33 and 65 of the contested decision found that the Data System was contrary to Article 85(1) of the Treaty on the ground that this information exchange system reproduced *mutatis mutandis* the previous system and that the information exchange did not fall within the scope of Article 85(3) of the Treaty because the restrictions of competition were not indispensable, provided sufficient reasons for its decision on this point, regardless of any appraisal, at this stage of examination of the case, of the correctness of those reasons'.

46 A careful reading of that sentence shows that the Court of First Instance did not fail to consider the reasons given in the contested decision as regards the factors mentioned in point 61 thereof, concerning the conditions laid down in Article 85(3) of the Treaty, or as regards the Data System.

47 As regards the fourth argument, that the Court of First Instance failed to apply *Papiers Peints*, it is clear that it explained, in the same paragraph 35 of the contested judgment, why the Commission was not required to give a more extensive statement of its reasons in the circumstances of the case. According to the Court of First Instance, the contested decision simply applies principles laid down in the Commission's previous decisions to a particular market. In addition, the Court of First Instance referred to paragraph 20 of the contested judgment in which it considered the alleged inconsistency between the contested decision and decisions previously adopted by the Commission.

48 With regard to the third argument, it should be observed that, in the same paragraph 35, the Court of First Instance considered that it was not necessary to examine the different legal systems of the Member States, in view of the fact that the contested decision was in line with an existing body of Commission decisions.

49 Since the grounds of the contested judgment show sufficiently clearly the reasoning followed by the Court of First Instance in rebutting the appellant's line of

argument set out in paragraph 33 of the contested judgment, it must be held that the appellant's argument in relation to paragraph 35 of the contested judgment is unfounded.

Paragraphs 38 and 39 of the contested judgment

50 Paragraphs 38 and 39 of the contested judgment set out the Court of First Instance's assessment of the plea alleging that the contested decision is imprecise.

51 With regard to paragraph 38, this Court finds that, after correctly making reference to its case-law on the question whether the nullity of a contract, for which Article 85(2) provides, affects the contract as a whole or is restricted to certain of its provisions (see Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299), the Court of First Instance held that it was clear from the terms of the contested decision that it was the information exchange system as a whole which was considered to be anti-competitive and not the dissemination of any specific information. In addition, it commented on the application of that case-law to an application for exemption under Article 85(3) of the Treaty. In that context, it considered that 'the case-law of the Court of Justice on the interpretation of Article 85(2) of the Treaty, as expressed in the *Consten and Grundig* judgment, is not in any event readily transposable to a case in which an application for exemption under Article 85(3) of the Treaty is being considered, since in the latter case it is for the Commission, when responding to the application submitted to it by the notifying undertakings, to reach its decision by reference to the agreement as notified to it, unless during its investigation of the matter it is able to obtain particular amendments to the agreement as notified'.

52 It follows from that paragraph that the Court of First Instance gave sufficient explanation of its reasons for considering that the contested decision was not

imprecise in characterising the information exchange system as a whole as anti-competitive.

53 As regards paragraph 39 of the contested judgment, it is clear from a careful reading of that paragraph that the Court of First Instance considered that, in points 16 and 61 of the contested decision and in Article 1 of its operative part, the Commission had placed the undertakings in a position where they could ascertain the extent to which their information exchange system was lawful, thus contributing to the legal certainty required by undertakings in their transactions. Contrary to the appellant's contention, that reasoning is not inconsistent.

54 The second part of this ground of appeal is therefore unfounded.

Paragraph 51 of the contested judgment

55 At paragraphs 49 to 57 of the contested judgment, the Court of First Instance expounded its assessment of the plea that the contested decision was based on a wrong definition of the relevant product and relevant market. More precisely, paragraph 51 states:

'As regards the definition of the product market, it is first necessary to assess the degree of substitutability of the product. The Court considers that the applicants' argument that the contested decision fails to make any analysis of the product market must be rejected since it is sufficiently apparent from the contested decision that it is based on the assumption that the relevant market is that for agricultural tractors in the United Kingdom. Furthermore, since participation in the information exchange system at issue is subject only to the participant being a manufacturer or importer of agricultural tractors in the United Kingdom, and not of a particular category of agricultural tractors, the applicants are not justified in arguing that the definition of the product market is wrong and that the different types

of agricultural tractors are not largely substitutable. The Court concludes from that fact that the undertakings themselves define their competitive position, in the context of the agreement, by reference to the general concept of agricultural tractor, as adopted by the Commission.'

56 It is clear from that paragraph that the reasoning is clear and sufficient. No fault can be found with the Court of First Instance for failing to provide reasons, *a fortiori* when the appellant has not adduced any specific arguments in support of its contention.

57 This part of the ground of appeal is, consequently, unfounded.

Paragraph 52 of the contested judgment

58 Paragraph 52 is worded as follows: 'As regards the question of the oligopolistic nature of the relevant market, the applicants' criticisms of the Commission's conclusion that the market is dominated by four undertakings holding between 75 and 80% of the market must be rejected, since ...'.

59 It does not appear from that sentence that the Court of First Instance was referring to the specific concept of a 'dominant position' within the meaning of Article 86 of the Treaty. The expression 'is dominated' is clearly used in the context of Article 85, with no reference to Article 86.

60 Accordingly, the last part of the first ground of appeal is unfounded.

61 Since in the light of the foregoing considerations the first ground of appeal is in part inadmissible and in part unfounded, it must be dismissed in its entirety.

The second ground of appeal

62 By its second ground of appeal, the appellant contends that the Court of First Instance failed to address errors of fact made by the Commission and their impact on the lawfulness of the contested decision. That ground concerns paragraphs 58 to 78 of the contested judgment, relating to the plea that the Commission's analysis of the information notified was factually inaccurate.

63 In this respect, it is apparent from the contested judgment:

— first, that the Court of First Instance considered that the appellants had not demonstrated that the errors of fact which the Commission might have made in point 14 of the contested decision were such as to affect its legality (paragraphs 66 to 73);

— second, that the Court of First Instance considered that the appellants' claim that the Commission made an error of fact in finding that SIL extracted from the V55 form the seven digits of the postcode of the registered keeper of the vehicle was unfounded in point of fact (paragraph 74);

— third, that with regard to the organisation of the dealer territories the Court of First Instance held that the appellants had not demonstrated the existence of one or more errors of fact in the Commission's finding that those territories were determined by reference to postcode areas, either individually or in groups (paragraph 75);

— fourth, that the Court of First Instance found that the appellants' argument that the last indent of point 26 of the contested decision ought to be interpreted to the effect that the manufacturers had organised an exchange of information between themselves, rather than an exchange of information about the relations between a manufacturer and its dealers, was unfounded in point of fact (paragraph 76);

— fifth, that as regards the argument that in its analysis of the Data System the Commission failed to take account of the fact that that system supplied quarterly reports of the sales made by the dealers of a given constructor on each dealer's territory, the Court of First Instance found that the Commission's assessment, as set out in point 65 of the contested decision, was not marred by any error of fact (paragraph 77).

64 In its appeal, the appellant claims that in paragraph 66 of the contested judgment the Court of First Instance recognised that the contested decision contained errors of fact relating to the characteristics of the information exchange agreement but that notwithstanding those findings, the Court of First Instance 'rewrote' the contested decision so that those factual errors did not affect its legality. Moreover, other fundamental errors alleged by the appellant and established by the Court of First Instance, in particular most of those listed in paragraphs 58 to 61 of the contested judgment, were then passed over in silence.

65 The appellant therefore maintains, first, that the Court of First Instance disregarded the evidence it had adduced in order to establish that tractors should be treated as differentiated products.

66 Second, the appellant criticises the Court of First Instance for failing to correct the Commission's error in taking into account the features of the information exchange system as it stood prior to notification.

67 Third, the appellant submits that at paragraph 75 of the contested judgment the Court of First Instance unduly minimised the error made by the Commission in its finding that the organisation of dealer territories was fixed on the basis of postcode areas.

68 Fourth, the appellant argues that the inquiry undertaken by the Court of First Instance showed that the Commission had misunderstood, or at least misrepresented, the type of information which could be communicated under the information exchange system and the Data System as well as the risks to competition to which they gave rise. However, at paragraphs 66, 67, 72, 74 and 77 of the contested judgment, the Court of First Instance disregarded those errors or else failed to draw the proper consequences from them.

69 Fifth, the appellant observes that at paragraphs 72 and 77 of the contested judgment the Court of First Instance did not deal with the legal consequences of all the differences between the information exchange system and the Data System, but only the aspect of information about dealer sales.

70 Last, the appellant claims that, at paragraphs 67 to 71, the Court of First Instance misunderstood its arguments relating to the Commission's assertion that communication of identifying data under the agreement created full transparency and was in consequence bound to destroy hidden competition.

71 In support of its submission that the Court of Justice has jurisdiction to consider the abovementioned arguments, the appellant refers to Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, in which it was held that the Court has jurisdiction to find the facts where the substantive inaccuracy of the findings of the Court of First Instance is apparent from the documents submitted to it.

72 With regard first of all to the Court's jurisdiction, it has already been recalled, at paragraph 25 of this judgment, that the Court has jurisdiction to examine the assessment made by the Court of First Instance where the substantive inaccuracy of the findings is apparent from the documents submitted to it. Such inaccuracy must be obvious without its being necessary to undertake a fresh assessment of the facts.

73 In the present case, consideration of the arguments put forward by the appellant before the Court of Justice reveals that the appellant is merely challenging the Court of First Instance's assessment of the evidence. Its line of argument is that the Court of First Instance should have drawn conclusions other than those which it did draw from the evidence submitted to it. The appellant does not indicate any documents in the file that might clearly demonstrate the existence of any material error; similarly, it does not specify the error which the Court of First Instance is supposed to have made in applying the rules of law concerning the burden of proof and the taking of evidence, nor does it put forward any other rule of law which it claims that the Court of First Instance has infringed.

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

The third ground of appeal

75 The appellant submits that the Court of First Instance misapplied Article 85(1) of the Treaty in that, first, it wrongly defined the relevant market and, second, it misinterpreted the conditions to be satisfied if an agreement or concerted practice is to be found to be incompatible with that provision, in particular, the requirement of an anti-competitive object or effect.

76 This argument may be divided into three parts concerning the relevant market, the anti-competitive effects of the information exchange system and the lack of any supporting arguments drawn from Community precedents or economic theory.

The first part of the third ground of appeal

77 The appellant maintains that the Court of First Instance failed to apply correctly, as it ought to have done, the legal principle established in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 11, according to which, for the purposes of the application of Article 85 of the Treaty, reference must be made to the particular features of the product in question and to a clearly defined geographical area in which it is marketed and where the conditions of competition are sufficiently homogenous. The appellant alleges that the Court of First Instance did not examine the Commission's assessment but merely conducted a formalistic review of it.

78 The arguments adduced in support of that allegation relate to the assessments made by the Court of First Instance concerning, first, the definition of the product market (paragraph 51 of the contested judgment), second, the determination of the geographical market (paragraph 56) and, third, the definition of the structure of the market from several other points of view.

79 As regards the definition of the product market, the appellant claims that the Court of First Instance, while recognising the need to assess the degree of substitutability of the product, at paragraph 51 of the contested judgment failed to evaluate that issue. Thus, the description of the relevant product market in the contested decision and the contested judgment fails to take into account the evidence submitted by the applicants showing that the product is highly differentiated, technically sophisticated and not homogenous. According to the appellant, that error in the description led to the incorrect evaluation of transparency on the market concerned.

80 In this connection, it is clear from paragraph 51 of the contested judgment that the Court of First Instance did assess the degree of substitutability of the product and observed that participation in the information exchange system was subject only to the participant's being a manufacturer or importer of agricultural tractors in the United Kingdom, and not of a particular category of tractors. The Court of First Instance concluded from that fact that the undertakings themselves defined their competitive position, in the context of the agreement, by reference to the general concept of agricultural tractor.

81 The appellant's submission that the Court of First Instance did not evaluate the degree of substitutability does not, therefore, withstand a reading of paragraph 51 of the contested judgment. The allegation that the Court of First Instance failed to take into account the evidence submitted by the applicants in this regard is in fact an attempt to challenge the findings of facts made by the Court of First Instance, which are not, however, open to review by the Court of Justice, since the appellant has not adduced any matters to show that evidence was fundamentally misconstrued.

82 In the second place, the appellant alleges that, by confining, at paragraph 56 of the contested judgment, the relevant geographical market to the United Kingdom, instead of extending it to the entire common market, the Court of First Instance erred in its analysis. That assessment is, it claims, belied by the wealth of evidence put forward by the applicants to prove that the condition laid down in *United Brands* had been satisfied, since conditions of competition were sufficiently homogeneous throughout the common market.

83 In this connection, it is apparent from paragraph 56 of the contested judgment that the Court of First Instance, relying on *United Brands* by analogy, considered that the relevant market could be defined geographically as the area in which conditions of competition and, in particular, consumer demand, displayed sufficiently homogenous characteristics. The Court of First Instance went on to consider that it was not ruled out that the agricultural tractor market was to be characterised as a Community-wide market. It stated, however, that 'assuming that view to be admissible, it does not in any event preclude the relevant market on which the

effects of the practice are to be measured from being defined as a national market where, as in the present case, the practice objected to is geographically limited to the territory of one of the Member States' and that, '[i]n such a case, it is the suppliers themselves which, by the mere fact of their own conduct, have given that market the characteristics of a national market'.

84 As the Court of Justice has already held in other cases, in assessing the geographical area of the relevant market, the region in which the concerted practice produces its effects is one of the factors to be taken into consideration (see, to this effect, Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7, and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 25 to 28). By setting up an information exchange system to disseminate to members of that system who are suppliers of the United Kingdom market data concerning sales on that market, the agreement itself confines its effect to the United Kingdom market so that it alone presents features which are sufficiently homogeneous to be analysed for anti-competitive effects. Consequently, the Court of First Instance did not err in law in reviewing the definition of the geographical market.

85 In the third place, the appellant states that the structure of the market is inaccurately characterised in the contested decision and in the contested judgment in several other essential respects and that the Court of First Instance disregarded the wealth of arguments and evidence proffered by the applicants on this point.

86 Here, it suffices to point out that the appellant does no more than challenge the assessment of facts made by the Court of First Instance, without putting forward any legal arguments for consideration by the Court. Nor does the appellant specify all the paragraphs of the contested judgment to which it objects in its contentions.

87 It follows from consideration of the first part of the third ground of appeal that it is in part inadmissible and in part unfounded.

The second part of the third ground of appeal

88 The second part of the third ground of appeal concerns paragraph 93 of the contested judgment in which the Court of First Instance held that '[t]he fact that the Commission is not able to demonstrate the existence of an actual effect on the market (which could be accounted for by the fact *inter alia* that implementation of the agreement has been suspended since 24 November 1988) has no bearing on the outcome of this case since Article 85(1) of the Treaty prohibits both actual anti-competitive effects and purely potential effects, provided that these are sufficiently appreciable, as they are in this case, having regard to the characteristics of the market as described above ...'

89 According to the appellant, the Court of First Instance erred in law in stating that Article 85(1) prohibits both actual and potential anti-competitive effects provided they are sufficiently appreciable. It submits that the case-law of the Court of Justice allows the potential effects of an agreement to be taken into account only in order to establish whether the agreement affects trade between Member States, and not in order to determine whether it has a restrictive effect on competition. In this regard, the appellant points out that the agreement has been in force for thirteen years, which should have been long enough to determine whether or not it had actual deleterious effects.

90 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).

91 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 Joined Cases 142/84 and 156/84 *BAT and Reynolds* v

Commission [1987] ECR 4487, 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*, cited above, paragraph 7).

92 The Court of First Instance was therefore right to hold that the fact that the Commission was unable to establish the existence of an actual anti-competitive effect was irrelevant to the outcome of the dispute. The second part of this ground of appeal is therefore unfounded.

The third part of the third ground of appeal

93 In the third part of its third ground of appeal, the appellant points out that this case is different from all the others in which an information exchange system has been examined under Article 85 of the Treaty, since the information exchange system concerned is not linked to a cartel, disseminates information only on past sales and does not concern commodities.

94 The appellant observes that, although the Court of First Instance recognised, at paragraph 91 of the contested judgment, that the contested decision was 'the first in which the Commission has prohibited an information exchange system which does not directly concern prices, but which does not underpin any other anti-competitive arrangement either', it held, at paragraph 35, that the contested decision 'simply applies principles laid down in the Commission's previous decisions to a particular market, namely that for agricultural tractors in the United Kingdom'. According to the appellant, that second finding contradicts the first and led the Court of First Instance to the erroneous conclusion that the contested decision complied with the obligation to state reasons, as expounded in *Papier Peints de Belgique*.

95 That argument, in so far as it seeks to establish that paragraph 35 of the contested judgment discloses a contradiction concerning the requirements governing the statement of reasons for the contested decision, has already been dealt with at paragraphs 47 to 49 of this judgment.

96 For the rest, the appellant does not indicate with sufficient precision the paragraphs of the contested judgment and the rules of law allegedly infringed for the Court to be able to consider this part of the ground of appeal.

97 The third part is, in consequence, inadmissible.

98 It follows that the third ground of appeal is in part inadmissible and in part unfounded and must, in consequence, be rejected.

The fourth ground of appeal

99 The fourth ground concerns paragraph 38 of the contested judgment in which the Court of First Instance considered the applicants' submission that, contrary to the requirements laid down by the Court in *Consten and Grundig* v *Commission*, the scope of the operative part of the contested decision was not apparent from the statement of reasons.

100 The appellant claims that in this case the Court of First Instance did not apply the principle, formulated in *Consten and Grundig* v *Commission*, that the provision in Article 85(2) rendering agreements prohibited pursuant to Article 85 automatically void applies only to those parts of the agreement caught by the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the

agreement itself. The Court of First Instance considered that this principle was not applicable to cases in which an individual exemption under Article 85(3) is requested. According to the appellant, the members of the information exchange system, and *a fortiori* the members of the Data System, notified their agreements to the Commission primarily with a view to obtaining negative clearance and only alternatively an individual exemption under Article 85(3).

101 The appellant adds that the Court of First Instance ought not to have held that the contested decision was valid, given that it contains no consideration relating to the anti-competitive character of the entire agreement. The Commission failed to indicate clearly, in accordance with the principle laid down in *Consten and Grundig* v *Commission*, which parts of the agreement should have been eliminated in order to make the information exchange system and Data System comply with Article 85(1).

102 Paragraph 38 of the contested judgment makes it clear that, contrary to what the appellant maintains, the Court of First Instance did not fail to apply the principle laid down in *Consten and Grundig* v *Commission*. The reservation expressed in the last sentence of paragraph 38 as regards the application of this principle concerns only its relevance in the context of the application of Article 85(3) of the Treaty. Without its being necessary to consider whether the Court of First Instance's interpretation was correct, the appellant's contention must therefore be held to be unfounded.

103 In its fourth ground of appeal, the appellant also asserts that the Court of First Instance wrongly failed to find that the grounds of the contested decision did not explain why the agreement as a whole had an adverse effect on competition.

104 This assertion has already been considered at paragraph 52 of this judgment, in connection with the second part of the first ground of appeal concerning insufficient reasoning in paragraph 38 of the contested judgment.

105 Last, if the fourth ground of appeal is to be understood as challenging the finding that the provisions of the agreement are not severable within the meaning of the *Consten and Grundig* line of authority, the applicants before the Court of First Instance did not plead that the Commission made an error in assessing whether or not those provisions were severable, but merely argued that the scope of the operative part of the contested decision was not clear from its grounds. Furthermore, the appellant has not advanced any argument before the Court of Justice concerning identification of parts which might be severable from the agreement as a whole. On this point, the fourth ground of appeal is therefore inadmissible.

106 It follows from those considerations that the fourth ground of appeal is in part inadmissible and in part unfounded and must therefore be rejected.

The fifth ground of appeal

107 The fifth ground of appeal, alleging misapplication of Article 85(3) of the Treaty, concerns paragraph 99 of the contested judgment.

108 At that paragraph, the Court of First Instance held that the Commission committed no error in refusing the application for individual exemption on the ground that the restrictions of competition ensuing from the information exchange were not indispensable. The Court of First Instance pointed out that, according to the Commission, individual company data and aggregate industry data were sufficient to operate in the agricultural tractor market.

109 The Court of First Instance went on to hold, in the same paragraph, that the Commission had correctly found that the observations set out with regard to the first notification were valid, *mutatis mutandis*, with regard to the second, since the Data System continued to provide monthly data regarding the sales volume and market shares of members and dealers. The Court of First Instance found that the Commission had thus intended to argue that it was not indispensable, in order to achieve the objectives contended for, to have available information which identifies individual sales by competitors over short periods of time.

110 Finally, in the same paragraph, the Court of First Instance held, in answer to the applicants' assertions that the information gathered was necessary to ensure after-sales or warranty services, that those could be carried out perfectly well without any information exchange system of the type in question.

111 In the first place, the appellant contests the Court of First Instance's finding that the Commission's observations concerning the first notification apply *mutatis mutandis* to the second. Here the appellant points out the changes made to the timing and quality of the information disseminated, which, in its view, the Court of First Instance failed to take into account.

12 Here it is sufficient to state that by this argument the appellant is challenging the Court of First Instance's assessment of facts, which cannot be subject to review by the Court of Justice upon an appeal.

13 In the second place, the appellant states that its application for individual exemption was subordinated to the finding of infringement of Article 85(1). In its view, that finding was made on the basis of presumptions about purely hypothetical effects of the information exchange system on competition. That infringement of Article 85(1) must, it believes, also be a factor in determining whether the requirement of indispensability under Article 85(3) was satisfied.

114 On this point, it is sufficient to state that, since the appellant's arguments seeking to demonstrate misapplication of Article 85(1) have been dismissed by this judgment, the particular argument in question is not relevant.

115 In the third place, the appellant maintains that, if the Court of First Instance considered that the applicants had not proved that the timeliness of the dissemination of information on registrations by model was indispensable, it must again be submitted that the indispensability of dissemination of such information is due to the manufacturers' need for up-to-date information in order to make decisions and take action which are responsive to customer needs. The appellant criticises the Court of First Instance for telescoping its arguments to the need for the parties concerned to have available information for after-service and warranty services.

116 The appellant goes on to point out that only the largest manufacturers are in a position to gather independently certain sales data. In addition, the data thus collected are, in the appellant's view, less reliable than those shared by means of the information exchange system. Accordingly, the system provides the same quantity and the same quality of information for large and small undertakings alike, and for new entrants on the market as well. Lastly, if the information exchange system did not exist, undertakings would be forced into exchanging information directly, which could be contrary to competition law.

117 Those arguments are the same as those put before the Commission and the Court of First Instance in order to maintain that the information exchange system concerned, in particular in its Data System configuration, fulfilled the condition of being indispensable as regards restrictions. Moreover, the appellant does not specify the error of law allegedly committed by the Court of First Instance in

reviewing the exercise of its discretion conferred on the Commission by Article 85(3), nor is there anything in the case-file to support the conclusion that the Court of First Instance made any error in carrying out its review.

118 Furthermore, it does not appear that the Court of First Instance based its assessment on the premiss that the sole advantage of the information exchange system pleaded by the appellants was the need to guarantee after-sales and warranty services. First, the summary of the applicants' arguments in paragraphs 96 and 97 of the contested judgment is not confined to those aspects. Second, it appears that the relevant passage in paragraph 99 of the contested judgment is an answer to specific arguments raised before the Court of First Instance in relation to the Data System.

119 Since the fifth ground of appeal is in part inadmissible and in part unfounded, it must be rejected.

120 It follows from all the foregoing considerations that the grounds put forward 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

121 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 New Holland Ford Ltd to pay the costs.

Gulmann Moitinho de Almeida Edward

Jann Sevón

Delivered in open court in Luxembourg on 28 May 1998.

R. Grass

Registrar

C. Gulmann

President of the Fifth Chamber