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

1. This case comes before the Court by way of appeal by John Deere Limited (hereinafter 'John Deere') against the judgment of the Court of First Instance (hereinafter 'the CFI') of 27 October 1994 [1] (hereinafter 'the contested judgment'). That judgment dismissed the application for annulment brought by John Deere against Decision 92/157/EEC [2] (hereinafter 'the contested decision') in which the Commission found that the UK Tractor Registration Exchange infringed Article 85(1) of the EEC Treaty, because it gave rise to an exchange of information which enabled each tractor manufacturer to learn about the sales of its various competitors and imports and sales by dealers.

I — Facts and procedure

2. The facts underlying the dispute were described by the CFI in paragraphs 1 to 18 of the contested judgment. I shall now set out those facts, taking a somewhat different approach.

3. To be used on the public highway in the United Kingdom in accordance with national law, every vehicle must be registered with the Department of Transport. The responsibility for such registration falls to the Local Vehicle Licensing Offices (hereinafter 'LVLOs'), of which there are about 60. The registration of vehicles is governed by procedural guidelines issued by the Ministry, entitled 'Procedure for the first licensing and registration of motor vehicles'. According to those guidelines, a special form — form V55 — must be used for the application to register a vehicle.

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

* Original language: Spanish.

1 — Case T-35/92 *Deere* v *Commission* [1994] ECR II-957.

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

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

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

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

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

7. The content of the Exchange was determined by the data included on form V55 and the use of those data under the information agreement. John Deere and the Commission had differing views in that regard, which are reflected in paragraphs 8 to 17 of the contested judgment.

8. According to John Deere, form V55 has five different versions, numbered V55/1 to V55/5, which are described in the procedural guidelines mentioned earlier. Forms V55/2 and V55/4, which were used only by British Leyland, are no longer in use, whereas form V55/3, used when form V55/1 is lost, misplaced or destroyed, is completed manually. Therefore, only versions 1 and 5 will be considered in this case.

9. In the Commission's opinion, there are two main versions of the form: first, forms

V55/1 to V55/4, which are 'pre-completed' by manufacturers and sole importers and used by dealers to register vehicles delivered to them, and, secondly, form V55/5, which is designed for parallel imports.

10. According to John Deere, the distinction drawn by the Commission is misleading. Form V55 is employed both for used vehicles registered for the first time in the United Kingdom and for vehicles imported into the United Kingdom by independent importers.

11. John Deere considers that only form V55/1, the reverse side of which is completed by the registered keeper of the vehicle, that is to say the customer or the owner, has already been 'pre-completed' on the front by the manufacturer of the vehicle or its importer. With the exception of the information appearing on the lower part, the information on the first page of form V55/1 is reproduced on an under-copy, sheet 2. The bottom half of that sheet is used for statistical data. It can be filled in voluntarily by the registered keeper of the vehicle. Even where the statistical part is not completed by the registered keeper, the dealer who has carried out the sale is requested by the departmental guidelines to insert the postcode of his customer. The form is then sent to the LVLO for the relevant area. The LVLO separates the two sheets. It sends the first to the Driver and Vehicle Licensing Centre (hereinafter 'DVLC'), which produces and issues the registration document. Still in compliance with the departmental guidelines, the second sheet is transmitted to a data-processing company which is designated for each major category of vehicle to the public authority by the trade sector concerned. In the case of agricultural tractors, this is SIL.

12. John Deere also considers that form V55/5 is used for all sales other than first sales. Contrary to the Commission's view, it does not enable parallel imports to be identified. SIL uses the data appearing on the form, after which it is destroyed without ever having been sent directly to the members of the agreement.

13. According to the Commission, the form contains the following information, certain points being disputed by the appellant:

— Make (manufacturer).

— Model, serial and chassis number; John Deere considers that the statement contained in the third indent of point 14 of the contested decision is in that respect

incomplete and inaccurate. According to it, that information is purely for SIL's internal use in order to avoid double registrations and SIL does not make the serial numbers of the vehicles available to members. In fact, SIL records the information relating to serial (or chassis) numbers but, under the system based on the first notification, it is no longer disseminated to the members of the Exchange, it having been agreed, since 1 September 1988, that SIL is not to send the registration form to the members of the agreement.

— Original and selling dealer (code number, name, address and postcode). According to John Deere, whose statements on that point were confirmed by SIL, and contrary to the indication given in the fourth indent of point 14 of the contested decision, SIL does not enter into its database the name, address and postcode of the dealer. Furthermore, the original dealer code (box 54) is recorded only if there is no selling dealer code (box 61).

— Full postal code of the registered keeper of the vehicle.

— Name and address of the registered keeper: according to John Deere, and contrary to the indication in the seventh indent of point 14 of the decision, SIL does not extract from form V55 the name and address of the keeper of the vehicle. In that respect it was confirmed that, although that information may appear on page 3 of form V55, which is the only sheet sent to SIL, the information is in any event not recorded by it, so that it is not passed on to the members of the agreement.

14. According to John Deere, the information used by SIL which, it explains, relates only to registrations and not sales, is as follows:

— the make of the vehicle (box 18);

— the vehicle model (box 21);

— the description of the body of the vehicle (box 23);

— the selling dealer (box 61);

— the postcode sector of the registered keeper of the vehicle (box 70);

— the date of receipt by SIL of the second sheet of the form.

— Information concerning the sales made by the dealers in the distribution network of each member, in particular imports and exports in their respective territories. It is therefore possible to identify imports and exports between the different dealer territories and to compare those sales activities with the sales achieved by dealers in their own territories.

15. In the Commission's view, the information sent to the members of the agreement can be divided into three separate categories as follows:

— Aggregate industry information: aggregate industry sales with or without a breakdown by horsepower or by driveline; the information is available for time periods broken down by year, quarter, month or week.

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

16. Furthermore, according to the Commission, until 1 September 1988 SIL provided members of the agreement with copies of form V55/5 which is used by independent importers. Since that date it has been providing them only with the information taken from that form. However, in the Commission's view, that enabled parallel imports from other Community countries to be identified, mainly through the use of the serial number.

17. For its part, John Deere considers that the Data System adopted in 1990 enabled SIL to furnish the members of the agreement with four types of information:

— Aggregate industry data: each member can obtain information on aggregate industry registrations without any product breakdown by model or with a breakdown by horsepower or by drive-

line for the United Kingdom as a whole or each of the 10 regions of the Ministry of Agriculture, Fisheries and Food (hereinafter 'MAFF'), as well as by land use, county, own dealer territories and postcode sector. Those sales can be analysed on a weekly or monthly basis.

— Data about the company's own sales: SIL can provide members with 'tailor-made' reports about their individual total sales, and also sales by model for the United Kingdom, by MAFF region, by land use, by county, by own dealer territory and by postcode sector. SIL can also provide to each manufacturer individually information, in aggregate or broken down by model, on sales made by a dealer in its territory or in total sales by a dealer, without indicating the location of the sale. Such data can be provided monthly. According to John Deere, it should be pointed out that, although point 26 of the contested decision correctly describes the information which may be sent in that context, the expressions 'imports' and 'exports' by dealers must be understood as meaning, with regard to the former, sales made by other dealers in a given territory and, with regard to the latter expression, sales made by a dealer outside his own dealer territory. In no case do those potentially confusing expressions indicate imports from other Member States or exports to such States. The purpose of the system is therefore not to monitor parallel imports. The appellant states that the Commission's description is liable to mislead. The system gives only to certain members of the agreement data about total sales to customers within the territory of a dealer, without indicating the dealer who made the sale, and indicates the total sales made by a dealer to customers within his own territory.

— Data about the sales of each competitor: SIL can indicate the aggregate sales of a given competitor, with or without breakdown by model, for the whole of the United Kingdom, by MAFF region, by land use, county, own dealer territory and postcode sector. Those data are disseminated on a monthly basis.

— Information derived from form V55: chassis number and registration, date of each tractor of a company's make sold in the United Kingdom. That information is disseminated on a monthly basis. It is intended to enable warranty and bonus claims to be verified.

18. On 4 January 1988, the AEA notified to the Commission the Exchange, which established a system for the exchange of information based on particulars relating to registrations of agricultural tractors, primarily with a view to obtaining negative clearance, or alternatively an individual exemption. The information exchange agreement replaced an earlier agreement, of 1975, which had not been notified to the Commission. The Exchange came to the notice of the Commission in 1984, during investigations carried out following a complaint made to it concerning obstacles to parallel imports.

19. On 11 November 1988, the Commission issued a Statement of Objections to the AEA, to each of the eight members of the Exchange and to SIL. On 24 November 1988 the members of the Exchange decided to suspend it. During a hearing before the Commission, they claimed, relying in particular on a study carried out by Professor Albach, a member of the Berlin Science Center, that the information distributed had a beneficial effect on competition. On 12 March 1990 five members of the agreement — including John Deere — notified to the Commission a new agreement for the dissemination of information, the Data System, and undertook not to implement the new system before receiving the Commission's response to their notification.

20. In Decision 92/157, the Commission:

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

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

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

21. That Commission decision was contested by John Deere before the CFI in proceedings for annulment, which were dismissed in their entirety by the judgment in Case T-35/92. On 13 January 1995, John Deere brought the present appeal against that judgment.

II — The grounds of appeal

22. In its appeal against the CFI judgment, John Deere relies on the following eight grounds:

— contradictory and insufficient reasoning;

— misapplication of Article 85(1) of the EC Treaty concerning the agreement;

— incorrect characterization of the United Kingdom agricultural tractor market as a closed oligopoly;

— misapplication of Article 85(1) concerning competition between manufacturers;

— misapplication of Article 85(1) with respect to AEA meetings;

— misapplication of Article 85(1) concerning restriction of intra-brand competition;

— misapplication of Article 85(1) concerning the effect on trade between the United Kingdom and the other Member States, and

— unjustified refusal to apply Article 85(3).

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

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

First, in numerous decisions [3] it has held that an appeal must specify the alleged flaws in the judgment which it applies to have set aside and the legal arguments which specifically support that application. That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court. Such an appeal amounts to nothing more than a request for a re-examination of the application submitted to the Court of First Instance, a matter which falls outside the jurisdiction of the Court of Justice by virtue of Article 49 of its Statute.

Secondly, the Court of Justice has held that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court has thus taken the view that the CFI's appraisal of the evidence submitted to it does not constitute a legal issue which may be reviewed in an appeal, except where such evidence has been distorted or where the material inaccuracy of the CFI's findings is apparent from the documents in the file. The Court of Justice has no jurisdiction to examine evidence accepted by the CFI in determining the facts, provided that it was properly obtained and the general rules and principles of law concerning the burden of proof and the appraisal of evidence have been observed. On the other hand, the Court of Justice is entitled to review the legal characterization of the facts and the legal conclusions drawn from them by the CFI. [4]

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

25. In my opinion, in competition cases arising from Commission decisions it is advisable, as suggested by Advocate General Jacobs, [5] to adopt a more restrictive interpretation of the criteria for the admissibility of appeals and in particular of the requirement laid down in Article 51 of the Statute that appeals to the Court of Justice are to be limited to points of law. Indeed, in such cases the CFI reviews a Commission decision which sets out the facts of the dispute and makes a legal assessment. The CFI, confining itself to the findings of the Commission or undertaking new investigations, establishes the facts and the Court of Justice must abide by that finding in appeal proceedings, since

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

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

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

the function of the CFI would be undermined if the Court of Justice were required, on request by appellants, to review the factual elements of CFI judgments.

I shall now examine each of the grounds of appeal relied on by John Deere, having regard to the strict criteria of admissibility just mentioned. The application of those criteria is particularly important in this appeal, in which the appellant frequently puts forward arguments identical to those relied on before the CFI and often confines itself to questioning the findings of fact made by the CFI, without identifying legal issues relevant to the appeal.

A. *Contradictory and inadequate reasoning*

26. In support of its view that the statement of reasons is contradictory, the appellant states that the CFI erred in law by examining, in paragraphs 39 and 40 of the contested judgment, the legality of the Exchange rather than that of the Data System, even though the undertakings which notified the latter to the Commission undertook to cease participating in the Exchange.

27. This part of the plea is inadmissible because it concerns a question of fact, decided by the CFI and not open to question on appeal. The CFI took the view that the contested decision properly analysed the legality of the Exchange and of the Data System, because not all the undertakings participating in the former were involved in the latter and because the notification of the Exchange was not withdrawn.

28. As regards the inadequacy of the statement of reasons, John Deere makes two allegations. First, the appellant considers that the CFI erred by considering, in paragraph 40 of the contested judgment, that the contested decision adequately stated its reasons regarding the legality of the Data System, to which it improperly applies by extrapolation the considerations expressed regarding the Exchange, despite the differences between the two. The appellant's argument to that effect is also inadmissible as a ground of appeal because it challenges a matter of fact definitively established in the CFI judgment, namely the analogies and differences between the data supplied in the context of the Exchange and within the data system.

29. Secondly, the applicant considers that the CFI did not sufficiently explain why it considered that the Commission was right to rely on the criterion of 10 tractors sold for a particular territory, type of product or

period of time as a threshold below which there is a considerable risk that, despite being presented in aggregate form, the data might allow identification of the exact sales figures of some or all competitors. John Deere considers that criterion of 10 units sold to be very restrictive because in small sales areas it considerably delays the dissemination of information.

30. The appellant's argument must be rejected. According to the case-law of the Court of Justice, review by the Court of complex economic assessments must be limited essentially to verifying that there was no manifest error of appraisal or abuse of power. [6] Without doubt, identification of the factor which prevents exact determination of the sales of competitors is a complex economic assessment. In paragraph 92 of the contested judgment, the CFI found that no manifest error of appraisal had been committed by the Commission in applying the criterion of 10 units sold, having regard to the characteristics of the market and the nature of the information exchanged. The CFI, in undertaking an exhaustive analysis of issues of fact in competition cases, is in a good position to carry out the minimal judicial review provided for by the Community case-law in relation to economic assessments contained in Commission decisions. In my opinion, the CFI's review of those assessments, which are always closely linked with the facts of the case, should not in principle be the subject of an appeal.

31. In view of all the foregoing, I consider that this ground of appeal is partially inadmissible and that the arguments which are admissible should be rejected.

B. *Misapplication of Article 85(1) of the EC Treaty concerning the agreement*

32. John Deere considers that the CFI erred in law by taking the view, in paragraph 66 of the contested judgment, that there was express, or at least tacit, connivance between the members of the agreement in defining their dealer sales territories by reference to the United Kingdom postcode districts.

33. This ground of appeal is inadmissible because it repeats the arguments put forward by John Deere before the CFI and questions points of fact definitively settled in the contested judgment. The CFI accepted as proved the fact that there was an, at least tacit, agreement between the economic agents concerned in defining, by reference to the United Kingdom postcode system, the

6 — Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 34, and Opinion of Advocate General Jacobs in *Hilti* v *Commission*, cited above, paragraph 9.

boundaries of their dealer sales territories, and that there was an institutional framework enabling information to be exchanged, through the AEA and SIL, between the traders.

34. Accordingly, this ground of appeal is inadmissible.

C. *Incorrect characterization of the United Kingdom agricultural tractor market as a closed oligopoly*

35. In this ground of appeal, the applicant submits that the CFI, in classifying the United Kingdom agricultural tractor market as a closed oligopoly, committed the following five errors:

— incomplete and insufficiently reasoned analysis of the relevant market;

— failure to examine the expert's report produced by John Deere;

— substantive inaccuracy of the CFI's findings;

— wrong definition of the relevant geographical market, and

— lack of any restriction of competition.

36. According to John Deere, the first error committed by the CFI in analysing the characteristics of the United Kingdom agricultural tractor market consists in failing to take account of three essential factors, namely price competition, product innovation through research and technological development and the purchasing power of tractor manufacturers' customers.

That argument cannot be upheld. As the Commission points out in its response, the CFI took account in the contested judgment of those three factors mentioned by John Deere, but held that the Commission did not commit any manifest error of appraisal in the contested decision by giving preference to other aspects of the relevant market and concluding that it constituted a closed oligopoly. Thus, paragraph 74 of the contested judgment refers to the factors mentioned by John Deere, but paragraphs 78 to 80 state that the Commission was not guilty of any manifest error of appraisal in relying on other characteristics of the market — manufacturers' market shares, relative stability, and high barriers to entry — and concluding that there was a closed oligopoly.

In my opinion, the CFI took account of the factors mentioned by John Deere and, in an appeal, it is not permissible to rely again on the arguments put forward at first instance regarding the factual characteristics of a market, a matter to be decided by the CFI.

38. The third error committed in determining the characteristics of the relevant market consists, according to the appellant, in substantive inaccuracies in the findings of the CFI based on the documents before it. John Deere considers that it cannot be inferred from those documents, as was done by the CFI, that the relevant market is characterized by relative stability of the competitors' positions, high barriers to entry and sufficient homogeneity of products.

37. The second error committed by the CFI, according to John Deere, when determining the characteristics of the United Kingdom agricultural tractor market consists in the failure properly to examine the economic report from Professor Albach, the expert nominated by the appellant. In my view, there was no such error, because the CFI referred to that report in paragraph 75 of the contested judgment. [7] In paragraphs 78 to 80 of its judgment, the CFI chose to characterize the United Kingdom tractor market in the same way as was done in the report of another expert, nominated by the Commission, Professor Neumann, and in the report on the European Community farm equipment sector, also produced by the Commission. In my opinion, the CFI sufficiently explained its preference for the latter economic analysis of the relevant market and did not therefore commit any manifest error of appraisal: the CFI cannot be required to refute, in its judgment, each of the arguments contained in Professor Albach's report.

This argument is inadmissible, because it challenges factual appraisals, definitively made by the CFI, in relation to the structure and characteristics of the United Kingdom agricultural tractor market. The appellant neither invokes nor identifies any irregularities in the documents before the Court which might have led the CFI to make an incorrect assessment of the facts; consequently, its argument is inadmissible in appeal proceedings and cannot draw support from the judgment in *Commission* v *Brazzelli Lualdi and Others*. [8]

39. Fourthly, the appellant alleges that the CFI incorrectly defined the relevant geographical market by limiting it to the United Kingdom tractor market.

7 — Professor Albach regards the United Kingdom tractor market as a 'wide oligopoly with heterogeneous products in which the aggregate market shares of the principal suppliers have declined and in which new entrants have appeared. The market is one in which price competition is fierce ...'.

8 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 48, which states: 'The Court of First Instance thus has exclusive jurisdiction to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it.'

That argument is not admissible in an appeal because John Deere did not raise the matter before the CFI, merely discussing the impact of the information system on trade between the Member States. [9]

40. Finally, John Deere alleges that the CFI erred in considering, in paragraph 51 of the contested judgment, that the fact that the market could be regarded as highly concentrated meant that competition within it was weakened. In its view, fierce competition is possible in an oligopolistic market.

John Deere's argument to that effect cannot be upheld. The CFI did not merely establish an automatic correlation between the degree of concentration on a relevant market and the intensity of the competition prevailing on it. In fact, the CFI analysed the characteristics of the United Kingdom agricultural tractor market and from them inferred that it was a closed oligopoly. It went on to conclude that in a market with such characteristics, the existence of an information system like the one under review in these proceedings restricts competition. In its submissions, John Deere puts forward no argument to challenge that conclusion by the CFI, which coincides with the view taken by the Commission in the contested decision.

41. In view of the foregoing considerations, I am of the opinion that this ground of appeal is partially inadmissible and that the admissible arguments should be rejected.

D. *Misapplication of Article 85(1) of the EC Treaty concerning competition between manufacturers*

42. This ground of appeal is divided into three parts:

— the reduction or removal of uncertainty regarding the operation of the market did not restrict competition;

— lack of any increased barriers to entry to the market, and

9 — See the judgment in *Commission* v *Brazzelli Lualdi and Others*, cited above, paragraph 59, which states: 'To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, 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 Court's jurisdiction is thus confined to review of the findings of law on the pleas argued before the Court of First Instance.'

— Article 85(1) does not prohibit 'purely potential effects on competition'.

I shall examine each of the three parts of this ground of appeal.

1. The reduction or removal of uncertainty regarding the operation of the market did not restrict competition

43. John Deere considers that, in the contested judgment, the CFI misinterpreted the meaning of the terms in Article 85(1) 'restriction ... of competition'. In its opinion, competition is restricted where undertakings cease determining their market behaviour independently and thus adversely affect competition. [10] In the present case, neither the CFI nor the Commission determined the existence of any restriction of competition because they did not prove that the reduction of uncertainty in the United Kingdom agricultural tractor market brought about by the information exchange system restricted the freedom of undertakings to adopt independent decisions or that the consequence of that system was a reduction of competition.

As regards the freedom of undertakings to adopt independent decisions, John Deere considers that the information exchange system did not limit it because the information supplied by SIL relates to the past performance of competitors and contains no data reflecting business secrets such as prices, customer names or production plans. That information does not disclose the future commercial strategy of undertakings, whose conduct in response to the increased transparency of the market is unforeseeable and does not necessarily coincide. According to the appellant, the Court of Justice's judgment in the *Woodpulp* case [11] confirms that argument. Moreover, the information exchange system did not lead to less commercial rivalry between the manufacturers of agricultural tractors and their aggressive commercial strategies have not disappeared, because the system supplied aggregate data on sales which, moreover, became known only after a delay of several months.

As regards the possible reduction of competition as a consequence of the information exchange system, John Deere denies that any reduction occurred. On the contrary, it considers that the system had a positive impact on conditions of competition in the United Kingdom agricultural tractor market because the increased transparency stimulated competition, allowing undertakings better to identify consumers' requirements and mar-

10 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663 and Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021.

11 — Joined Cases 89/95, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström* v *Commission* [1993] ECR 1307, paragraph 64.

ket trends, so that they could adjust their production planning accordingly.

44. To justify its reasoning, John Deere relies on several arguments which, in my opinion, are inadmissible because they misinterpret the facts determined by the CFI in the contested judgment. The CFI took the view that the United Kingdom tractor market is an oligopolistic market with high barriers to entry (paragraphs 78 to 84), that the information exchanged under the information agreement constituted business secrets (paragraph 81) and that manufacturers exchanged detailed and precise information at short intervals (paragraph 51).

45. On that basis, I consider that this part of the ground of appeal must be dismissed, because the CFI correctly applied the criterion of restriction of competition, which must be present for an agreement to be contrary to Article 85(1).

46. According to the case-law of the Court of Justice, competition is restricted or distorted, within the meaning of Article 85(1), where traders cease independently to determine their commercial policy. That requirement of independence does not deprive them of the right to adapt themselves intelligently to the conduct of their competitors, but it does preclude any direct or indirect contact between traders, the object or effect of which is to change normal conditions of competition in the relevant market, having regard to the nature of the products or services offered, the size and number of undertakings and the volume of that market. [12]

47. The independence of traders to decide on their commercial policy clearly disappears when they enter into an agreement which restricts their future freedom of action on the market. Such independence may also be undermined when traders set up cooperation arrangements to promote a common economic interest, which, whilst not directly providing the basis for anti-competitive practices, affects competition between manufacturers.

48. In these proceedings, the main manufacturers of agricultural tractors in the United Kingdom set up cooperation arrangements, in the form of the information exchange system, intended to enable them to learn about the United Kingdom market. The effect of the agreement was very considerably to increase the transparency of that market and as a result to reduce uncertainty regarding the commercial strategies of competing undertakings.

12 — Judgments in *Suiker Unie*, cited above, paragraphs 173 and 174, and *Züchner* v *Bayerische Vereinsbank*, cited above, paragraphs 13 and 14.

49. In my opinion, that reduction of uncertainty, brought about by the information exchange agreement, restricts the freedom of undertakings to adopt independent commercial decisions and thereby restricts competition within the meaning of Article 85(1). That conclusion, which coincides with the views put forward by the Commission and the CFI, is based on the following reasoning:

— Transparency and the consequent reduction of uncertainty only strengthen competition in highly competitive markets. However, in oligopolistic markets like the one in this case excessive transparency enables traders rapidly to learn of the commercial policy followed by their competitors and this results in 'blocking' the market, acting as a disincentive to aggressive commercial policies. Excessive transparency annihilates, or at least restricts, competition in an oligopolistic market.

— The information exchanged between the undertakings participating in the agreement relates to business secrets and enables those undertakings to identify their dealers' sales inside and outside the territory allocated to them, and to determine the sales of other competing undertakings and their dealers participating in the agreement. The numerous sales data supplied by SIL also enable undertakings to identify parallel imports from other Member States.

— The information is supplied by SIL to the undertakings participating in the agreement either weekly, monthly or quarterly. The time lapse between the sale and the transmission of information is quite short and means that the data are not 'historic' as far as the undertakings are concerned but provide information on the commercial policy being followed by competing undertakings.

— Undertakings selling tractors are the only recipients of the information supplied by SIL, which is not made public. Therefore, purchasers derive no benefit from the information agreement. As a result, contrary to John Deere's contention, the Court of Justice's judgment in *Woodpulp* [13] is not applicable to this case because there the system of quarterly announcements of woodpulp sale prices charged by producers furnished useful information to purchasers. However, the agreement in this case facilitates the exchange of information only between undertakings selling tractors which are competitors on the United Kingdom market.

50. In view of those considerations, I am of the opinion that the first part of this ground of appeal must be dismissed.

13 — Cited above, paragraphs 63 and 64.

2. Lack of any increased barriers to entry to the market

51. The CFI took the view in paragraphs 52 and 84 of the contested judgment that the information agreement had a negative impact on traders who wished to gain access to the United Kingdom agricultural tractor market because if they did not participate in the agreement they were deprived of essential information concerning that market and because, if they do participate in it, their commercial policy is rapidly learned by the undertakings already established in the market.

John Deere argues that that statement is incorrect for two reasons. First, the information exchange system is available without discrimination to all manufacturers and sellers who decide to set up in the United Kingdom and if they do not become members they can adopt an independent commercial strategy, even if they do not have at their disposal the information supplied through the agreement. Second, if the new traders participate in the system, their freedom to act independently in the market is not removed and their commercial strategy is not rapidly ascertained by competitors.

52. That reasoning is not admissible in an appeal, because John Deere is merely repeating to the Court of Justice the same arguments which were rejected by the CFI in the contested judgment, and the appellant has produced no argument concerning a possible error of law in the CFI's assessment.

3. Article 85(1) does not prohibit 'purely potential effects on competition'

53. John Deere considers that the CFI erred in law by stating, in paragraphs 61 and 92 of the contested judgment, that Article 85(1) prohibits both actual anti-competitive effects and potential effects, provided that they are sufficiently appreciable. Accordingly, the CFI considered it irrelevant that the Commission had not proved the actual anti-competitive effects of the information exchange agreement on the United Kingdom agricultural market.

According to John Deere, the judgments of the Court of Justice in *Societé Technique Minière* [14] and *Salonia* [15] and the judgment of the CFI in *Petrofina* v *Commission* [16] relied on by the CFI in concluding that Article 85(1) prohibits purely potential anti-competitive effects were incorrectly applied in the contested judgment. The *Salonia* and *Petrofina* judgments refer to the potential

14 — Case 56/65 [1996] ECR 235.
15 — Case 126/80 [1981] ECR 1563.
16 — Case T-2/89 [1991] ECR II-1087.

effects of an agreement on trade between Member States and not its potential effects on competition. In the *Societé Technique Minière* judgment there is no statement that purely potential anti-competitive effects are sufficient to prove an infringement of Article 85(1).

54. Those arguments cannot be upheld.

55. For an agreement to be contrary to Article 85(1) it is necessary for it to have as its 'object or effect the prevention, restriction or distortion of competition within the common market ...'. The Court of Justice has held [17] that it is necessary to verify first whether the object of the agreement itself constitutes a restriction of competition. If that is the case, the condition laid down in Article 85(1) is fulfilled and it is unnecessary to analyse the effects of the agreement. If the object of the agreement is not restriction of competition, it is appropriate to analyse its effects to determine whether or not it restricts competition. [18]

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

Determination of the effects of an agreement on competition constitutes a complex economic appraisal and the Court of Justice has held that, although it should undertake a comprehensive review of whether the conditions for the application of Article 85(1) are fulfilled, its review of complex economic appraisals by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers. [22]

17 — See in particular the judgments in *Société Technique Minière*, cited above, page 247; Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1996] ECR 299, Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 19; *Remia* v *Commission*, cited above, paragraph 18; Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 39, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487.

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

19 — *BAT and Reynolds* v *Commission*, cited above, paragraph 54, and Case T-19/91 *Vichy* v *Commission* [1992] ECR II-415, paragraph 59.

20 — Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10.

21 — Case 5/69 *Völk* [1969] ECR 295 and Case T-7/93 *Langnese-Iglo* v *Commission* [1995] II-1533, paragraph 98.

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

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

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

I do not consider that the CFI should have required the Commission to carry out an analysis of the actual effects of the agreement on competition in the United Kingdom agricultural tractor market, in which it would have indicated the prices and market shares of each trader that would have prevailed if there had been no information exchange agreement.

57. I also consider that the CFI's reference in the contested judgment to the *Salonia* judgment and its judgment in *Petrofina* is not entirely relevant, because, as John Deere points out, it is stated in both cases that the potential effects of an agreement must be taken into account in assessing whether or not it affects trade between the Member States. That reference to the case-law made by the CFI in support of its reasoning is accounted for by the fact that restriction of competition and the impact on intra-Community trade constitute two conditions which must be fulfilled for there to be an infringement of Article 85(1), and they are closely linked with each other in the case-law of the Court of Justice, [23] and in both cases the case-law allows account to be taken of the potential effects of agreements. In my opinion, that somewhat imprecise reference to case-law by the CFI does not constitute an error of law in the reasoning followed in the contested judgment.

58. Accordingly, I consider that this part of the ground of appeal cannot be upheld.

59. In view of the foregoing reasoning, I consider that this ground of appeal is partially inadmissible and that those parts which are admissible must be rejected.

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

E. *Misapplication of Article 85(1) of the EC Treaty with respect to the AEA meetings*

60. In this ground of appeal, John Deere argues that the CFI erred in law by accepting, in paragraph 87 of the contested judgment, the Commission's reasoning to the effect that the regular meetings within the AEA Committee provided the manufacturers of agricultural tractors with 'a forum for contacts' which made it possible to maintain a policy of high prices and thereby restricted competition within the meaning of Article 85(1). The appellant contends that, under the Data System, the members only held sporadic meetings to deal with purely administrative matters and that the Commission produced no evidence regarding the existence of high sales prices.

61. In this ground of appeal, John Deere gives no reason for the view that the CFI erred in law by stating that the contacts maintained by the tractor manufacturers within the committee of their professional association were used to decide on arrangements for the operation of the information exchange agreement and, as a result, to reduce price competition. Accordingly, this ground of appeal is inadmissible since it merely puts to the Court of Justice arguments identical to those relied on by John Deere before the CFI, which were rejected in paragraphs 87 and 88 of the contested judgment.

F. *Misapplication of Article 85(1) of the EC Treaty concerning the restriction of intra-brand competition*

62. John Deere contends that the CFI erred in law by considering that the information exchange agreement enabled the participating undertakings to confer absolute territorial protection on their dealers (paragraph 96 of the contested judgment) and monitor parallel imports by referring to the vehicle chassis number, which the manufacturer recorded on form V55/5 (paragraph 97 of the contested judgment).

As regards absolute territorial protection of dealers, the appellant considers that the information provided to manufacturers through the agreement concerning their total sales and those of their dealers in each district did not enable the former to impose pressure on dealers selling tractors outside their territory because they did not know to which customers and in which other district those sales had been made.

As regards the monitoring of parallel imports, John Deere considers that the CFI took no account of the fact that form V55/5 ceased to be sent by SIL to the members of the Exchange in September 1988 and that, under the Data System, SIL did not supply members with the name of the independent importer.

63. Both parts of this ground of appeal are inadmissible because the arguments advanced are the same as those put forward by John Deere at first instance, which were properly rejected by the CFI, and because they query matters of fact determined by the CFI definitively in the contested judgment without raising any legal issue which can be reviewed in appeal proceedings.

G. *Misapplication of Article 85(1) of the EC Treaty concerning the effect on trade between the United Kingdom and the other Member States*

64. The appellant contends that the CFI erred in law by accepting, in paragraph 101 of the contested judgment, the reasoning in the contested decision to the effect that the information exchange agreement substantially affects trade between Member States, since the reduction of competition deriving from that agreement necessarily has an impact on the volume of imports into the United Kingdom, in view of the characteristics of the United Kingdom market and the fact that the main traders there operate throughout the common market. John Deere considers that the Commission did not prove that United Kingdom prices were lower than those charged in other Member States, and that was the basic point needed to demonstrate the impact of the information exchange agreement on intra-Community trade.

65. In paragraph 101 of the contested judgment, the CFI found that the Commission had not been able to prove that prices on the United Kingdom market were higher than those on continental markets, but John Deere was likewise unable to prove that they were lower.

66. In my opinion, this ground of appeal cannot be upheld. In paragraph 101 of the contested judgment, the CFI properly considered that the information exchange agreement substantially affected trade between Member States within the meaning of Article 85(1). As the CFI pointed out, the characteristics of the United Kingdom tractor market, the large share of that market controlled by the undertakings participating in the agreement (88%), the identification of wholesale sales and the fact that the companies were present on the markets of the other Member States constitute more than sufficient grounds for concluding that the agreement in question affected intra-Community trade. Without doubt, that reasoning shows with a sufficient degree of probability that the agreement had a direct or indirect, actual or potential impact on trade in agricultural tractors between the United Kingdom and the other Member States, in the sense required by the case-law of the Court of Justice for that condition for the application of Article 85(1) to be fulfilled. [24]

24 — See, *inter alia*, the judgments in *Consten and Grundig* v *Commission*, cited above, at p. 344; *Salonia*, cited above, paragraph 12; *Remia* v *Commission*, cited above, paragraph 22; *DLG*, cited above, paragraph 54, and *Oude Luttikhuis and Others*, cited above, paragraph 18.

H. *Unjustified refusal to apply Article 85(3) of the EC Treaty*

67. The applicant considers that the CFI erred in law by concluding, in paragraph 105 of the contested judgment, that the Exchange and the Data System did not fulfil the necessary conditions for the grant of an individual exemption under Article 85(3). John Deere submits that the CFI erred by considering that that undertaking had not demonstrated that the restrictions of competition deriving from both information exchange agreements were strictly necessary to achieve an improvement of production and distribution advantageous for consumers. The applicant also contends that it would not have been possible to obtain such reliable information concerning the United Kingdom agricultural tractor market if the manufacturers had carried out individual research.

68. This ground of appeal is inadmissible, because John Deere merely questions assessments of fact made by the CFI or raises again before the Court of Justice the same arguments which were properly rejected by the CFI in the contested judgment. John Deere even refers to the arguments set out in its originating application to the CFI without identifying any possible matter of law in the reasoning of the CFI to which it takes exception.

Costs

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

Conclusion

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

(1) declare the appeal partially inadmissible;

(2) dismiss the admissible grounds of appeal;

(3) order the appellant to pay the costs.