JUDGMENT OF THE COURT (Second Chamber)

21 September 2006 *

In Case C-167/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 5 April 2004,

JCB Service, represented by E. Morgan de Rivery and E. Friedel, lawyers,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, J. Makarczyk, R. Silva de Lapuerta, P. Kūris and G. Arestis (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 October 2005,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

Judgment

1 By its appeal, JCB Service applies for the judgment of the Court of First Instance of the European Communities of 13 January 2004 in Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49 ('the judgment under appeal') to be set aside in full or in part; that judgement allowed in part the application for annulment of Commission Decision 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP.F.1/35.918 — JCB) (OJ 2002 L 69, p. 1) ('the contested decision').

Legal context

2 Article 2 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87, 'Regulation No 17') provides that upon application by the undertakings or associations of undertakings concerned, the Commission of the European Communities may certify that, on the basis of the facts in its possession, there are no grounds under Article 81(1) EC or Article 82 EC for action on its part in respect of an agreement, decision or practice.

3 Under Article 3(1) of that regulation, where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 81 EC or Article 82 EC, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

4 Article 4(1) of Regulation No 17 provides that agreements, decisions and concerted practices of the kind described in Article 81(1) EC which come into existence after the entry into force of that regulation and in respect of which the parties seek application of Article 81(3) EC must be notified to the Commission.

5 Under Article 4(1) and (2) of Regulation No 27 of the Commission of 3 May 1962, First Regulation implementing Council Regulation No 17 of 6 February 1962 (Form, content and other details concerning applications and notifications) (OJ, English Special Edition 1959-1962, p. 132), as amended by Regulation (EEC) No 1133/68 of the Commission of 26 July 1968 (OJ, English Special Edition 1968(II), p. 400, 'Regulation No 27'), applications under Article 2 of Regulation No 17 relating to the applicability of Article 81(1) EC and notifications under Article 4 of that regulation are to be submitted on Form A/B and are to contain the information asked for in that form.

6 Article 15, relating to fines, of Regulation No 17 provides:

'...

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

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

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

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

...

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

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

7 The Commission Notice of 14 January 1998 entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3, 'the Guidelines') states inter alia:

'The principles outlined [in the Guidelines] should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

8 Under Section 1 of the Guidelines, the basic amount of the fine is to be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17.

9 According to those guidelines, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

10 In this respect, Section 1A of the Guidelines distinguishes between minor, serious and very serious infringements. With regard to very serious infringements, it is stated in that section that these will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly.

11 In relation to the duration of an infringement, a distinction is made under Section 1B between infringements of short duration — in general, less than one year — which do not lead to an increase in the basic amount of the fine, infringements of medium duration — in general, one to five years — and those of long duration — in general, more than five years — for which the amount of the fine can be increased by up to 10% per year in the amount determined for gravity.

12 Section 2 of the Guidelines provides that the basic amount will be increased where there are aggravating circumstances such as, inter alia, retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement. Section 3 of the Guidelines also provides for the basic amount to be reduced where there are attenuating circumstances.

Factual background to the dispute

13 JCB Service is a company incorporated under English law, held by Transmissions and Engineering Services Netherlands BV. It owns and controls directly or indirectly the companies in the JCB Group, which comprises 28 companies, in particular JC Bamford Excavators, JCB Sales, JCB SA, JCB Germany and JCB Spain. The JCB group manufactures and markets construction site machinery, earthmoving and construction equipment and agricultural machinery as well as the spare parts for those various products.

14 The JCB Group's distribution network is structured on a national basis with one subsidiary per Member State (in, the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic and the Kingdom of the Netherlands) or one exclusive importer.

15 Two companies in the JCB Group (JC Bamford Excavators and JCB Sales) notified to the Commission in June 1973, using form A/B drawn up pursuant to Regulation No 27, several standard distribution agreements to be concluded with the distributors or main dealers linked to the group. Those agreements concerned the Member States of the common market, except for the French Republic. Companies of the JCB group also notified agreements applicable in other States which have since become Member States of the European Union, namely the Greek Republic, the Kingdom of Spain, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden, or of the European Economic Area (EEA), namely the Republic of Iceland and the Kingdom of Norway.

16 The agreements were registered by the Commission on 30 June 1973.

17 By letter of 27 October 1975, the Commission's Directorate-General (DG) for Competition informed JCB Sales that the agreements notified entailed several restrictions in breach of the provisions of Article 81 EC and required their amendment. The Commission focused on the agreements concerning the common market, stating that the other agreements did not seem likely to affect trade between the Member States.

18 On 18 December 1975, during a meeting held between staff of DG Competition and JCB Service, the latter had submitted revised versions of the agreements concerning

the United Kingdom of Great Britain and Northern Ireland and other Member States of the common market at the material time, except for the French Republic.

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

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

21 Furthermore, at a meeting held on 18 March 1976, JCB Service provided the Commission with certain additional information, but not a new version of the agreements in question.

22 On the same date, JCB Service also provided a copy of an agreement concluded with its French subsidiary JCB SA which was similar to the agreements already notified.

23 There were no developments on the JCB notification file until 6 March 1980, when JCB Sales sent the Commission the standard UK distributor agreement replacing the agreements notified in 1973 and 1975, which had expired, and, according to JCB Sales, contained only minor changes.

24 By letter of 29 December 1995, JCB Sales sent the Commission another UK distributor standard agreement replacing the agreement notified in 1980.

25 The two agreements mentioned above were not notified to the Commission on a Form A/B; the latter did not react to the despatch of those agreements.

26 By judgment of 11 December 1995, the Tribunal de Commerce de Paris (Commercial Court, Paris) (France) dismissed in part an action for unfair competition brought on 28 November 1990 by JCB Service's subsidiary in France, JCB SA, as exclusive importer of JCB products in France, against Central Parts SA ('Central Parts'), which obtained JCB Group spare parts from the United Kingdom in order to resell them in France. JCB SA had accused Central Parts of using the JCB sign and the description 'distributeur agrée' (authorised distributor) unlawfully. That judgment was subsequently overturned by judgment of 8 April 1998 of the Cour d'appel de Paris (Court of Appeal, Paris) (France), on the ground that Central Parts had engaged in unfair competition vis-à-vis JCB SA.

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

28 In order to verify and supplement the information in its possession, the Commission carried out an investigation pursuant to Article 14(3) of Regulation No 17 at the premises of JCB Service, of its French subsidiary, JCB SA, and of two of its official distributors in the UK, namely Gunn JCB Ltd and Watling JCB Ltd whose registered offices are in Altrincham and Leicester respectively.

29 On 24 March 1998, the Commission sent a first statement of objections to JC Bamford Excavators, which did not take account of the notification of the agreements made in 1973. JCB pointed out that omission on 6 July 1998 in its written observations in response to the statement of objections and then when it was heard by the Commission's departments on 16 October 1998.

30 A second statement of objections taking account of the 1973 notification was sent to JCB Service (JC Bamford Excavators) on 30 July 1999, to which JCB Bamford Excavators replied in writing on 13 December 1999, before its oral submissions at the hearing held in January 2000.

The contested decision and the procedure before the Court of First Instance

31 On 21 December 2000 the Commission adopted the contested decision. Having set out the relevant facts of the case, the Commission considered first the infringement of Article 81(1) EC by JCB Service and its subsidiaries (recitals 137 to 196 in the preamble to the contested decision).

32 The Commission examined whether the agreements at issue had the object or effect of restricting or distorting competition. After assessing the restrictive object and effect of those agreements and practices as a whole, the Commission took the view that there was partitioning of national markets and absolute territorial protection. Having regard to the position of JCB Service and its subsidiaries in the relevant markets and the very nature of the restrictions involving market partitioning between several Member States, through absolute territorial protection and price fixing, the Commission stated that the restriction of competition and the likely effects on trade between Member States were appreciable.

33 In particular, in relation to the question as to whether the agreements at issue had the object or effect of restricting or distorting competition, the Commission took the view, in recital 140 of the contested decision, that JCB Service and its official distributors had implemented various agreements or concerted practices which had as their individual object or effect the restriction of competition in different Member States, within the meaning of Article 81 EC. These were elements of a broader agreement restrictive of competition within the meaning of that article which governed the distribution of JCB Group machines and spare parts in the EC.

34 Such elements, which, according to the Commission, did not need to be defined precisely as either agreements or concerted practices in so far as they were caught by Article 81(1) EC, were the following:

— the prohibition or the restriction on official JCB Group distributors selling outside their allotted territories, in particular to other Member States, covering active and passive sales to end-users and to resellers, both authorised and unauthorised;

— the imposition of a service fee on sales made by official distributors outside their allotted territories, in particular to other Member States;

— the implementation, at least in the United Kingdom, of the remuneration system named 'Multiple Deal Trading Support', which makes allowances granted to distributors dependent on the destination of sales and limited to sales to end-users;

— the determination of resale or retail prices or discounts for goods purchased from the JCB group for resale by official distributors of that group; and

— the obligation for official distributors to purchase exclusively from the JCB group all their machines and spare parts for resale, preventing, in particular, purchases from distributors in other Member States.

35 In relation to the restrictive object and effect of the various elements of the agreements as a whole, the Commission took the view, in recital 180 of the contested decision, that the context of differences in prices and profits across Member States for JCB Group machines and parts sheds light on the group's and some of its official distributors' interests in partitioning national markets and fixing resale prices or discounts within the common market so as to prevent purchasers from taking advantage of wide price differentials across the EC.

36 In recital 181 of that decision, the Commission stated that the combination of the restrictions in the agreement between the JCB group and its official distributors consistently pursued the object of partitioning national markets within the common market with a view to providing absolute territorial protection.

37 In recital 182 of the contested decision, the Commission considered that by their very nature, the arrangements on the discounts to be applied, as well as the objective of maximising gross margins agreed by the JCB group and its official distributors across the United Kingdom, distorted and harmonised market prices across territories. According to the Commission, the same was true in respect of the special financial support offered by the JCB group in France to distributors, who competed with parallel traders.

38 The Commission pointed out, moreover, in recital 185 of the contested decision, that the availability of a territory as a precondition for, and hence a restriction on, becoming an official distributor of the JCB group did not directly relate to the quality of the service to be provided. A distributor located in an area where an official distributor of the JCB group operated to the entire satisfaction of the latter would not become a distributor of that group, irrespective of its potential or actual merits. As a result of that limitation the number of distributors, and competition derived therefrom, was quantitatively limited by the condition that they were allocated a territory. That limitation in the JCB group's selective distribution system, which was neither of a qualitative nature nor laid down uniformly for all potential resellers, could be caught by Article 81(1) EC.

39 In addition, according to recital 187 of the contested decision, the official UK distributors who were prevented from selling new machines to unauthorised resellers were also requested to pay a service fee on sales made outside their territory. That fee was intended to maintain the JCB Group's service standards, whilst compensating for the cost to the local distributor of providing services for a machine which it did not sell.

40 In those circumstances, as stated in recital 188 of the contested decision, the prohibition on directly or indirectly selling machines to unauthorised resellers in other Member States went beyond the goal of assuring high service standards and had the object or the effect of restricting competition.

41 According to recital 189 of the contested decision, the market partitioning effects of the combination of territorial exclusivity restricting cross-border sales and selective clauses were further increased by three other restrictions, namely, first, a prohibition on or restriction of cross-supplies within the official network, second, a service

support fee levied on sales made outside the allotted territory and, third, the Multiple Deal Trading Support in the United Kingdom.

42 In that context, the Commission concluded, first, in recital 191 of the contested decision, that the restrictive objects and effects of the various elements of the agreement were mutually supportive in preventing or restricting imports or exports within and outside the JCB group's distribution network in order to grant absolute territorial protection. The combination of selective distribution (the ban on sales to unauthorised resellers) in the JCB group's distribution agreements with, first, the three categories of restrictions, then, the other restrictions that artificially harmonised prices and discounts across different territories and, finally, the territorial protection restricting passive sales, clearly had the anti-competitive object of partitioning national markets in the EC and was therefore caught by Article 81(1) EC.

43 Second, the Commission examined whether the conditions required under Article 81(3) EC were fulfilled and concluded that this was not the case here (recitals 197 to 222).

44 Third, after considering that it had no evidence that the infringement of Article 81 EC had been brought to an end and finding that the JCB group denied that any such infringement existed, the Commission took the view, in recital 224, that it was necessary, pursuant to Article 3(1) of Regulation No 17, to require the JCB group to bring that infringement to an end.

45 Finally, the Commission decided on the fine to be imposed. In this regard, before deciding on the fine, it made the finding, in recital 228, that only the agreements notified using the form A/B on 30 June 1973 had been duly notified. Therefore, according to the Commission, the other agreements sent to the Commission without using that form could not be taken into account for the purposes of applying Article 15(5) of Regulation No 17.

46 In relation to the amount of the fine to be imposed, the Commission pointed out, in recital 247, that regard had to be had both to the gravity and to the duration of the infringement, while also taking into account, where appropriate, aggravating and mitigating circumstances.

47 As regards, first of all, the gravity of the infringement, the Commission took the view, in recital 251, that the infringements committed were 'very serious' and on that basis fixed the fine at EUR 25 million.

48 Concerning next the duration of the infringement, the Commission stated, in recital 252, that the different elements of the infringements had been in force from 1988 to 1998.

49 In those circumstances, the Commission made clear, in recital 253, that the 11-year period in which at least one element of those agreements or practices had been in force was therefore to be regarded as of long duration. It then concluded, in recital 254, that the basic amount of the fine resulting from the gravity and the duration of the infringement was to be EUR 38 750 000.

50 Finally, taking account of one aggravating circumstance, that is the financial penalty imposed on one distributor as a retaliatory measure for making sales outside the territory, the Commission increased the fine imposed by EUR 864 000 stating, in recital 257, that there were no mitigating circumstances that needed to be taken into account. Therefore, the total amount of the fine imposed by the Commission pursuant to Article 15(2) of Regulation No 17 was EUR 39 614 000.

51 Against that background, the contested decision included the following:

'*Article 1*

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

(a) restrictions on passive sales by authorised distributors in the United Kingdom, Ireland, France and Italy, which include sales to unauthorised distributors, end users or authorised distributors located outside exclusive territories and, in particular, in other Member States;

(b) restrictions on sources of supply regarding purchases of contract goods by authorised distributors located in France and Italy, which prevent cross supplies between distributors;

(c) fixing of discounts or resale prices applicable by authorised distributors in the United Kingdom and France;

(d) imposition of service support fees on sales to other Member States effected by authorised distributors outside exclusive territories in the United Kingdom on the initiative of and according to fixed scales set forth by JC Bamford Excavators Ltd or other subsidiaries of JCB Service, thereby making distributors' remuneration dependent on the geographic destination of sales;

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

Article 2

The application for exemption submitted by JC Bamford Excavators Ltd on 30 June 1973 is rejected.

Article 3

JCB Service and its subsidiaries shall bring to an end the infringements established in Article 1 on notification of this Decision. JCB Service or its subsidiaries, in particular JC Bamford Excavators Ltd, shall, within two months of notification of this Decision:

(a) inform their authorised distributors in the Community that they may carry out passive sales to end-users and authorised distributors;

(b) amend their agreements with their authorised distributors either by allowing passive sales to unauthorised distributors inside other authorised distributors' exclusive territories and active and passive sale[s] to unauthorised distributors within their own territories, or by authorising active and passive sales by authorised distributors to other authorised distributors, end-users or to their duly appointed agents outside their exclusive territories;

(c) amend their agreements with their authorised distributors in Italy and France by allowing purchases of contract goods from other authorised distributors in the Community and inform all authorised distributors in the Community accordingly;

(d) inform their authorised distributors in the Community that requests emanating from its subsidiaries seeking service support fees from authorised distributors without evidence of prior disagreement between the distributors concerned are void and should be ignored;

(e) inform their authorised distributors in the United Kingdom that allowances under the multiple deal trade support are granted regardless of whether sales are made within the distributors' territory or outside respectively or whether agreement with other distributors outside the territory has been made;

(f) send copies of the above correspondence and amended agreements to the Commission.

Article 4

A fine of EUR 39 614 000 is imposed on JCB Service in respect of the infringements referred to in Article 1, except for the restrictions on sales to unauthorised distributors implemented in the United Kingdom, for which no fine is imposed.'

52 By application lodged at the Registry of the Court of First Instance on 22 March 2001 (Case T-67/01), JCB Service brought an application under Article 230 EC, as a principal claim, for annulment of the contested decision, and, in the alternative, for partial annulment of that decision and corresponding reduction of the fine imposed on it.

53 In paragraph one of the operative part of the judgment under appeal, the Court of First Instance annulled Article 1(c) to (e) and Article 3(d) and (e) of the contested decision. Further, in paragraph 2 of the operative part thereof, the amount of the fine imposed on JCB Service in Article 4 of that decision was reduced to EUR 30 million. Finally, under paragraph 4, the remainder of the JCB Service's application was dismissed.

Forms of order sought and procedure before the Court

54 In its appeal, JCB Service claims that the Court should:

— set aside the judgment under appeal in its entirety in so far as it infringes Community law by not observing JCB Service's rights of defence;

— set aside the judgment under appeal in so far as, first, it condemns an alleged general restriction of passive sales by authorised distributors in the United Kingdom, Ireland, France and Italy and an alleged restriction of the sources of supply of distributors located in France and Italy, which prevented cross-supplies between distributors, and, second, it imposes a fine on JCB Service for these alleged infringements;

— itself give final judgment in Case T-67/01 in accordance with Article 61 of the Rules of Procedure of the Court and annul, in whole or in part, the contested decision and, in the exercise of its unlimited jurisdiction, annul or reduce the fine of EUR 30 million imposed on JCB Service by the Court of First Instance in the judgment under appeal;

— in accordance with Article 69 of the Rules of Procedure of the Court, order the Commission to pay the costs both before the Court of First Instance and before the Court of Justice;

— alternatively, in the event that the Court does not itself decide on the case, reserve the costs and refer the case back to the Court of First Instance for reconsideration in accordance with the Court's judgment.

55 In its response lodged on 23 June 2004, pursuant to Article 115(1) of the Rules of Procedure, in which it also brought a cross-appeal against the judgment under appeal, the Commission submits that the Court should:

— dismiss the appeal in its entirety;

— set aside the judgment under appeal to the extent that it reduced the fine by the amount set to take account of the aggravating factor (EUR 864 000) and to increase the fine fixed by the judgment under appeal by a corresponding amount;

— order JCB Service to pay the costs of these proceedings.

56 By letter of 26 July 2004, JCB Service applied for leave to submit a reply pursuant to Article 117(1) of the Rules of Procedure of the Court of Justice.

57 By decision of 5 August 2004, the President of the Court granted leave for a reply to be submitted, in which JCB Service maintained the forms of order sought relating to the main appeal and applied to the Court for the cross-appeal to be dismissed.

The main appeal

58 In support of its claims seeking to have the judgment under appeal set aside, JCB Service puts forward three pleas. The first alleges infringement of the rights of the defence, the second infringement of Article 81 EC and the third infringement of Article 15 of Regulation No 17.

The first plea

59 This first plea has two limbs. JCB Service alleges, first, that the excessive duration of the procedure before the Commission infringes the rights of defence and, second, that the Court of First Instance infringed its right to benefit from the presumption of innocence. Each of these two limbs sets out distinct complaints.

The first limb

60 It should be pointed out that the Court of First Instance, first of all, recalled, in paragraph 36 of the judgment under appeal, the settled case-law of the Court of Justice stating that the need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of Community law whose observance is ensured by the Community judicature (see Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 167 to 171).

61 Next, and before adopting a position on the arguments advanced by JCB Service, the Court of First Instance, in paragraph 37 of the judgment under appeal, drew a distinction between the two sets of administrative proceedings at issue, namely, first, consideration of the agreements notified in 1973, which was concluded by the rejection, in Article 2 of the contested decision, of the application for exemption, and, second, investigation of the complaint made in 1996, the conclusions of which are set out in the other articles of the operative part of the contested decision relating to the infringement.

62 As regards the proceedings which followed notification in 1973, the Court of First Instance found, in paragraph 38, that the Commission filed the notified agreements in 1992 without taking a decision and it was only JC Bamford Excavator's reply to the first statement of objections which led the defendant to reconsider those agreements in the course of the investigation of the complaint.

63 In the same paragraph, the Court observed that 'the fact that those proceedings lasted 27 years breaches the obligation of the administration to adopt a position and close proceedings, once opened, within a reasonable time', while making clear, however, that 'regrettable as such a breach is, it cannot have affected either the lawfulness of the rejection of the application for exemption or the proper conduct of the proceedings to establish that there was an infringement.'

64 In those circumstances, the Court stated, at paragraph 40, that infringement of the principle that the Commission must act within a reasonable time, if established, would justify the annulment of a decision taken following administrative proceedings in competition matters only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure.

65 In paragraph 42, the Court also considered that JCB Service did not argue that the length of time which elapsed had resulted in any particular procedural irregularity and confined itself to submitting that the Commission's conduct reveal poor management of the file. According to the Court, no inference of relevance to the consideration of the claims for annulment could therefore be drawn from the length of time which had elapsed since the notifications made in 1973.

66 As regards the investigation of the complaint referred to the Commission on 15 February 1996, the Court found, in paragraph 43, that the total duration of the procedure, 4 years, 10 months and 6 days, did not appear excessive given the complexity of the case, which involved several Member States and covers 5 heads of infringement, and the need to draw up a second statement of objections.

67 In addition, the Court pointed out in paragraph 45 of the judgment under appeal that JCB Service did not argue that the Commission's alleged failure to act within a reasonable time in investigating the complaint gave rise, in the present case, to an infringement of the rights of defence. The Court added: 'as was confirmed at the hearing, JCB Service confines itself to arguing that the length of the procedure reveals the Commission's partiality and mismanagement of the file and thereby demonstrates the unlawfulness of the contested decision. Against that background, and without it being necessary to rule on the alleged excessive length of the investigation of the complaint, it must be held that the plea as it is argued cannot entail the total or partial annulment of the operative part of the contested decision.'

68 Finally, the Court concluded, in paragraph 46, that the plea relied on by JCB Service was not such as to affect the lawfulness of the contested decision, either with regard to the application for exemption or with regard to the infringement, and that it had to be rejected as inoperative.

69 First of all, JCB Service claims that the Court of First Instance dismissed the first plea, advanced in support of the action brought against the contested decision and alleging that the Commission failed to fulfil its obligation to act within a reasonable time, without ruling on the breach of its rights of defence which JCB Service had, however, expressly relied on. The appellant further argues that the Court erred in law by not taking into account an objective breach of the rights of defence which, it claims, follows simply from the finding that the duration of the proceedings as a whole was manifestly excessive.

70 It should be recalled that, as is clear from paragraphs 32 and 33 of the judgment under appeal, JCB Service submitted before the Court of First Instance that the Commission failed to fulfil its obligation to act within a reasonable time which derives both from a general principle of Community law and from Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). According to JCB Service, the agreements concerning its distribution arrangements had been notified as from 30 June 1973 and the Commission closed that procedure 27 years later in rejecting the request for exemption. It argued further that the procedure initiated following the complaint by Central Parts lasted nearly five years, which was also unreasonable.

71 It should be noted that, contrary to the argument advanced by JCB Service, the latter alleged before the Court of First Instance in a rather general way breach of its rights of defence in relation to the allegedly excessive duration of the two administrative procedures (notification and infringement) without however explaining in actual fact how, stage by stage, its ability to defend its position had been affected by one or other procedure.

72 In particular, as regards the notification procedure, JCB did no more than criticise the excessively long duration of that procedure. The Court of First Instance was right in considering in paragraph 39 that the mere fact of not having been adopted within a reasonable time cannot render unlawful a decision taken by the Commission following notification of an agreement.

73 Furthermore, that delay alone was not detrimental to JCB Service's interests. After notification of the agreements in 1973 and for the entire period up until adoption of the contested decision, JCB Service benefited from the provisions of Article 15(5) of Regulation No 17.

74 In relation to the part of the contested decision in which the Commission found a breach of Article 81(1) EC and imposed a fine on JCB Service, it should be recalled that the Court underlined the fact that JCB Service confined itself to defending its argument that the length of the procedure revealed the Commission's partiality and mismanagement of the file and, thereby, was enough to demonstrate the unlawfulness of the contested decision.

75 It must therefore be held that the Court of First Instance was able to substantiate its reasoning without disregarding Community law or distorting the arguments of JCB Service.

76 JCB Service argues, however, that it was denied its right to have the Commission's inaction sanctioned by way of an action for failure to act pursuant to Article 232 EC and, in any event, to defend its position against any mistaken views of the Commission through the procedural dialogue available between a notifying party and the Commission and in the course of the infringement procedure.

77 Even if JCB Service may raise the argument mentioned above before the Court of Justice, it should be made clear that the exercise of its rights of defence cannot be affected by the long period of time which elapsed between notification of the agreements in 1973 and adoption of the contested decision. During that period, JCB Service could first, have brought an action for failure to act against the Commission so that the latter would decide on the request for exemption in question, and second, have notified to the Commission the agreements or practices in which it was engaged using form A/B. However, that did not happen.

78 It follows that JCB Service cannot, in any event, allege breach of its rights of defence in the context of the notification procedure.

79 As regards the infringement procedure, it should be noted that JCB Service did not advance any specific argument showing that its rights of defence in the context of the handling of Central Parts' complaint by the Commission's departments had been infringed. Further, JCB has not challenged before the Court of Justice the grounds given by the Court of First Instance for the dismissal of its complaint alleging that the Commission had disregarded its right to have access to the documents placed on the file relevant to its defence.

80 Accordingly, that argument should be dismissed and the first complaint put forward by JCB Service declared unfounded.

81 Second, JCB Service complains that the Court of First Instance made an error of assessment in failing to sanction the distinction made by the Commission in the contested decision between the notification phase and the infringement phase. Such a distinction is without any basis and seeks to deny the negative impact of the excessive duration of the decision-making procedure on the case at issue as a whole.

82 It should be pointed out that even though, as a matter of form, the contested decision does not distinguish between the notification phase and the infringement phase, it is clear from that decision that the Commission's assessment deals separately with the request for exemption and the infringement phase.

83 First of all, as regards the part of the contested decision relating to the rejection of the request for exemption in 1973, it is clear from recitals 197 to 222 of that decision that, before rejecting the request for exemption, the Commission considered

whether that request could be granted under Article 81(3) EC or under the rules laid down in the regulations made pursuant to that article, namely Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1), Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L 145, p. 25) ('Regulation No 1475/95') and Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) EC to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21).

84 The same is true, secondly, as regards that part of the contested decision finding an infringement. As is clear from recitals 140 to 170, the Commission's assessment is based unequivocally on agreements of JCB Service or clauses of those agreements which were not the subject of a proper notification, that is a notification using the form A/B provided for by Regulation No 27. It is also apparent from the contested decision that the Commission took into consideration conduct of JCB Service, which was not connected with the agreements notified in 1973.

85 On that point, JCB Service argued, nevertheless, before the Court of First Instance and in the present proceedings that the subsequent amendments to the agreements notified in 1973, although sent to the Commission without using a form A/B, in light of the circumstances of the present case, should have been taken into consideration and should have benefited from the provisions of Article 15(5) of Regulation No 17.

86 Such a claim must, in any event be dismissed. It should be pointed out that the use of that form A/B is mandatory and is an essential prior condition for the validity of the notification (see Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraphs 61 and 62).

87 The Court of First Instance was therefore correct in finding, in paragraph 41 of the judgment under appeal, that, as regards the decision finding an infringement, care was taken in that decision not to base findings on matters which were notified and to establish that the practices of which JCB Service was accused were different from those stipulated by the notified agreements. It was also right in concluding that the fact that the agreements were notified long ago could not affect the lawfulness of the infringement proceedings relating to matters other than those notified.

88 Finally, as regards the fine imposed by the Commission on JCB Service, that decision, in particular in recitals 227 and 228 thereof, makes it abundantly clear that the agreements of 1973, which were notified in accordance with the formal requirements of Regulation No 27, were excluded from the Commission's assessment of the amount of the fine to be imposed.

89 It follows from the foregoing that the second complaint raised by JCB Service must be dismissed, and therefore the first limb of this plea must be held unfounded.

The second limb

90 The Court of First Instance recalled, in paragraph 50 of the judgment under appeal, that the principle of the presumption of innocence is part of the Community legal order and applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 175 and 176).

91 In the light of that case-law, the Court of First Instance considered, in paragraph 53, that the mere fact that the Commission adopted two successive statements of objections could not suffice to establish that the principle of presumption of innocence was breached.

92 In the same paragraph, the Court of First Instance added that a general presumption of the guilt of the undertaking concerned can be attributed to the Commission only if the findings of fact it made in the contested decision were not supported by the evidence it furnished.

93 Given the existence of a memorandum of 16 May 1995 from the Sales Development Director, sent to the managers of the companies in the JCB group, which states that the prohibition of parallel imports is contrary to the decisions of the Commission and the case-law of the Court of Justice, the Court of First Instance pointed out, in paragraph 54, that JCB Service could not claim that it was unaware of the requirements of Community competition law, as, moreover, attested by its notification of its agreements as soon as the United Kingdom joined the European Community.

94 In the same context, regarding a letter of 13 April 1995 from Berkeley JCB to JCB Sales, the Court considered, in paragraph 55, that that correspondence recorded the fact that that distributor might be approached by both end-users and agents, adding that, even if the Commission had misinterpreted that part of the sentence in stating in the contested decision that overseas end-users and their duly appointed agents were referred to, that possible inaccuracy did not in itself demonstrate partiality but, at worst, betrayed a poor understanding of the document.

95 Further, the Court considered, in paragraph 56, in relation to a judgment of the Cour d'appel de Paris of 8 April 1998 and a judgment of the Tribunal de commerce de Nîmes (Commercial Court, Nîmes) (France) of 22 June 1999, that the fact that the

author of a complaint in a procedure applying Regulation No 17 might have engaged in misconduct for which it was sentenced by a court is irrelevant to the infringements actually alleged against JCB Service which are, moreover, separate.

96 Finally, in respect of the transcript of an interview held on 6 November 1996 on the premises of the authorised distributor, Watling JCB, between its senior staff and staff of DG Competition, the Court of First Instance considered, in paragraph 58, that in the picture of relations between the JCB group and one of its distributors which emerges from that interview, no element can be clearly pinpointed as evidence as to whether or not the practices of the distribution network constitute infringements. According to the Court, it seems that it cannot be argued that the Commission excluded the document from its examination of the elements of the infringement in order to suppress exculpatory evidence.

97 According to JCB Service, the contested decision infringes the principle of the presumption of innocence, which entails that any reasonable doubt as to the evidence must be resolved in favour of the accused party. In this respect, the Court of First Instance, it claims, made manifest errors of assessment by failing to fulfil its duty to take account of certain evidence submitted by JCB Service and to assess it together with other evidence so as to rely on a firm, precise and consistent body of evidence. Furthermore, the Court was led to reject or ignore unduly pieces of evidence which confirmed, JCB Service maintains, the infringement by the Commission of the principle of the presumption of innocence.

98 In particular, JCB Service claims, first of all, that the handling of the file in the present case by drawing up two statements of objections reveals the Commission's biased attitude and therefore, the breach of the principle of the presumption of innocence is founded. In those circumstances, JCB Service is essentially arguing that

the Court was wrong to hold, in paragraph 53 of the contested decision, that the mere fact that the Commission adopted two successive statements of objections cannot suffice to establish that the principle at issue was breached.

99 In this respect, it should be noted that the fact of the Commission's drawing up a statement of objections cannot possibly be considered to be evidence of a presumption of the culpability of the undertaking concerned. Otherwise, the opening of any proceedings in this area would potentially be liable to infringe the principle of the presumption of innocence.

100 Furthermore, it should be recalled that the first statement of objections did not take account of the notification made in 1973, which JCB Service pointed out on 6 July 1998 in its written observations in response to that statement, then in the hearing held by the departments of the Commission on 16 October 1998. It is thus in this context, in order to correct the omissions of the first statement of objections, that the Commission adopted the second statement of objections following JCB Service's observations.

101 Accordingly, contrary to the claims of JCB Service in the present case, the fact of drawing up the two successive statements of objections in the context mentioned in the preceding paragraph cannot possibly constitute evidence of breach of the principle of the presumption of evidence.

102 Thus, the first complaint raised by JCB Service must be dismissed as unfounded.

103 Second, JCB Service complains that the Court of First Instance did not sanction the Commission's assessments based on internal documents of JCB Service, such as the letter of 13 April 1995 from Berkeley JCB to JCB Sales, the memorandum of 16 May 1995 and the transcript of the interview with Watling JCB, which was held on 6 November 1996. According to JCB Service, the Commission considered those documents with partiality, ignoring the exculpatory evidence and presuming it to be guilty.

104 In that context, JCB also contends that, like the Commission, the Court was also wrong to reject or disregard certain decisions of national courts or national authorities which demonstrated the validity of the agreements entered into by JCB Service as well as their implementation, namely the decisions of the Cour d'appel de Paris of 8 April 1998, the Tribunal de commerce de Nîmes of 22 June 1999, the Conseil français de la concurrence (French Competition Council) of 20 July 2001, and the Irish Competition Authority of 22 September 1994.

105 It should be noted at the outset that, even if, as the plea is formulated, it alleges errors of assessment or reasoning, JCB is in essence seeking to challenge the Court's assessment of fact and, in particular, to dispute the probative value of certain facts and documents which led the latter to the conclusion that the Commission did not show bias against the appellant.

106 According to settled case-law, it is clear from Article 225 EC and the first paragraph of Article 58 of the EC Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first to find 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 found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 23, and Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51).

107 Further, according to case-law, the Court of Justice has no jurisdiction to find the facts or, as a rule, 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 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. That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see *Baustahlgewebe* v *Commission*, cited above, paragraph 24; Case C-40/03 P *Rica Foods* v *Commission* [2005] ECR I-6811, paragraph 60; *General Motors* v *Commission*, cited above, paragraph 52; and Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 85).

108 It should also be noted that such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (*General Motors* v *Commission*, paragraph 54).

109 It must be pointed out that the assessment of the Court of First Instance in paragraphs 54 to 59 of the judgment under appeal is an assessment of the facts which may not be challenged in the course of an appeal, since JCB Service has not demonstrated that the Court had distorted the content of the documents on the file submitted to it. The Court in fact confined itself to considering whether the Commission's handling of that evidence could be regarded as biased and concluded that this was not so in the present case.

110 Thus, the first arguments advanced by JCB Service in connection with the second complaint must be dismissed as inadmissible.

111 JCB Service cites, also in connection with that complaint, a decision of the Conseil français de la concurrence of 20 July 2001 and a decision of the Irish Competition Authority of 22 September 1994 that are favourable to it.

112 With regard to the first of those decisions cited in the paragraph above, even if it could be relied on in the present case, it must be pointed out that that decision was taken after the contested decision. Therefore, it cannot by itself affect the lawfulness of either the judgment under appeal or the contested decision.

113 As far as the decision of the Irish Competition Authority cited above is concerned, it should be noted that this was not relied on before the Court of First Instance in the context of a breach of the principle of the presumption of innocence.

114 In those circumstances, to allow a party to put forward for the first time before the Court of Justice a plea in law and arguments which it has not raised before the Court of First Instance would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (see C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, paragraph 79).

115 Thus, JCB Service's claims based on the decision of the Irish Competition Authority must also be dismissed as inadmissible.

116 It follows from the foregoing that the second complaint put forward by JCB Service must also be dismissed as inadmissible.

117 Finally, JCB Service maintains that the Court of First Instance, in the judgment under appeal, unduly ignored certain evidence which gave rise to a breach of the principle of the presumption of innocence, that is a fax of 2 June 1997 and a memorandum of 26 January 1996 from the marketing director of JCB Sales.

118 In relation to the memorandum of 26 January 1996, it should be noted that, like the decision of the Irish Competition Authority, it was also not relied on before the Court of First Instance in the context of the breach of the principle of the presumption of innocence and, therefore, as is clear from paragraph 114 of the present judgment, the claim based on that memorandum must be dismissed as inadmissible.

119 As regards the fax of 2 June 1997 sent by an official in DG IV to a representative of Central Parts, which indicated the alleged intention of the Commission's departments to collect inculpatory evidence against JCB Service, it must be pointed out that, in any event, the claims based on that fax are not such as to establish that the Court distorted the evidence produced to it.

120 In that respect, it should be noted that that fax was sent to a representative of the complainant, Central Parts, on 2 June 1997, thus six months after the inspections undertaken by the Commission's departments on 5 November 1996 at the premises of the companies of the JCB group and of its official distributors in the United Kingdom. In such circumstances, the fact that a Commission official who, according to JCB Service, participated in the investigation of Central Parts' complaint, may have a view as to the classification of that complaint or the opening of an infringement procedure does not warrant the conclusion that the handling of the case at issue by the Commission's departments was biased and thus that the principle of the presumption of innocence was infringed.

121 It is clear from all of the above that the Court of First Instance was right to conclude, in paragraph 60 of the judgment under appeal, that there was nothing in the conduct of the administrative procedure to indicate that the Commission interpreted the documents and the facts in a tendentious or biased manner or exhibited partiality in its conduct towards the appellant.

122 It follows that the last complaint raised by JCB Service and the second limb of the present plea, and, therefore, the first plea as a whole, must be dismissed as partially inadmissible and partially unfounded.

The second plea

123 This second plea falls into two limbs. JCB Service argues that the Court of First Instance infringed, first, Article 81(1) EC and, second, Article 81(3) EC by refusing to annul the contested decision in so far as that decision rejected JCB Service's application for exemption in 1973. Each of those two limbs sets out separate complaints.

The first limb

124 JCB Service complains that the Court erred in law in relation, first, to the first element of the infringement set out in Article 1(a) of the contested decision relating to the restrictions on passive sales by authorised distributors of the JCB Group in the United Kingdom, Ireland and France to unauthorised distributors, end-users or authorised distributors established outside exclusive territories and, in particular, in other Member States and, second, to the second element of the infringement set out in Article 1(b) of that decision relating to the restrictions on sources of supply imposed on authorised distributors in France and Italy, prohibiting cross-supplies between those distributors.

— The first element of the infringement relating to the restrictions on passive sales by authorised distributors in the United Kingdom, Ireland and France

125 In relation, first of all, to the United Kingdom, the Court pointed out, in paragraph 86 of the judgment under appeal, that the notified agreements concerning distributors and main dealers of the Member State in question contain, in the version amended in 1975, a Clause 4. That clause, laying down a prohibition on selling to unauthorised agents, did not contain a general prohibition on selling to final dealers or to authorised agents outside the territory allocated. However, it was interpreted by the Commission as entailing a general prohibition on out-of-territory sales.

126 In that respect, and after considering, in paragraph 88 of the judgment under appeal, various documents, namely a letter sent on 26 October 1992 by Watling JCB to the secretary of the Queen's Award Office, a letter of 13 April 1995 from Berkeley JCB to JCB Sales, a letter of 21 November 1995 from TC Harrison JCB, and a letter of 30 November 1992 from Gunn JCB to JCB Sales, the Court found that the documents all showed that the distributors believed that their agreement with the JCB group bound them to restrictive commercial practices and acted accordingly. The Court stated further that, going beyond the prohibition on selling to unauthorised agents contained in Clause 4, the distributors concerned behaved as though they were subject to a more general prohibition on selling outside their territory, in particular for export.

127 In the light of these findings, the Court concluded, in paragraph 89 of the judgment under appeal, that, in the United Kingdom, restrictive practices going beyond the provisions of the notified agreements were implemented and that, therefore, the first element of the infringement relating to passive sales was established.

128 JCB Service maintains that, as a result of a manifestly erroneous analysis of the facts, the Court erred in law by sanctioning an obligation imposed on a distributor not to

sell products wholesale for resale to unauthorised distributors, the obligation contained in Clause 4 of the agreement in question.

129 It should be noted at the outset that, in its complaint, JCB Service merely disputes the Court's overall assessment of the facts and evidence in paragraph 88 and the conclusion in paragraph 89 of the judgment under appeal maintaining in essence that the Court should have come to the opposite conclusion having regard to the facts of the case. However, JCB Service does not raise any serious argument to warrant the conclusion that the Court distorted the content of the documents on the file submitted to it or that it erred in law.

130 In those circumstances, and in accordance with the case-law cited in paragraphs 106 to 108 of the present judgment, the first argument of the first complaint must be dismissed as inadmissible.

131 Second, in relation to Ireland, the Court of First Instance held, in paragraph 90 of the judgment under appeal, that the standard agreements notified contained no clause prohibiting wholesale sales to unauthorised agents like those considered in the case of the United Kingdom, but that the agreement concluded by JCB Sales in 1992 with Earthmover Commercial Industrial (ECI) JCB, its distributor for Ireland, contained a Clause 4, concerning wholesale sales, which was comparable to the Clause 4 of the United Kingdom distributor and main dealer agreements. According to the same paragraph of the judgment under appeal, the agreement in question was not notified.

132 In this respect, and after considering various documents on which the Commission based its decision, that is a fax of 31 January 1995 from JCB Sales to JCB SA, and two other faxes of 31 January and 30 March 1995 from ECI JCB to JCB Sales, the Court considered in paragraph 92 that, given that the contractual provisions were identical

to those for the United Kingdom but not notified, the facts which were submitted to it, in conjunction with the general strategy of limiting out-of-territory sales in the rest of the JCB Group's distribution network, were sufficient to establish that element of the infringement, that is to say, restrictions imposed on passive out-of-territory sales.

133 JCB Service maintains that, contrary to what follows from paragraphs 90 and 91, Clause 4 of the distribution agreement relating to Ireland does not infringe Article 81 EC. In this regard, it argues that the prohibition on sales contained in the Ireland distributors and resellers agreement of 1992 is drafted in terms identical to Clause 4 of the versions of the agreements concerning the United Kingdom. Since the Court considered in paragraph 86 that that clause concerning the agreements applicable to the United Kingdom, did not infringe Article 81 EC, it is of no account that the agreement relating to Ireland, containing the same clause, was not notified to the Commission. JCB Service further maintains that the documents referred to in paragraph 92 were analysed in a manifestly erroneous manner by the Court of First Instance.

134 It should be noted, first, that contrary to JCB Service's assertion, the Court did not consider, in paragraph 86, that Clause 4 of the versions of the United Kingdom distributors and resellers agreements did not raise any problem in respect of Article 81(1) EC. The Court in fact found that despite the fact that the agreement applicable to the United Kingdom did not contain a general prohibition on sales, the clause in question was interpreted by distributors as entailing a general prohibition on out-of-territory sales.

135 Second, and in the light of the case-law cited in paragraph 86 of the present judgment, it should be recalled that, in order for a notification to be valid under Article 81 EC, it must be made using a form A/B. In the present case, it is common ground that the agreement entered into in 1992 by JCB Service and applicable in Ireland was never notified to the Commission.

136 It follows from the foregoing that the second argument of the first complaint put forward by JCB Service is without any foundation and therefore must be dismissed.

137 With regard to the alleged erroneous assessment of the documents examined by the Court in paragraph 92 of the judgment under appeal, it should be noted that, in its complaint, JCB Service disputes the Court's assessment of the facts and evidence without advancing arguments allowing it to be concluded that the Court distorted the content of the documents on the file submitted to it or that it erred in law.

138 In those circumstances and in accordance with the case-law cited in paragraphs 106 to 108 of the present judgment, that argument should also be dismissed as inadmissible.

139 Third, in relation to France, the Court pointed out in paragraph 96 of the judgment under appeal that the standard dealership contract, dating from 1991, includes, in Article 2, a reciprocal exclusivity clause which prohibits the dealer from, inter alia, selling, distributing or promoting directly or indirectly JCB Group products and parts outside the territory allocated. According to the same paragraph, that agreement, which was not notified, prohibits active sales and also expressly lays down a prohibition on passive sales outside the territory allocated.

140 After examining the documents on which the Commission relied in the contested decision to prove the existence of the offending restrictions, that is a fax of 21 June 1988 from JCB SA to an authorised dealer, a letter of 10 January 1995 from JCB SA to Philippe MPT and a letter of 31 January 1996 sent by Pinault Équipement to JCB SA, the Court found, in paragraph 98, that those documents confirm to a great extent the restrictive practices and partitioning of markets provided for by the standard dealership agreement.

141 In that regard, JCB Service argues that the Court adopted a manifestly erroneous analysis of Article 2 of the agreement relating to France in stating that that article 'prohibits active sales and also expressly lays down a prohibition on passive sales outside the territory allocated'. JCB Service further maintains that the Court relied on manifestly irrelevant pieces of evidence to prove the alleged restriction.

142 It should be pointed out that the contested decision is not based on an alleged express prohibition contained in the dealership agreement itself, but on the way it is effectively applied. That conclusion is clear from recitals 111 to 114 of the contested decision, and, in particular, from recital 146 thereof in which the Commission found that '[the agreement] between the JCB [Group] and its official distributors, as effectively applied, prevents or restricts such distributors from selling outside their allotted territories'.

143 In those circumstances, the validity of the contested decision is in no way affected. It follows that the argument advanced by JCB Service in the present case is irrelevant, and thus must be dismissed.

144 In relation to the arguments of JCB Service that the Court relied on irrelevant evidence on which to base the existence of the infringement, namely a fax of 21 June 1988 from JCB SA to an authorised dealer and a letter of 31 January 1996 from Pinault Équipement to JCB SA, it must be pointed out that JCB Service is once again disputing the Court's factual assessments as to the existence of the prohibited practices without showing the slightest distortion of evidence.

145 The finding is the same as regards parallel exports in the geographical market concerned, in relation to the argument that the Court, in paragraphs 106 to 107 of

the judgment under appeal, erroneously assessed documents which it examined, namely a letter of 2 June 1992, which JCB Sales sent to Watling JCB, and two faxes, of 11 and 15 May 1995, from the German subsidiary, JCB Germany.

146 In paragraph 107, the Court considered, as it was entitled to do, without any distortion, first, that the documents in question show that JCB Service has a policy of partitioning the territories of its distributors and national markets which leads it to prohibit generally any out-of-territory sale, whether it is a case of parallel exports outside its distribution network or not, and second, that the conduct in question reinforces the restrictions imposed on passive sales.

147 It follows from the foregoing that all the arguments advanced by JCB Service seeking to dispute the first element of the infringement must be dismissed.

— The second element of the infringement relating to the restrictions on sources of supply of distributors in France and Italy, preventing cross-supplies between those distributors

148 The Court pointed out, in paragraph 112, that in relation to France Article 2 of the standard dealership agreement requires, as an essential condition of the contract, that supplies of JCB Group products and parts be obtained exclusively from the French subsidiary, JCB SA, and from JCB Service.

149 According to the same paragraph, in Italy Article 4 of the distribution contract prohibits distributors from selling or from being involved, directly or indirectly, in the sale of products other than JCB Group products, and Article 6 thereof requires

them to obtain supplies of spare parts and other subsidiary products used for the repair of JCB Group products exclusively from JCB SpA, unless they have prior written agreement from JCB Service, in the cases covered by those two articles.

150 After holding that the clauses of the agreements mentioned above have a restrictive purpose, the Court considered, in paragraph 115 of the judgment under appeal, the documents on which the Commission relied to make its finding of an infringement in France, namely a letter dated 21 June 1996, sent by JCB SA to Sem-Cedima, one of its dealers, and another letter, of 10 February 1999, from an authorised dealer in France. According to the same paragraph, those documents confirm that the agreements were implemented and that there were restrictions in France on the sources of supply of authorised agents of the JCB Group.

151 With regard to Italy, the Court pointed out, in paragraph 116 of the judgment under appeal, that, in concluding that the second element of the infringement was established, the Commission relied on no evidence other than the provisions of the contract and that, in that respect, JCB Service submitted that the Commission could not impose a penalty on it for clauses which were not rigorously interpreted and implemented, without investigating and proving whether they were actually implemented.

152 However, the Court considered, in paragraph 117, that the fact that the clauses restricting competition were not rigorously interpreted and applied was irrelevant to the establishment or otherwise of the alleged infringement. In the same paragraph, referring to the case-law of the Court of Justice, the Court of First Instance added that the absence of any analysis of the effects of the agreement in the decision in question did not, therefore, in itself constitute a defect in that decision, given that the anti-competitive object or effect of an agreement must be taken into account as alternative, not cumulative, requirements.

153 In those circumstances the Court concluded, in paragraph 118, that the Commission was right to take the view that the element of the infringement relating to restrictions on sources of supply as regards purchases of contract goods by dealers operating in France and in Italy was established.

154 In that regard, JCB Service argues that the Court erred in law and infringed the applicable Community competition rules, in this instance Commission Regulation (EEC) No 1983/83 and Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article [81](3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10). Indeed, it claims, a block exemption was available under Regulations No 67/67 and No 1983/83.

155 It should be recalled that JCB Service argued before the Court that the allegation that the agreements gave rise to restrictions on the sources of supply of authorised distributors in France and in Italy, obliging them to obtain supplies solely from the national JCB Service subsidiary and prohibiting cross-supplies between authorised distributors, was based on a misinterpretation of those agreements by the Commission, the purpose of the clauses at issue being merely to ensure that distributors market only JCB Group products. JCB Service also argued that the Commission did not investigate whether the contested clauses had actually been implemented.

156 The arguments advanced by JCB Service in support of its plea before the Court of Justice are thus new and therefore inadmissible. It should be recalled, as stated in paragraph 114 of the present judgment, that in an appeal the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the Court of First Instance.

157 It is clear from all the foregoing considerations that the arguments of JCB Service seeking to dispute the second element of the infringement must be rejected, and therefore the first limb of the second plea must be dismissed as partially inadmissible and partially unfounded.

The second limb

158 The Court of First Instance pointed out, first of all, in paragraph 160, that, according to the contested decision, the Commission refused the application for exemption made in 1973 on the grounds that consideration of that application required an understanding of the whole of the JCB Group's distribution system, which was impossible given the incomplete nature of the notifications and because the JCB Group's agreements and practices entailed restrictions on competition and did not fulfil the cumulative conditions laid down by Article 81(3) EC to qualify for exemption. According to the Court, that application related only to the standard agreement for Ireland, the Kingdom of Sweden and the Channel Islands and was made by JCB Sales.

159 The Court stated, in paragraph 161 of the judgment under appeal, that the parties had discussed, in the proceedings before the Court, the general question whether the JCB Group's distribution system could be the subject of a decision under Article 81(3) EC and that that question was dealt with in recitals 201 to 222 of the contested decision.

160 The Court added, however, that an exemption could, in any event, have been granted only in respect of the properly notified agreement for which it had been requested and that, in that respect, JCB Service's application sought annulment of Article 2 of the contested decision which rejected the application made in 1973. According to the Court, the merits of the application for exemption had to be assessed in the light only of the agreement referred to in paragraph 160 of the judgment under appeal, without it being necessary for it to consider whether such an exemption could have been granted for all the agreements sent by the JCB Group to the Commission.

161 Second, after pointing out in paragraph 164 of the judgment under appeal that the agreement at issue could not be covered by the block exemption regime provided for

by Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article [81](3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), as replaced by Regulation No 1475/95, the Court of First Instance examined whether the agreement could be covered by an individual exemption under Article 81(3) EC.

162 In that respect, the Court considered, in paragraph 165, that that possibility was available where the agreements or practices at issue contributed to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and did not impose on the undertakings concerned restrictions which were not indispensable to the attainment of those objectives and did not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. The Court stated further in the same paragraph that, in the contested decision, the Commission took the view that the combination of selectivity and exclusivity in the JCB Group's distribution system entailed cumulative restrictions which were not indispensable, without those restrictions being offset by benefits, inter alia, for consumers.

163 As pointed out in paragraph 166 of the judgment under appeal, JCB Service confined itself to stating generally that the distribution agreements fulfilled the requirements for the grant of an exemption without indicating precisely what advantages the agreement at issue entailed which would qualify it for such a decision. Further, according to the same paragraph, JCB Service merely asserted that that agreement did not disadvantage consumers and that the Commission had not established that it had no advantages; however at no stage did it indicate what the advantages of the restrictions set up were and how they were justified.

164 Finally, as regards the Commission's decisions granting individual exemptions for distribution systems combining exclusivity and selectivity and which are relied on by

JCB Service in support of its plea, namely Commission Decision 75/73/EEC of 13 December 1974 relating to a proceeding under Article [81] of the EEC Treaty (IV/14.650 — Bayerische Motoren Werke AG) (OJ 1975 L 29, p. 1, 'the BMW decision'), and Commission Decision 85/559/EEC of 27 November 1985 relating to a proceeding under Article [81] of the EEC Treaty (IV/30.846 — Ivoclar) (OJ 1985 L 369, p. 1, 'the Ivoclar decision'), and Commission Notice 93/C 275/03 pursuant to Article 19(3) of Council Regulation No 17 in Case No IV/34.084 — Sony España SA (OJ 1993 C 275, p. 3), the Court held, in paragraph 167, that the decisions made in those cases could not be transposed to the JCB Group distribution system.

165 According to the same paragraph of the judgment under appeal, in the case of the BMW decision, active out-of-territory sales were not prohibited, still less passive sales and supplies within the network. Further, as regards the Ivoclar distribution system, a choice had subsequently to be made between an exclusive model and a selective model. Finally, Sony España SA had only one restrictive aspect in common with the distribution system of the JCB Group.

166 In the light of the foregoing, the Court concluded in paragraph 168 of the judgment under appeal, that JCB Service had not proved that its agreement could be covered by the system of block exemption under Regulation No 123/85, replaced by Regulation No 1475/95; nor had it proved that it could qualify for an individual exemption under Article 81(3) EC.

167 JCB Service argues, first of all, that the Court committed a manifest error of assessment of the scope of the individual exemption requested, by limiting, as is clear from paragraph 161 of the judgment under appeal, its assessment of the application for exemption to only one of the notified agreements.

168 It should be noted that, after stating in recitals 197 to 200 that no block exemption could be applied under Regulations No 1983/83, No 1475/95 and No 2790/1999, the Commission then considered whether, pursuant to Article 4(1) of Regulation No 17, it could grant an individual exemption under Article 81(3) EC.

169 Having pointed out in recital 202 of the contested decision that no decision pursuant to Article 81(3) EC may be taken on restrictive agreements or concerted practices that have not been validly notified, the Commission assessed, in recitals 207 to 220 of that decision, whether the cumulative conditions of the above article were fulfilled in relation to the actual agreements or concerted practices.

170 After establishing, in recital 221 of the contested decision, that this was not so in the present case, the Commission concluded in the following recital that no individual exemption could be granted, even if JCB had notified its actual agreements as implemented.

171 It is clear from the foregoing that the Commission examined, in connection with the application of Article 81(3) EC, all the actual agreements or concerted practices. The Court of First Instance did not call into question the Commission's assessment in this regard. In those circumstances, the argument based on the reference in paragraph 160 and 161 of the judgment under appeal only to the agreement for Ireland, the Kingdom of Sweden and the Channel Islands must be rejected.

172 It follows from the foregoing that the first complaint raised by JCB Service must be dismissed.

173 JCB Service points out, second, that the judgment under appeal contains a contradiction in relation to its application for exemption.

174 On the one hand, the Court considered, in paragraphs 133, 145 and 154 respectively of the judgment under appeal, that the following three infringements were not established:

— the fixing of discounts or resale prices applicable by distributors established in the United Kingdom and in France;

— the imposition of service support fees on sales to other Member States effected by distributors in the United Kingdom according to fixed scales set by JCB Service; and

— the withdrawal of multiple deal trading support for agents in the United Kingdom in the case of outside sales thereby making distributors' remuneration dependent on the geographic destination of sales.

175 On the other hand, the Court of First Instance then endorsed the rejection of the application for exemption, relying in the judgment under appeal on recitals 201 to 222 of the contested decision, recitals which, according to JCB Service, concerned those three elements of the infringement.

176 It should be pointed out that the Court considered, in paragraphs 160 to 169, whether the Commission's analysis in connection with the rejection of JCB Service's application for an individual exemption was well founded, but did not call it into question.

177 In this respect, it should be recalled first of all that in recital 209 of the contested decision the Commission referred to the fact that the combination of territorial exclusivity with the prohibition on selling to unauthorised distributors, which may compete with official distributors, and exclusive purchase of parts for official distributors prevents or restricts the development of the market for maintenance, repair and provision of spare parts under optimum safety conditions, which is separate from the market for sales of new machines. In the same recital, it added that regarding the local market power that an official distributor enjoys in respect of supplies under tight time constraints, that combination outweighs the expected benefits for the consumer, taking into account, in particular, JCB Service's important market share in backhoe loaders.

178 In recitals 214 and 215 of the contested decision, the Commission then stated that passive sales must be allowed in an exclusive distribution system to avoid the disadvantages for competition outweighing the benefits and that, within the common market, the combination of territorial exclusivity, restriction of active and passive sales and selective distribution in the JCB Group network cannot be regarded as indispensable to the improvement of distribution of construction and earthmoving machines, among which the JCB Group holds an EC market share of 45% for backhoe loaders. In particular, the Commission stated that such machines are, for the most part, operated in limited geographic areas and do not travel over long distances and variable locations, unlike motor vehicles.

179 Finally, in recital 218, the Commission did not find it indispensable for an improved distribution with benefits from high safety standards accruing to users either to restrict to authorised distributors or end-users the supply of JCB Group machines and spare parts or to allocate exclusive territories outside which active or, a fortiori, passive sales are not possible.

180 It is clear from the foregoing that, when assessing the cumulative conditions of Article 81(3) EC, the Commission referred in any event to those elements constituting the first two elements of the infringement provided for in Article 1 of the contested decision. In those circumstances, no contradiction can be invoked to challenge the rejection of the application for exemption.

181 Accordingly, the second complaint raised by JCB Service must also be dismissed.

182 JCB Service argues, third, that the Court of First Instance made an error of assessment in stating in paragraph 166 that JCB Service had failed to indicate the precise advantages of its distribution agreements. To this end, it asserts that the advantages in question had already been analysed in recitals 207 and 208 of the contested decision and that the Court manifestly disregarded that fact.

183 It should be pointed out from the outset that the Court's finding in paragraph 166 that JCB Service had failed to indicate what precise advantages the agreement at issue entailed which would qualify it for an exemption decision is incorrect.

184 As is clear from recital 207 of the contested decision, the Commission acknowledges that some of the benefits common to certain categories of distribution agreements, like the exclusive distribution, exclusive purchase and distribution of motor vehicles, may be derived from the JCB Group's distribution arrangements, which in fact combine provisions present in those three categories.

185 Further, in recital 208 of the contested decision, the Commission stated in particular that consumers can be deemed to obtain a fair share of the objective benefits outlined and that it is a legitimate concern to select distributors on the basis of their ability to provide high service standards to purchasers of JCB Group products.

186 Nonetheless, according to case-law, if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but its operative part appears well founded on other legal grounds the appeal must be dismissed (Case C-226/03 P *José Martí Peix* v *Commission* [2004] ECR I-11421, paragraph 29).

187 In that regard, according to case-law, in order for an application for individual exemption to be granted under Article 81(3) EC, the conditions set out in that article must be cumulatively fulfilled (see order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 34).

188 Irrespective of the merits of its allegation in the present case, JCB Service fails to show, on the basis of its other arguments, that the finding in recital 221 of the contested decision that the cumulative conditions for the application of Article 81(3) EC were not fulfilled in the instant case is incorrect, and thus that, by endorsing the Commission's position in that regard, the Court of First Instance erred in law.

189 It follows that the third complaint raised by the appellant must also be dismissed.

190 JCB Service asserts, fourth, that the Court, in paragraph 167, misinterpreted the rules relating to exemptions. In fact, it claims, there was no restriction on passive sales, so that the principles defined in the cases giving rise to the BMW and Ivoclar decisions should have been applied by analogy to the present case, and thus should have been sufficient for the requested exemption to be granted.

191 It should be noted that JCB Service, in this claim, merely disputes the Court's assessment of the facts, arguing that the latter, in the light of the BMW and Ivoclar decisions cited above, should have arrived at the opposite conclusion to that set out in paragraph 167 of the judgment under appeal. However, JCB Service does not put forward any argument to warrant the conclusion that the Court of First Instance committed any distortion of the facts or erred in law in the instant case.

192 In those circumstances and in accordance with the case-law referred to in paragraphs 106 to 108 of this judgment, the fourth complaint raised by JCB Service must be dismissed as inadmissible.

193 It follows from the foregoing that the second limb of the second plea and that plea as a whole should be dismissed as partially inadmissible and partially unfounded.

The third plea

194 The third plea falls into two limbs. Each of those two limbs themselves set out distinct complaints. JCB Service argues that the Court of First Instance infringed Article 15 of Regulation No 17, and, in that regard, it alleges, first, breach of certain fundamental principles, and, second, breach of the rules relating to the calculation of the amount of the fine.

The first limb

195 First of all, the Court of First Instance stated, in paragraph 176 of the judgment under appeal, that the Commission could not impose a fine on JCB Service in respect of the agreements notified in 1973 and 1975 without being in breach of Article 15(5)(a) of Regulation No 17. According to the Court, the lawfulness of the contested decision in that respect must be examined solely by reference to the elements of the infringement covered by the notification and which the Court of First Instance held to be established. Those consisted of the first element of the infringement, relating to the restrictions imposed on passive sales referred to in Article 1(a) of the contested decision included in the agreements notified in respect of the United Kingdom arising from Clause 4 of those agreements, and of the second element of the infringement, relating to restrictions on sources of supply, referred to in Article 1(b) of the contested decision, which, according to the Court of First Instance, was not covered by the notification.

196 In those circumstances, the Court of First Instance considered, in paragraph 177 of the judgment under appeal, that Clause 4 was applied in a way which diverged from its terms, its scope being extended to cover a more general prohibition for distributors on selling outside their territory, especially for export. It also stated that in so far as the practices which attracted the fine did not remain within the limits of the provisions of the notified agreements, the provisions of Article 15(5)(a) of Regulation No 17 had not been breached.

197 In that respect, JCB Service argues that the Court of First Instance erred in law in so far as, in considering the fine, it failed to have due regard, first, to the infringement of the principle of sound administration in the light of the Commission's obligation to adopt a decision within a reasonable period and, second, to the legitimate expectations of JCB Service. The Commission's letter of 13 January 1976 and the decisions of the national courts and authorities encouraged JCB Service to believe that there was a serious possibility that the agreements at issue would benefit from the requested exemption and, therefore, that it would escape a possible fine.

198 In relation, first, to the infringement of the principle of sound administration, having regard to the Commission's obligation to adopt a decision within a reasonable period, it should be noted that JCB Service is essentially complaining that the Court of First Instance failed to sanction the fact that the Commission imposed a fine in the instant case without having regard to the fact that the contested decision was adopted outside a reasonable period.

199 As was stated in paragraphs 77 to 79 of this judgment, JCB Service cannot, in any event, seek annulment, in the present case, of the contested decision on the ground that it was adopted outside a reasonable period, since the rights of defence were not breached. Accordingly, this first complaint must be dismissed.

200 In relation, second, to infringement of the principle of protection of legitimate expectations, it should be noted that, in its complaint, JCB Service essentially claims that it is covered by the provisions of Article 15(5)(a) of Regulation No 17. However, such a claim must be dismissed as manifestly unfounded in relation to the agreements not duly notified.

201 Second, and in response to JCB Service's claim that the fine imposed is disproportionate, particularly compared with those imposed under the same procedure on undertakings such as Volkswagen AG and Opel Nederland BV (Commission Decisions 98/273/EC of 28 January 1998 relating to a proceeding under Article [81] of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60) and 2001/146/EC of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.653 — Opel) (OJ 2001 L 59, p. 1)), the Court stated, in paragraph 187 of the judgment under appeal, that regardless of the comparisons the Commission found useful in setting the amount of the fine imposed on JCB Service, such matters could only give an indication, since the facts of the cases, such as markets, products, the undertakings and periods concerned, were not the same.

202 It therefore concluded, in paragraph 189 of that judgment, that the fact that the fines imposed on Volkswagen AG, Opel Nederland BV and JCB Service amounted to different percentages of their respective turnovers was not, in the present case, evidence of discriminatory treatment against the appellant.

203 In that regard, JCB Service nonetheless maintains that the Court infringed the principle of equal treatment by not responding to its argument that the fine was disproportionate compared with those imposed in the comparable circumstances of the Volkswagen AG and Opel Nederland BV decisions.

204 It should be pointed out from the outset that, contrary what is claimed by JCB Service in the present case, the Court clearly responded to its allegations in paragraphs 187 and 189 of the judgment under appeal.

205 Further, it should be noted that JCB Service's arguments do not seek to question the settled case-law of the Court of Justice that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination.

206 It follows from the foregoing that the second set of complaints raised by JCB Service must be rejected, and thus the first limb of this plea dismissed.

The second limb

207 It should be recalled first of all that, according to the case-law of the Court of Justice, although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 209).

208 In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations (*Dansk Rørindustri and Others* v *Commission*, cited above, paragraph 211).

209 Further, it should be recalled that, according to that case-law, the Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed under Article 15 of Regulation No 17. Those Guidelines, for the drafting of which the Commission used inter alia criteria defined in the case-law of the Court of Justice, consequently ensure legal certainty on the part of the undertakings (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 213).

210 It is in the light of that case-law that the arguments advanced by JCB Service, seeking to show that the Court of First Instance was wrong not to sanction the alleged breach of the Guidelines by the Commission, must be considered.

211 In relation, first, to the gravity of the infringement, it must be pointed out that in all the language versions, with the exception of the English version which uses the term 'serious' for the infringements at issue, according to paragraph 182 of the judgment under appeal, those infringements may be held to be 'very serious' by reason of the damage they do to the smooth operation of the internal market, in particular by the partitioning of national markets which it is their object and effect to achieve, and therefore, in themselves, warrant a high fine. According to the following paragraph of that judgment, JCB Service is a relatively important undertaking in the European Community and the sector concerned, and therefore, the Commission did not err in its assessment of the impact of the infringement on the national markets concerned in setting the amount of the fine.

212 In relation, next, to the duration of the infringement, it is clear from paragraph 184 that it covered a period of 10 years. In that respect, the Court of First Instance stated in paragraph 185 that '[b]oth elements of the infringement were present at the same time for half of that period. JCB Service pointed out that it was only for a period of five years that all the elements of the infringement — now reduced to two — were present at the same time. However, the restrictions imposed on exports, which constitute the first element of the infringement and which are at the heart of [the distribution system of the JCB Group], are of prime importance and give rise, logically, to the restrictions on sources of supply [which constitute the second element of the infringement] ... [G]iven the major importance of the first element of the infringement, which relates to a central aspect of [the] JCB [Group]'s distribution system, there is no reason to consider that the duration of the infringement should have been put at less than 10 years.'

213 Finally, as regards the fact that the Commission refused to take account of the particular mitigating circumstances, according to paragraph 190 of the judgment under appeal, JCB Service could not validly claim that the Commission's failure to take a formal position on its agreements amounted to 'implied approval', such an approach being alien to Community competition law.

214 Further, the same paragraph of the judgment under appeal states that JCB Service could also not argue on the basis of the decision of the Irish Competition Authority or of the judgment of the Cour d'appel de Paris, cited above. Similarly, according to the Court of First Instance, as the rejection of its application for exemption had been held to be well founded, no mitigating circumstances on the basis of the purported compatibility of the JCB Group's distribution system with the Community rules on competition could be acknowledged in the instant case.

215 First, JCB Service maintains in essence that the Court of First Instance was wrong to consider, in paragraph 182, that the two forms of anticompetitive practice established in the instant case warranted, in themselves, a high fine as '[very] serious' infringements. Irrespective of their formal classification in the contested decision, the practices at issue cannot be classified as 'very serious' infringements in the light of their nature and their actual impact on the market.

216 Contrary to the claims of JCB Service in the present case, the infringements found are clearly infringements classified as 'very serious' within the meaning of Section 1A of the Guidelines and therefore are liable to attract a fine appropriate to that type of infringement.

217 In that respect, it should be recalled, from recital 248 of the contested decision, that distribution agreements which, like those of JCB Service, have as their object the partitioning of national markets within the common market through a variety of reinforcing restrictions of competition, jeopardise the proper functioning of the single market, frustrate one of the principal aims of the Community and have been held for decades as infringements of Article 81 EC in decision-making practice and case-law.

218 In recitals 249 and 250 of the contested decision, the Commission took the view that the implementation of those restrictions was apparent with certainty in respect of distributors in at least several Member States, which constituted a substantial part of the common market, that JCB Service was a large undertaking with considerable strength in some of the product and geographic markets affected, had an effective capacity to cause significant damage to other downstream operators through its behaviour and had the infrastructures which should have enabled it to realise that its conduct infringed Article 81 EC.

219 It is in those circumstances that the Commission concluded, in recital 251 of the contested decision, that JCB Service's infringements were 'very serious' and should attract a fine of EUR 25 000 000 on account of their gravity.

220 It follows from the foregoing that the Court of First Instance was correct in not sanctioning the Commission for having imposed a fine for the infringements at issue corresponding to infringements described as 'very serious'.

221 As regards the fact that, in paragraph 182 of the English version of the judgment under appeal, the Court refers to 'serious' instead of 'very serious' infringements, it should be observed that this is simply a clerical error. Apart from the fact the words 'very serious' appear in all the other language versions of the judgment under appeal, it should be pointed out that the use of the word 'serious' is of no account in the present case since paragraph 182 of the judgment under appeal makes it unequivocally clear that the infringements here are 'very serious' within the meaning of Section 1A of the Guidelines, warranting a high fine.

222 Secondly, JCB Service argues that, by fixing the duration of the infringement at 10 years, the Court of First Instance, like the Commission, improperly assessed that duration. It claims that it is necessary to appraise the duration of the illicit practice at issue in light of the Commission's negligence, which led JCB Service reasonably to believe that its distribution network did not infringe competition rules. In such a context, given that the duration of a practice is a factor mandating an increase of the amount of the fine, the duration of the challenged practices should not be retained as a factor to be used in order to increase the amount of what is still an unjustified fine.

223 That argument is entirely irrelevant. It should be observed that the Commission's assessment of the duration of the infringement found concerns agreements and practices which were not notified. In those circumstances, JCB Service cannot, in any event, draw its arguments from agreements which have not been notified according to the procedures required by the case-law in order to challenge the substance of the Commission's assessment of the duration of the infringement under the Guidelines.

224 In that regard, JCB Service maintains that there is simply no evidence to support a finding that the alleged infringements were conducted over a period of 10 years. Having regard to the documents considered in relation to the two elements of the infringement considered to be established in the judgment under appeal and which date back to 1992, the Court of First Instance could not consider that the period of infringement had begun in 1988, nor state in paragraph 184 of the judgment under appeal that 'the Commission pointed to facts relating to the two elements of the infringement which are established' and that '[e]vidence, which has been considered previously, is included in the file concerning the whole period considered' without actually examining the evidence.

225 It should be noted that, in its complaint, JCB Service confines itself in essence to criticising the Court of First Instance for not setting out or citing all the evidence enabling the duration of the infringement to be established. However, it does not show that the Court erred in law in paragraph 184 by endorsing the Commission's findings in relation to the infringement's duration. JCB Service has not in fact advanced any argument to show that the Commission's assessment in this regard departs from Section 1B of the Guidelines. That argument must therefore be dismissed.

226 Finally, JCB Service submits that the Court failed to take into account in the present case the existence of attenuating circumstances within the meaning of Section 3 of the Guidelines. First of all, the alleged illicit practices were not committed intentionally by JCB Service but were a result of the Commission's negligence and maladministration. Next, JCB Service did not implement the illicit practice in Italy which it is alleged to have pursued. Finally, the memorandum of 16 May 1995, referred to in paragraph 93 of the present judgment, is a particular attenuating circumstance and not an aggravating circumstance.

227 As regards the first complaint mentioned above, it should be noted that JCB Service bases its reasoning on the fact the Commission's delay in relation to its application for exemption affected the infringement procedure opened by the Commission in respect of agreements and concerted practices which were not notified. As a result, it claims, that element should be considered to be a particular attenuating circumstance in setting the final amount of the fine.

228 It should be observed that JCB Service is again seeking to establish a procedural link between notified and unnotified agreements in order to challenge the substance of

the Commission's decision on the amount of the fine imposed. However, such a link is manifestly lacking, and, therefore, cannot possibly justify the existence of an attenuating circumstance within the meaning of Section 3 of the Guidelines.

229 As regards the second complaint mentioned above, it should be recalled that the Court of First Instance considered in paragraph 103, to which paragraph 117 also refers, that '[i]n any event, however the agreements were implemented in practice, Article 81(1) EC prohibits the existence, in distribution contracts, of clauses having the object or effect of restricting sales. They constitute a restriction on competition which may be subject to a penalty under Article 81(1) EC if they are capable of affecting trade between Member States ... The fact that a clause in an agreement between undertakings, the object of which is to restrict competition, has not been implemented by the contracting parties is not sufficient to remove it from the ambit of the prohibition laid down in Article 81(1) EC'.

230 It is clear from the foregoing that, contrary to the arguments of JCB Service, the Court of First Instance never considered in the judgment under appeal that JCB Service had not implemented the offending practice in Italy. Rather, the Court confined itself to referring to the arguments of JCB Service and drawing from them a different conclusion. In those circumstances, this second complaint raised by JCB Service should also be dismissed.

231 As regards the third complaint mentioned above, it should be noted that the memorandum of 16 May 1995 states that the prohibition of parallel imports is contrary to the decisions of the Commission and the case-law of the Court of Justice. This therefore goes to show that JCB Service was aware of the fact that its conduct was contrary to Article 81 EC, and therefore it cannot be considered to be a particular attenuating circumstance.

232 It follows from all the above considerations that the Court of First Instance did not commit an error of law or assessment in paragraph 190 of the judgment under appeal by endorsing the Commission's view that, when calculating the fine, there was no need to take into account any particular attenuating circumstances.

233 The second limb of the third plea and the plea as a whole must therefore be dismissed as unfounded, and thus the claim that the judgment under appeal should be set aside fails since no plea has been successful.

234 Since the other claims in the appeal were submitted should the Court set aside the judgment under appeal, the appeal must be dismissed in its entirety.

The cross-appeal

235 The Commission contends that the Court of First Instance erred in law as regards the interpretation of Article 15(5) of Regulation No 17 by disregarding in the calculation of the fine the aggravating circumstance described in the contested decision, namely the retaliatory measures taken by JCB Service against a distributor which had breached Article 4 of the United Kingdom dealership agreement (prohibition on sales to unauthorised resellers). In particular, the Commission submits that there was an aggravating circumstance, not on the basis of the notified Clause 4 as such, but because the restrictive character of that article was reinforced by pecuniary penalties.

236 In that respect, it should be recalled that the Court of First Instance observed, in paragraph 191 of the judgment under appeal, that the Commission found that there were aggravating circumstances, considering the penalty, described as a 'retaliatory measure', imposed by JCB Service on JCB Gunn for breach of Clause 4 to be such and that it increased the amount of the fine accordingly by EUR 864 000. It also found that it was not disputed that Gunn JCB's conduct was contrary to its contractual commitments and that it was not entitled to multiple deal trading support, and, finally, that JCB Service imposed a penalty for breach of a contractual provision. However, the Court stated that whether a clause is legal or illegal, it must enjoy immunity from fines under Article 15(5) of Regulation No 17 where it appears in a notified agreement.

237 In those circumstances, the Court considered in paragraph 192 that the Commission could not lawfully impose a fine for conduct classified as an aggravating circumstance but linked to the application of a clause of a properly notified agreement. The Commission could not therefore increase the amount of the fine to take account of alleged aggravating circumstances.

238 JCB Service argues that the Court of First Instance did not err in law. First, JCB's request for damages from its distributor constituted merely the implementation of the clause concerned, and not the implementation of a non-notified provision. The request for damages was also necessary in order to ensure the validity of the selective distribution agreement and to avoid unlawful discrimination between distributors. Finally, the request concerned was incorrectly described by the Commission as a 'retaliatory measure' constituting an aggravating circumstance, since under the Guidelines on the method of setting fines 'retaliatory measures' are those taken against 'other undertakings with a view to enforcing practices which constitute an infringement'.

239 It should be recalled that the Commission stated in recital 40 of the contested decision that '[i]n the two forms A/B filled in for the United Kingdom, JCB was requested to provide information as to the contents of the agreement or concerted practices and, more specifically, under section II(3)(f), as to "sanctions which may be taken against participating undertakings (penalty clause, expulsion, withholding of supplies, etc.")'. In both forms, the response given was "No". This response was not provided negligently or mechanically. In the form A/B accompanying the agreement notified for Denmark also on 30 June 1973, a penalty of GBP 250 or 3 times the prices of spare parts purchased from other sources than JCB was reported'.

240 The findings which precede this recital were neither disputed by JCB Service in the course of the present proceedings nor challenged before the Court of First Instance. In those circumstances, it should be considered that given its response of 'no' in section II(3)(f) of the form A/B in relation to sanctions which may be taken against undertakings participating in the agreement for the United Kingdom, JCB Service had notified the Commission of its intention not to impose such sanctions.

241 Thus, the response of 'no' in the section mentioned above of the form A/B means that the sanctions imposed on the distributor in the United Kingdom went beyond the limits of the activity described in the notification, and therefore, contrary to what was stated in paragraph 191 of the judgment under appeal, the sanctions at issue cannot enjoy immunity from fines under Article 15(5) of Regulation No 17.

242 It thus follows that the Court of First Instance erred in law in paragraphs 191 and 192 of the judgment under appeal in finding that the Commission could not impose a fine of EUR 864 000 for conduct classified as an aggravating circumstance and that the Commission could not increase the amount of the fine to take account of alleged aggravating circumstances.

243 It follows from the foregoing that the cross-appeal must be allowed with regard to paragraphs 191 and 192 of the judgment under appeal and paragraph 2 of its operative part.

244 Under Article 61 of the Statute of the Court of Justice, the Court, where it quashes a decision of the Court of First Instance, may either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for final judgment. Since the state of the proceedings so permits, it is appropriate to give final judgment on the amount of the fine to be imposed on JCB Service and to fix that fine at EUR 30 864 000.

Costs

245 Pursuant to the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under the first subparagraph of Article 69(2) of the Rules of Procedure, which applies to appeals pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

246 Since the Commission has applied for costs and JCB Service has been unsuccessful, it must be ordered to pay the costs of the main appeal proceedings. Since the Commission has applied for costs relating to the cross-appeal, JCB Service must also be ordered to pay those costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the appeal;**

2. **Allows the cross-appeal of the Commission of the European Communities;**

3. **Sets aside paragraph 2 of the operative part of the judgment of the Court of First Instance of the European Communities of 13 January 2004 in Case T-67/01 *JCB Service* v *Commission*;**

4. **Fixes the amount of the fine imposed on JCB Service under Article 4 of Commission Decision 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP.F.1/35.918 — JCB) at EUR 30 864 000;**

5. **Orders JCB Service to bear all the costs of these appeal proceedings.**

[Signatures]