OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 16 September 1997 *

1. This case comes before the Court by way of appeal by New Holland Ford Limited (hereinafter 'New Holland') against the judgment of the Court of First Instance (hereinafter 'the CFI') of 27 October 1994 [1] (hereinafter 'the contested judgment'). That judgment dismissed the application for annulment brought by New Holland and Fiatagri Limited against Decision 92/157/EEC [2] (hereinafter 'the contested decision') in which the Commission found that the UK Tractor Registration Exchange infringed Article 85(1) of the EEC Treaty, because it gave rise to an exchange of information which enabled each tractor manufacturer to learn about the sales of its various competitors and imports and sales by dealers. In this appeal, New Holland acts for itself and for Fiatagri since the latter transferred its business to New Holland on 1 January 1987 and was then wound up.

I — Facts and procedure

2. The facts underlying the dispute were described by the CFI in paragraphs 1 to 16 of the contested judgment. I shall now set out those facts, taking a somewhat different approach.

3. To be used on the public highway in the United Kingdom in accordance with national law, every vehicle must be registered with the Department of Transport. The responsibility for such registration falls to the Local Vehicle Licensing Offices (hereinafter 'LVLOs'), of which there are about 60. The registration of vehicles is governed by procedural guidelines issued by the Ministry, 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.

4. Form V55 contains a considerable quantity of information concerning the sales of vehicles. Manufacturers and importers of agricultural tractors decided to establish, on the basis of that information, an information system known as the 'UK Agricultural Tractor Registration Exchange' (hereinafter 'the Exchange'), providing information about the sales by the various manufacturers and sales and imports by dealers. The application of that agreement was suspended in 1988, but in 1990 some of the participating undertakings, including New Holland, concluded a new

* Original language: Spanish.

1 — Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905.

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

agreement for the dissemination of information, called the 'UK Tractor Registration Data System' (hereinafter 'the Data System').

5. In principle, any manufacturer or importer of agricultural tractors in the United Kingdom could join the Exchange and the Data System. The number of participants in the agreement varied while the investigation was being carried out, as a result of restructuring in the industry. At the date of notification of the Exchange, eight manufacturers, including New Holland and Fiatagri, were parties to the agreement. Those eight manufacturers were the leading economic agents in the industry, since, according to the Commission, they held 87% to 88% of the agricultural tractor market in the United Kingdom, the remainder being shared by several small manufacturers.

6. Organization of the information exchange system was entrusted to the Agricultural Engineers' Association Limited (hereinafter 'the AEA'), a trade association open to all manufacturers and importers of agricultural tractors in the United Kingdom, which at the material time had about 200 members, including in particular Case Europe Limited, John Deere Limited, Fiatagri, New Holland, Massey-Ferguson (United Kingdom) Limited, Renault Agricultural Limited, Same-Lamborghini (UK) Limited and Watveare Limited.

Processing of the data contained on form V55 was entrusted to the data-processing company Systematics International Group of Companies Limited (hereinafter 'SIL'), to which the United Kingdom Ministry of Transport passed the information obtained when agricultural tractors were registered. SIL invoiced the cost of its services to each of the members of the agreement, under individual contracts concluded between SIL and those members.

7. The content of the Exchange was determined by the data included on form V55 and the use of those data under the information agreement. New Holland and the Commission had differing views in that regard, which are reflected in paragraphs 8 to 16 of the contested judgment.

New Holland insisted that, in view of the administrative source of the information disseminated to the members of the agreement and of the fact that dealers' stocks are limited, a considerable period could elapse between the date of an order for a tractor and its date of delivery, which itself precedes the vehicle's entry into circulation on public roads and, consequently, the transmission of the information to the members of the agreement. There could therefore be a lengthy period between the date of the sale and that of registration and as a result there was no 'instant picture' of the market, so that the information collected was only approximate in nature. SIL used information appearing on

the administrative form, after which it was destroyed without having been passed on directly to the members of the agreement.

8. New Holland conceded that there were several versions of form V55, numbered V55/1 to V55/5. However, it emphasized that only form V55/1 was 'pre-completed'. Forms V55/2 and V55/4, which were used only by British Leyland, are no longer in use, whereas form V55/3, used when form V55/1 was lost, was completed manually. Finally, form V55/5 was used by independent importers and for sales of second-hand vehicles. A tractor was quite often registered after being used exclusively on private land and not on public roads. In all those cases the members had no direct access to the forms.

9. In the Commission's opinion, there are two main versions of the form: first, forms V55/1 to V55/4, which are 'pre-completed' by manufacturers and sole importers and used by dealers to register vehicles delivered to them, and, secondly, form V55/5, which is designed for parallel imports.

In paragraphs 11 to 16 of the contested judgment the CFI summarized the parties' positions concerning the data contained on the forms and the information supplied by SIL on the basis of them.

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

— make (manufacturer);

— model, serial and chassis numbers, date of registration; it is apparent from the meeting between the parties and the Judge-Rapporteur on 7 December 1993 that the information relating to serial (or chassis) numbers is recorded by SIL. However, in the system which is the subject-matter of the first notification that information is no longer disseminated to the members of the agreement, it having been agreed since 1 September 1988 that SIL is no longer to send the vehicle registration form to the members of the agreement. According to the applicants, the manufacturers need that information to conduct their recall campaigns and to check the validity of warranty claims submitted to them; the applicants state that that is the reason why that information, whose transmission to the members is also provided for by the Data System, was sent to the members until September 1988;

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

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

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

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

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

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

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

— own data, released only to the member of the agreement concerned: they relate to sales of registered tractors made by each of the dealers belonging to that member's distribution network, to data relating to the two previous categories, with a

geographical breakdown corresponding to the sales territories of that member's distribution network, to specific analyses requested by a given member, and also to registration figures for tractors sold by it.

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

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

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

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

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

given dealer (dealer-import). It does not therefore relate to exports to other Member States or imports from such States.

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

10. On 11 November 1988, the Commission issued a Statement of Objections to the AEA, to each of the eight members of the Exchange and to SIL. On 24 November 1988 the members of the Exchange decided to suspend it. 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 New Holland — notified to the Commission a new agreement for the dissemination of information, the Data System, and undertook not to implement the new system before receiving the Commission's response to their notification.

11. In Decision 92/157, the Commission:

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

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

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

12. That Commission decision was contested by New Holland before the CFI in proceedings for annulment, which were dismissed in their entirety by the judgment in Case T-34/92. On 13 January 1995, New Holland brought the present appeal against that judgment.

II — The admissibility of the appeal

13. New Holland claims that the Court should set aside the CFI judgment on the following grounds:

(a) Grounds relating to procedural errors:

— breach of the obligation to state adequately the reasons on which the contested judgment is based;

— breach of the obligation to address the material factual errors in the contested decision and their impact on the legality of the decision.

(b) Grounds relating to substantive errors:

— misapplication of Article 85(1);

— misapplication of Article 85(2) and of the principle laid down in *Consten and Grundig*; [3]

— misapplication of Article 85(3).

14. Before analysing each of those grounds, I consider it appropriate to give an overview of the criteria laid down by the Court of Justice for the admissibility of appeals against CFI judgments.

3 — Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299.

15. On the basis of the first paragraph of Article 51 of the EC Statute of the Court of Justice, which implements Article 168a(1) of the EC Treaty, and Article 112(1)(c) of its Rules of Procedure, the Court of Justice has progressively established the criteria for the admissibility of appeals.

First, in numerous decisions [4] it has held that an appeal must specify the alleged flaws in the judgment which it applies to have set aside and the legal arguments which specifically support that application. That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the CFI, including those based on facts expressly rejected by that Court. Such an appeal amounts to nothing more than a request for a re-examination of the application submitted to the CFI, a matter which falls outside the jurisdiction of the Court of Justice by virtue of Article 49 of its Statute.

Secondly, the Court of Justice has held 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 has thus taken the view that the CFI's appraisal of the evidence submitted to it does not constitute a legal issue which may be reviewed in an appeal, except where such evidence has been distorted or where the material inaccuracy of the CFI's findings is apparent from the documents in the file. The Court of Justice has no jurisdiction to examine evidence accepted by the CFI in determining the facts, provided that it was properly obtained and the general rules and principles of law concerning the burden of proof and the appraisal of evidence have been observed. On the other hand, the Court of Justice is entitled to review the legal characterization of the facts and the legal conclusions drawn from them by the CFI. [5]

That case-law lays down relatively strict criteria regarding the admissibility of appeals, in order to ensure that the appeal procedure does not *de facto* become a re-analysis of the case and to ensure that the finding of facts by the CFI is not put in question.

16. In my opinion, in competition cases arising from Commission decisions it is advisable, as suggested by Advocate General

4 — See, *inter alia*, the orders of 26 April 1993 in Case C-244/92 P *Kupka-Floridi* v *ECS* [1993] ECR I-2041, of 26 September 1994 in Case 26/94 P *X* v *Commission* [1994] ECR I-4379, of 17 October 1995 in Case C-62/94 P *Turner* v *Commission* [1995] ECR I-3177 and the judgment of 24 October 1996 in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 25 and 26.

5 — Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 67, and the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 39 and 40.

Jacobs, [6] to adopt a more restrictive interpretation of the criteria for the admissibility of appeals and in particular of the requirement laid down in Article 51 of the Statute that appeals to the Court of Justice are to be limited to points of law. Indeed, in such cases the CFI reviews a Commission decision which sets out the facts of the dispute and makes a legal assessment. The CFI, confining itself to the findings of the Commission or undertaking new investigations, establishes the facts and the Court of Justice must abide by that finding in appeal proceedings, since the function of the CFI would be undermined if the Court of Justice were required, on request by appellants, to review the factual elements of CFI judgments.

In view of that restrictive approach, as the Commission submits in its response, the Court of Justice should be very strict in deciding as to the admissibility of grounds of appeal in which the parties contend that the facts have been distorted by the CFI and, with a view to having the Court of Justice re-examine the facts of the case, allege that the CFI has committed a manifest error of assessment.

17. In this case, the Commission, in its response, contests the admissibility of the appeal as a whole because it does not clearly identify the disputed points in the contested judgment, merely repeats the arguments rejected by the CFI and re-interprets the facts established by the CFI. After the appellant clarified its grounds of appeal in its reply the Commission partially changed its position and proceeded to refute the grounds relied on by New Holland.

18. Although the appeal submissions were not remarkable for their clarity and precision, I consider that they raise a number of legal issues which may be relied on in an appeal: it is not therefore appropriate to declare the appeal inadmissible as a whole, even though certain specific grounds may be dismissed.

However, I wish to draw attention to the fact that the attitude of the appellant, which re-interprets the facts established by the CFI in the contested judgment and expressly bases its grounds of appeal on that re-interpretation, is not in harmony with the criteria laid down by the Court of Justice to ensure that appeals are properly conducted.

6 — Opinion of Advocate General Jacobs in *Hilti* v *Commission*, cited above, paragraphs 8 to 12 and 46 to 49.

III — The grounds of appeal

A. *Breach of the obligation to state adequately the reasons on which the contested judgment is based*

19. New Holland considers that in the contested judgment the CFI merely undertook a purely formal re-examination of the contested decision, without taking account of the manifest errors which, according to the applicants, were committed by the Commission in its assessment of the facts and application of the law. New Holland thus considers that the CFI did not comply with the case-law of the Court of Justice laying down the general principle that every court is under an obligation to state the reasons on which its decisions are based, indicating in particular the reasons which led it not to uphold a complaint expressly raised before it. [7]

In particular, New Holland contends that the CFI did not take account in the contested judgment of all the evidence produced in the written and oral phases of the procedure or of the fact that the Commission accepted some of the arguments put forward by the applicants and SIL regarding certain aspects of the information exchange system. Nor did the CFI deal with the legal and economic arguments raised by the parties at the hearing, in particular the analysis made by Professor Albach of the structure of the relevant market, the complexity of agricultural tractors as a product, the evolution of the undertakings' market shares and the effect of the information exchange agreement on price levels.

20. New Holland then identifies in its appeal a number of arguments concerning inadequate reasoning of the contested decision which it raised before the CFI and which the latter dismissed without giving sufficient reasons or did not refer to in the contested judgment. Those arguments relate to the following points:

— insufficient reasoning of the contested decision;

— imprecision of the content of the contested decision;

— definition of the relevant product and market;

— improper use of the term 'dominance'.

7 — Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 29, and Case C-68/91 P *Moritz* v *Commission* [1992] ECR I-6849, paragraph 21.

21. Insufficiency of reasoning is an admissible ground of appeal. However, in this case I consider that New Holland does not clearly identify the legal deficiencies in the reasoning of the contested judgment. The arguments which New Holland raises in this ground of appeal under the heading of insufficient reasoning of the contested judgment do not meet the conditions laid down by the case-law of the Court of Justice regarding the admissibility of appeals.

Quite apart from the manifest lack of clarity and precision in the formulation of this ground of appeal, I consider that New Holland is merely questioning the appraisal and evaluation of the evidence made by the CFI in the contested judgment, or is again putting to the Court of Justice the same arguments as were rejected by the CFI in the contested judgment.

22. In any event I consider that the CFI gave sufficient reasons in its judgment regarding the points indicated by New Holland in the present ground of appeal. The CFI mentioned the parties' positions relating to the various pleas in law, summarizing their main arguments, and then disposed of the issues, duly explaining its position.

23. I therefore propose that the Court of Justice treat this ground of appeal as inadmissible.

B. *Breach of the obligation to address the material factual errors in the contested decision and their impact on the legality of the decision*

24. The appellant alleges that in paragraph 66 of the contested judgment it was acknowledged that the contested decision contained a number of errors of fact concerning characteristics of the information exchange agreement, but the CFI, instead of drawing the logical consequences from those errors, proceeded in paragraphs 67 to 72 of the contested judgment to 're-write' the contested decision in such a way that those errors did not affect the legality of the decision. Moreover, other fundamental errors invoked by the applicants and established by the CFI in its exhaustive investigation were not dealt with in the contested judgment. That omission extended to most of the errors to which the applicants drew attention and which the CFI summarized in paragraphs 58 to 61 of the contested judgment.

New Holland considers that, in accordance with the judgment in *Commission* v *Brazzelli Lualdi and Others* [8] the Court of Justice has jurisdiction in an appeal to find the facts where the substantive inaccuracy of the

8 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49.

factual findings of the CFI is apparent from the documents submitted to it.

25. New Holland then gives a number of examples of manifest errors or inaccuracies in the contested decision which the CFI did not analyse or from which it failed to draw the proper consequences in the contested judgment, despite the evidence produced by the applicants. Those errors are as follows:

— tractors should be regarded as a differentiated product;

— the features of the information exchange agreement prior to the notification are irrelevant;

— there was no agreement as to the organization of dealer territories;

— the information available under the Exchange and the Data System was misunderstood;

— the specificity of the Data System was overlooked;

— 'full' transparency regarding prices; destruction of 'hidden competition'.

26. As New Holland points out, the decision in *Commission* v *Brazzelli Lualdi and Others*, recently confirmed in the order in *San Marco* v *Commission*, [9] allows the Court of Justice to examine in an appeal the facts established by the CFI where the substantive inaccuracy of the factual findings of the CFI is apparent from the documents submitted to it. In its response the Commission asserts that the judgment in *RTE and ITP* v *Commission* [10] does not refer to the matter of substantive inaccuracy and therefore implies that *Commission* v *Brazzelli Lualdi and Others* has been overruled on that point. I do not share the Commission's view on that point and the order in *San Marco* v *Commission* confirms that the case-law of the Court of Justice has not changed in that respect.

27. However, in this ground of appeal New Holland does not identify any material inaccuracy on the part of the CFI in establishing the facts in the contested judgment, evi-

9 — Order in *San Marco* v *Commission*, cited above, paragraph 39.

10 — *RTE and ITP* v *Commission*, cited above, paragraph 67.

denced in the documents before the Court. The appellant merely draws attention to a number of errors and material inaccuracies in the contested decision which it alleged before the CFI and which the latter did not establish or from which it did not draw in the contested judgment the relevant consequences concerning the validity of the Commission's decision.

In fact, in this ground of appeal the appellant merely questions the appraisal and evaluation made by the CFI, in paragraphs 58 to 78 of the contested judgment, of the evidence put before it regarding certain matters of fact in the contested decision. New Holland expresses its disagreement with the probative value attributed by the CFI to the various items of evidence but does not indicate any substantive inaccuracy in the findings of the CFI appearing in the documents before the Court.

28. According to the case-law of the Court of Justice, it is for the CFI alone to assess the value which should be attached to the items of evidence produced to it and in an appeal the Court of Justice has no jurisdiction to decide as to the facts or the evidence admitted by the CFI to support them provided that the evidence was duly obtained and the rules and general principles of law relating to the burden of proof were observed together with the rules of procedure relating to the taking of evidence. [11]

29. According to that case-law, the present ground of appeal is inadmissible since New Holland merely questions the appraisal and evaluation of the evidence carried out by the CFI and raises before the Court of Justice the same arguments as those rejected by the CFI in the contested judgment. In any event, I consider that the CFI sufficiently justified, in paragraphs 58 to 78 of the contested judgment, its appraisal of the evidence, with the result that the Court of Justice is in a position to undertake the review required under Community case-law. The CFI cannot be required to indicate in detail the importance which it attaches to each item of evidence or to explain all the reasons which prompt it to accord greater probative value to some items of evidence than to others.

30. This ground of appeal should therefore be dismissed.

11 — *Commission* v *Brazzelli Lualdi and Others*, cited above, paragraph 66, and the order in *San Marco* v *Commission*, cited above, paragraph 40.

C. *Misapplication of Article 85(1) of the EC Treaty*

31. New Holland states that the CFI misapplied Article 85(1) in the contested judgment in two important respects. In its opinion, the CFI wrongly defined and described the relevant market and also wrongly interpreted the requirements for an agreement or concerted practice to be incompatible with Article 85(1), in particular the requirement of an anti-competitive object or effect. New Holland then sets out its arguments in support of this ground of appeal, under the following headings: the relevant market, the anti-competitive effects of the information exchange agreement and the absence of support from Community precedents or economic theory.

1. The relevant market

32. As far as the relevant market is concerned, the appellant claims that the CFI breached its obligation to apply correctly the legal principle established in *United Brands* v *Commission*, according to which reference must be made in its examination to the 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 homogeneous. [12] In New Holland's view, the CFI confined itself, in the contested judgment, to making a purely formal examination of the contested decision without analysing, in the light of the applicants' arguments, the Commission's assessment of the product market, the geographical market and the structure of the relevant market.

33. With respect to the relevant product market, the appellant does not in fact examine the accuracy of the assessment made by the CFI, which, after taking account of the degree of substitutability, took the view in paragraph 51 of the contested judgment that the relevant product was agricultural tractors. Indeed, New Holland does no more than argue that the CFI erred in accepting the Commission's description, by virtue of which tractors are a homogeneous product, because the evidence supplied to the CFI by the applicants showed that agricultural tractors constitute a highly differentiated and technically complex product. The CFI's error in determining the characteristics of agricultural tractors led it to evaluate incorrectly the effects of relative transparency on the relevant market.

34. In my view, New Holland's argument to that effect must be rejected. The CFI adequately applied, in paragraph 51 of the contested judgment, the criterion of substitutability established by the Court of Justice in order to determine the relevant product

12 — Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 11.

market. [13] The members of the information exchange agreement were potentially all the manufacturers of tractors, and consequently, as the CFI pointed out, the undertakings themselves defined the relevant product. Moreover, New Holland has not put forward any arguments proving insufficient substitutability as between the various models of tractors marketed in the United Kingdom and thus demonstrating that the different models constitute differentiated relevant markets.

35. As regards the finding concerning the geographical market, New Holland is of the opinion that the CFI erred in paragraph 56 of the judgment in considering that the United Kingdom, rather than the Common Market as a whole, is the relevant market. According to the criterion established in *United Brands,* the relevant geographical market should have been the entire territory of the Community because the Community market in agricultural tractors displays homogeneous conditions of competition.

36. That argument must be rejected. To my mind the CFI correctly applied the *United Brands* judgment and the case-law of the Court of Justice in determining the geographical extent of the relevant market. [14] As the CFI indicated in paragraph 56 of the contested judgment, it could have been considered that the market in agricultural tractors was Community-wide, but the application of the information exchange agreement to the United Kingdom market limited the relevant geographical market to the United Kingdom, which was where that agreement took effect. The Court of Justice has often identified the geographical extent of the relevant market with the area where the concerted practice took effect, [15] which in a good number of cases was the territory of a Member State. The reasoning of the CFI in the contested judgment thus seems to be perfectly valid.

37. As regards the description of the structure of the relevant market, New Holland argues that the contested judgment and the contested decision mis-characterize it in various fundamental respects. Thus, the CFI considered that the market share of the four large manufacturers has remained stable and that there has been no significant penetration by competitors, that there were strong barriers to entry to the market deriving from the high costs needed in order to set up a distribution system, the existence of brand loyalty and the information exchange agreement, and that the selling prices of agricultural tractors in the United Kingdom were lower than in other Member States. According to

13 — See, *inter alia*, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37, and Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 13.

14 — See A. Frignani and M. Waelbroeck, *Disciplina della Concorrenza nella CE*, UTET, Turin, 1996, p. 243 et seq.

15 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, *Michelin* v *Commission*, cited above, and Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359.

New Holland, those factual assessments concerning the characteristics of the relevant market are based on Commission investigations and the economic analysis by Professor Neumann, the expert nominated by the Commission. New Holland provided the Commission with abundant evidence and a more rigorous economic analysis, carried out by Professor Albach, which showed the abovementioned findings to be incorrect but which the CFI did not take into account in the contested judgment.

38. New Holland's argument is inadmissible in an appeal because it questions the assessment and the probative value accorded by the CFI to the evidence produced to it. New Holland has not alleged that evidence was distorted or that the substantive inaccuracy of the CFI's findings is apparent from the documents before the Court. Since, in the contested judgment, the CFI obtained evidence in the proper manner and observed the rules and general principles regarding the burden of proof and the assessment of evidence, the Court of Justice has no jurisdiction in an appeal to examine the evidence which the CFI accepted in order to establish the facts.

2. The anti-competitive effects of the information exchange agreement

39. New Holland considers that the CFI erred in law in stating in paragraph 93 of the contested judgment that Article 85(1) prohibits both actual anti-competitive effects and potential effects, provided that the latter are sufficiently appreciable. Accordingly, the CFI considered it irrelevant that the Commission had not proved the actual anti-competitive effects of the information exchange agreement on the United Kingdom market in agricultural tractors.

According to New Holland, the case-law of the Court of Justice [16] allows account to be taken of the potential effects of an agreement only in order to determine whether it affects trade between Member States, but not to show that it has a restrictive effect on competition. Therefore, the CFI should have required the contested decision to have contained an analysis of the actual effects on competition of the information exchange agreement. In the alternative, New Holland argues that it is necessary to demonstrate the actual effects on competition at least in the case of agreements which have actually been applied. The information exchange agreement was applied for 13 years until it was suspended on 24 November 1988 and the Commission should have examined its actual effects on competition in the United Kingdom market in agricultural tractors and the evolution of that market from the time of suspension of the application of the agreement to the date of adoption of the contested decision.

16 — Case 56/65 *Société Technique Minière* [1966] ECR 235, particularly at 249, and Case 126/80 *Salonia* [1981] ECR 1563, paragraph 12.

40. Those arguments cannot be upheld.

41. For an agreement to be contrary of Article 85(1) it must have 'the object or effect of preventing, restricting or distorting competition in the common market'. According to the case-law of the Court of Justice, [17] it is necessary first to check whether the object of the agreement in itself constitutes a restriction of competition. If it does, the condition laid down by the provision is fulfilled and it is unnecessary to examine its effects. Only if it is concluded that the object of the agreement does not involve a restriction of competition is it appropriate to analyse its effects to see whether it gives rise to such a restriction. [18]

The effects of an agreement must be assessed in relation to the competition which would prevail in the relevant market if that agreement had not existed. Accordingly, the Court of Justice considers that the Commission's examination of agreements 'must be based on an assessment of the agreements as a whole', which means that both the actual effects and the potential effects of those agreements on competition must be taken into account, [19] and also the entire economic context in which competition would operate in the absence of the agreement. [20] It is also necessary for the agreement to have an appreciable effect on competition. [21]

In addition to restriction of competition, an effect on intra-Community trade is a further necessary requirement for there to be an infringement of Article 85(1). Those two requirements are closely linked with each other in the case-law of the Court of Justice, [22] which refers without distinction to the relevance of the potential effects of agreements on competition or on intra-Community trade. However, it certainly cannot be asserted, as New Holland suggests, that Community case-law takes into account the potential effects of agreements on intra-Community trade and that, on the contrary, it requires proof of actual effects on competition.

Determination of the effects of an agreement on competition constitutes a complex economic appraisal and the Court of Justice has held that, although it should undertake a comprehensive review of whether the conditions for the application of Article 85(1) are fulfilled, its review of complex economic appraisals by the Commission is necessarily

17 — See in particular *Société Technique Minière*, cited above, at 249; *Consten and Grundig*, cited above; Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 19; Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 18; Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 39, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487.

18 — See the Opinion of Advocate General Tesauro in Case C-250/92 *DLG* [1994] ECR I-5641, paragraphs 15 and 16.

19 — *BAT and Reynolds* v *Commission*, cited above, paragraph 54, and Case T-19/91 *Vichy* v *Commission* [1992] ECR II-415.

20 — Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515.

21 — Case 5/69 *Völk* [1969] ECR 295 and Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533.

22 — See C. Bellamy and D. Child, *Derecho de la Competencia en el Mercado Común*, Civitas, Madrid, 1991, p. 142.

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. [23]

42. In the present case, the information exchange agreement did not have an anti-competitive object and, therefore, it was necessary to consider its effects on competition in the United Kingdom agricultural tractor market. In the contested judgment, the CFI considers that the Commission sufficiently demonstrated, in the contested decision, the restrictive effects of the information exchange agreement.

That appraisal by the CFI appears to me to be consonant with the case-law of the Court of Justice mentioned above. The Commission duly explained in the contested decision the potential restrictive effects on competition of the information agreement, having regard to the characteristics of the United Kingdom agricultural tractor market (closed oligopoly with high barriers to entry) and the content and periodicity of the information exchanged between the principal economic agents in the market. An analysis was made of a complex economic situation and the CFI carried out, in the contested judgment, the judicial review provided for by the case-law of the Court of Justice.

I do not consider that the CFI should have required the Commission to carry out an analysis of the actual effects of the agreement on competition in the United Kingdom agricultural tractor market, in which it would have indicated the prices and market shares of each trader that would have prevailed if there had been no information exchange agreement. Proof of the anti-competitive effects of that agreement would have been a requirement that the Commission would have found difficult to fulfil, [24] and which would be unnecessary since the characteristics of the relevant market and the object of the information exchange agreement were sufficient to show that it was capable of restricting competition.

43. For all those reasons, I consider that this part of the ground of appeal cannot be upheld.

3. The lack of arguments based on Community precedents or economic theory

44. New Holland claims that the contested decision is entirely novel and that there are no precedents since it is the first time that

23 — *Remia* v *Commission*, cited above, paragraph 34, and *BAT and Reynolds* v *Commission*, paragraph 62.

24 — The difficulty of proving the actual effects on intra-Community trade of an agreement restrictive of competition has been highlighted in Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 19.

the Commission has expressed its views on a 'pure' information system, not linked with any anti-competitive agreement, which only disseminates information on past sales and does not relate to a basic product. Paragraph 91 of the contested judgment recognizes that the contested decision 'is the first in which the Commission prohibited an information exchange agreement which does not directly concern prices, but which does not underpin any other anti-competitive arrangement either', but the CFI considered, in paragraph 35 of the contested judgment, 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 New Holland, that second view expressed by the CFI, contradicting the first, prompted it to consider that the contested decision complied with the obligation of a higher standard of reasoning which applies to Commission decisions that break new ground, in accordance with the *Papiers Peints* judgment. [25]

45. I find it difficult to understand New Holland's argument: the absence of precedents requires a more detailed statement of reasons for Commission decisions and the breach of that obligation, recognized in the *Papiers Peints* judgment, could be invoked in an appeal by alleging an inadequate statement of reasons, not the misapplication of Article 85(1).

25 — Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, paragraph 33.

46. Apart from the fact that New Holland does not precisely identify the issue of law which it raises in this part of the present ground of appeal, I consider that those arguments were put forward in the same terms before the CFI, which rejected them in paragraph 35 of the contested judgment. Moreover, when the appellant does introduce a new argument, it does so in reliance on a definition of the characteristics of the relevant market which differs from that established in the contested judgment. For all those reasons, I consider that this part of the ground of appeal is inadmissible.

47. In view of the foregoing considerations, I am of the opinion that this ground of appeal is partially inadmissible and that the admissible parts should be dismissed.

D. *Misapplication of Article 85(2) and of the principle laid down in* Consten and Grundig

48. The appellant considers that the CFI erred in declining, in paragraph 38 of the contested judgment, to apply the principle laid down in *Consten and Grundig* according to which the nullity provided for in Article 85(2) applies only to those parts of the agreement which are contrary to Article 85(1) or to the agreement as a whole, where those parts do not appear to be severable

from the agreement itself. [26] According to New Holland the CFI should not have considered the contested decision valid because the Commission did not specify those parts of the information exchange agreement which the undertakings should have removed in order to make it compatible with Article 85(1).

49. This ground of appeal cannot be upheld. In my opinion, the CFI correctly applied *Consten and Grundig* in paragraphs 36 to 38 of the contested judgment since it took account of the parties' submissions in that regard and took the view, correctly, that the content of the contested decision made it clear that the Commission considered the information exchange agreement in its entirety to be incompatible with Article 85(1). It was not possible to distinguish within that agreement certain parts that should be eliminated with a view to rendering it legal because it operated as a structured whole. Indeed, the appellant does not make any submission in this ground of appeal concerning identification of parts of the agreement which might be severable from it.

E. *Misapplication of Article 85(3) of the EC Treaty*

50. In this ground of appeal, in which once again it is difficult clearly to identify the issues raised, New Holland objects to the solution adopted by the CFI in paragraph 99 of the contested judgment regarding the application of Article 85(3) to the information exchange agreement. The CFI confirmed the contested decision, considering that the restrictions of competition resulting from that agreement were not needed in order to attain the objectives set by the undertakings participating in it. The Commission properly explained, in the view of the CFI, how the manufacturers of agricultural tractors in the United Kingdom could achieve their objectives by using an information system with lesser anti-competitive effects or having recourse to other mechanisms such as the identification of market data by each undertaking.

New Holland considers that reasoning of the CFI to be incorrect and that as a result the CFI incorrectly applied Article 85(3). First, it reiterates that the timescale provided for in the information exchange agreement was necessary for the manufacturers to learn in due time of fluctuations in demand in order to match their supply to customer demand. Secondly, the appellant states that the information exchange agreement allows all manufacturers, both large and small, to obtain the same information because it is managed by an independent data-processing company. If there were no agreement large manufacturers would be better placed than small ones to learn about the market.

51. This ground of appeal is admissible, since it relates to a matter of law, namely

26 — *Consten and Grundig*, cited above, at 344.

determination of the need for the information exchange agreement, this being one of the preconditions for an individual exemption under Article 85(3). [27] However, I am of the view that it must be dismissed. The appellant adduces no convincing arguments to show any manifest error of assessment in the solution adopted in the contested decision, confirmed in paragraph 99 of the contested judgment. To adjust to customer requirements and ensure after-sales and guarantee services it would not appear necessary to use an information exchange agreement which supplies, at short intervals, individualized data concerning competitors' sales. The effects of a system of that kind are positive in an atomized market, but in an oligopolistic market like that of agricultural tractors in the United Kingdom its effects are harmful because it discourages competition between manufacturers.

52. Consequently, this ground of appeal should be dismissed.

Costs

53. Under Article 69(2) of the Rules of Procedure, which apply to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Consequently, if, as I suggest, the grounds of appeal relied on by the appellant are dismissed, it should be ordered to pay the costs.

Conclusion

In view of the foregoing considerations, I suggest that the Court of Justice:

(1) declare the appeal partially inadmissible;

(2) dismiss the admissible grounds of appeal;

(3) order the appellant to pay the costs.

27 — See Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraphs 24 to 29.