

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 15 December 2005¹

1. In this appeal JCB Service seeks to have the judgment of the Court of First Instance in Case T-67/01 *JCB Service v Commission*² set aside in whole or in part.

reasoning, incorrect application of applicable Community rules, and infringement of fundamental principles governing fines and of rules governing their calculation.

2. That judgment essentially confirmed a Commission decision³ finding various infringements of Community competition rules by JCB Service, but reduced the fine imposed from EUR 39 614 000 to EUR 30 000 000.

4. The Commission disputes all of those allegations, and has lodged a cross-appeal seeking to have the fine restored to its original amount.

3. The appellant alleges infringement of its rights of defence owing to the excessive duration of the procedure before the Commission, disregard of the presumption of innocence, incorrect legal characterisation of facts, distortion of evidence, contradiction in

Legal framework

5. Article 81(1) EC prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'. Under Article 81(2), such agreements are void.

1 — Original language: English.

2 — [2004] ECR II-49.

3 — 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) (hereinafter 'the contested decision').

6. Article 81(3) however allows that prohibition to be declared inapplicable to agreements, decisions or concerted practices ‘which [contribute] 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 which [do] not

Commission Regulations No 27⁵ and No 99/63.⁶

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

8. Article 2 of Regulation No 17 stated: ‘Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under [Article 81(1) or Article 82 EC] for action on its part in respect of an agreement, decision or practice.’

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

9. Application was to be made on form A/B, annexed to Regulation No 27, and was to contain the detailed information asked for in that form. As explained however in the introduction to form A/B, as subsequently annexed to Regulation No 3385/94, ‘[the Commission is not] obliged to give negative clearance. Article 2 of Regulation No 17 states that “... the Commission may certify ...”. The Commission issues negative clearance decisions only where an important problem of interpretation has to be solved.

7. At the material time, those rules were implemented by, in particular, Council Regulation No 17⁴ and

4 — First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87); now repealed, with the temporary exception of Article 8(3), with effect from 1 May 2004 by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), under which national authorities now have many of the responsibilities which were previously the Commission’s.

5 — First Regulation implementing Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 132), repealed and replaced by Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 (OJ 1994 L 377, p. 28).

6 — Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), repealed and replaced by Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty (OJ 1998 L 354, p. 18).

In the other cases it reacts to the application by sending a comfort letter.⁷

10. In cases where the Commission considered there to be an infringement of the competition rules, it was to inform the undertakings concerned in writing of the objections raised against them, in accordance with Article 2(1) of Regulation No 99/63. That communication is known as a statement of objections.

11. Article 15 of Regulation No 17 concerned fines. Article 15(2) allowed the Commission to impose fines not exceeding 10% of turnover in the preceding business year on undertakings or associations of undertakings which infringed Article 81(1) EC, having regard both to the gravity and to the duration of the infringement.

12. In 1998, in order to ensure that its own decisions on the subject were transparent and objective, the Commission issued guidelines,⁸ under which the amount of the fine is determined in successive stages.

13. First, the Commission fixes a basic amount according to whether the infringement is minor, serious or very serious⁹ in the light of its nature, its actual impact on the market and the size of the relevant geographic market, and may increase that fine by a percentage according to its duration.¹⁰ It then assesses whether that amount should be further increased because of aggravating circumstances or reduced because of mitigating circumstances,¹¹ and further adjustments may be based on certain objective factors.¹²

14. Article 15(5)(a) of Regulation No 17 provided that fines were not to be imposed in respect of acts taking place after notification to the Commission and before its decision in application of what is now Article 81(3) EC, provided they fell within the limits of the activity described in the notification.

15. Commission Regulation (EEC) No 1983/83¹³ provided for block exemption of exclusive distribution agreements. Article 2 of that regulation set out the permissible

7 — See also the Commission's notice on procedures concerning applications for negative clearance (OJ 1982 C 343, p. 4).

8 — 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) (hereinafter 'the Guidelines').

9 — Attracting, respectively, fines of up to EUR 1 million, up to EUR 20 million and over EUR 20 million (paragraph 1.A of the Guidelines).

10 — Paragraph 1.B.

11 — Paragraphs 2 and 3 respectively.

12 — Paragraph 5(b).

13 — Of 22 June 1983 on the application of Article [81(3) EC] to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1).

restrictions on competition in that context, specifically the obligation to obtain the contract goods for resale only from the other party and to refrain from active sales. Article 3 provided however that Article 1 was not to apply, *inter alia*, where:

outside, or from selling in, the contract territory contract goods.’

Factual and procedural background

‘(c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory;

(d) one or both of the parties makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market, in particular where one or both of them:

16. JCB Service is a company incorporated under English law, which directly or indirectly owns and controls the 28 companies in the JCB Group.¹⁴ JCB manufactures and markets construction site machinery, earth-moving and construction equipment and agricultural machinery, and spare parts for those products. Its distribution network is structured on a national basis, with one subsidiary or one exclusive importer per country.

17. On 30 June 1973, using form A/B drawn up pursuant to Regulation No 27, JCB notified to the Commission eight standard distribution agreements to be concluded with the distributors or main dealers linked to the group in, in particular, the United Kingdom, Ireland, Germany, Benelux, Denmark and Italy.

...

2. exercises other rights or take[s] other measures so as to prevent dealers or users from obtaining

14 — In what follows, I use ‘JCB’ to refer to JCB Service, as party to the present proceedings, and also, except where it might give rise to confusion, to the JCB Group as a whole and to the various companies in the group to the extent that they represented the group’s activities.

18. On 27 October 1975, the Commission informed JCB that the notified agreements entailed several restrictions in breach of what is now Article 81 EC. It required their amendment and put various questions to the company.

19. Revised standard agreements applicable in the United Kingdom and Ireland were sent to the Commission on 18 December 1975.

20. On 13 January 1976, the Commission informed JCB Sales that certain problems had been resolved, while others remained, and sought clarification of several provisions.

21. In March 1976, JCB Sales answered those points and provided detailed information regarding the remaining problems; at a meeting with the Commission, it provided further information, together with a copy of its agreement with its French subsidiary.

22. There were no further developments until 6 March 1980, when JCB Sales sent the Commission a modified standard UK Distributor Agreement replacing the agreement notified in 1975. Then, on 29 December 1995, JCB Sales sent the Commission another standard UK Distributor Agreement

replacing the 1980 agreement. The Commission did not reply to those communications, which did not use form A/B as prescribed in Regulation No 27.

23. On 11 December 1995, the Tribunal de Commerce (Commercial Court), Paris, dismissed in part an action for unfair competition brought by JCB's French subsidiary against Central Parts SA, which obtained JCB spare parts from the United Kingdom in order to resell them in France. JCB had accused Central Parts of unlawfully using the JCB sign and describing itself as an authorised distributor. That judgment was later overturned, in 1998, by the Cour d'Appel (Court of Appeal), Paris, which held that Central Parts had engaged in unfair competition vis-à-vis JCB.

24. On 15 February 1996, Central Parts lodged a complaint with the Commission concerning JCB's practices with regard to distribution of its products.

25. On 5 November 1996, the Commission undertook an inspection at the premises of JCB's French subsidiary and of two of its distributors in the United Kingdom.

26. The Commission then sent JCB a first statement of objections, in which however it overlooked the notification sent in 1973, an

omission pointed out by JCB. A second statement of objections taking account of the 1973 notification was sent on 30 July 1999; JCB replied on 13 December 1999 and was heard again on 16 January 2000.

27. On 21 December 2000, the Commission adopted its decision.¹⁵ It examined the agreements notified in 1973, the amended agreements communicated after that date, and JCB's distribution arrangements and practices as disclosed by evidence of various kinds.

28. It found that there were various restrictions on sales by official JCB distributors outside their allotted territories and penalties attached to such sales once made, that there was concertation on maintenance of resale prices, and that there were exclusive purchase requirements preventing cross-network supplies. Those arrangements all had the purpose or effect of restricting competition and affected trade between Member States, thus infringing Article 81(1) EC. It considered whether the conditions in Article 81(3) EC were fulfilled, and concluded that they were not. For the purposes of Article 15(5)(a) of Regulation No 17, the Commission considered that only the agreements notified by form A/B on 30 June 1973 had been duly notified; other agreements had not been so notified, and various practices either fell outside the scope of the notified agree-

ments or constituted abusive implementation thereof. To the extent that the notified provisions had restrictive effects, these were reinforced by the unnotified restrictions. Finally, the Commission examined the gravity and duration of the infringements and took account of one aggravating circumstance — a retaliatory penalty imposed on a distributor for out-of-territory sales — but found there to be no mitigating circumstances.

29. The Commission considered the infringements to be 'very serious', attracting a fine of EUR 25 000 000 on account of gravity, to be increased by 5% for each of the 11 years of duration found (thus EUR 13 750 000) and by EUR 864 000 in respect of the retaliatory penalty imposed.

30. Article 1 of the contested decision reads as follows:

'JCB Service and its subsidiaries have infringed Article 81 of the Treaty 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

15 — Cited in footnote 3.

and provide absolute protection in exclusive territories outside which authorised distributors are prevented from making active sales and which include the following:

JCB Service, thereby making distributors' remuneration dependent on the geographic destination of sales;

(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;

(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.'

(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;

31. Article 2 of the contested decision rejected the application for exemption filed on 30 June 1973.

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

32. Article 3 ordered JCB to bring an end to the infringements, in particular to

(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 JCBamford Excavators Ltd or other subsidiaries of

'(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;

are made within the distributors' territory or outside respectively or whether agreement with other distributors outside the territory has been made.'

33. Article 4 imposed a fine of EUR 39 614 000.

34. On 22 March 2001, JCB Service applied to the Court of First Instance for annulment of the contested decision.

(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;

35. The Court of First Instance delivered judgment on 13 January 2004. It found that several of the infringements were not established by the evidence and that the increase in the fine on account of the retaliatory penalty imposed on a distributor was not justified because the penalty constituted implementation of a notified agreement. Consequently, it annulled Articles 1(c), (d) and (e) and 3(d) and (e) of the contested decision, reduced the fine to EUR 30 million, and dismissed the remainder of the application.

(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;

36. JCB brought the present appeal on 5 April 2004, requesting the Court essentially to:

(e) inform their authorised distributors in the United Kingdom that allowances under the multiple deal trade support are granted regardless of whether sales

— annul the judgment under appeal in its entirety in so far as it infringes Com-

munity law by violating JCB's rights of defence;

- alternatively, annul the judgment in so far as it (i) finds that there was a general restriction on passive sales by authorised distributors, and a restriction on the sources of supply of distributors in France and Italy, preventing cross-supplies, and (ii) imposes a fine for such infringements;
- give final judgment annulling, wholly or in part, the contested decision and annulling or reducing the fine.

37. The Commission in its response requests the Court to dismiss the appeal in its entirety, and in its cross-appeal to annul the judgment under appeal to the extent that it reduces the fine by the amount of the increase in respect of the aggravating factor constituted by the penalty imposed on a distributor.

Preliminary remarks

38. Before examining the grounds of appeal, there are two general points to be made with

regard to JCB's approach in its argument, in which it makes extensive reference to the evidence examined by the Commission and the Court of First Instance, and places considerable emphasis on the Commission's silence between 1975 and 1996.

39. First, as regards the respective roles of the Commission and the Courts in the assessment of infringements of the Community competition rules, when the Commission adopts a decision finding an infringement and imposing a fine, the undertaking concerned may challenge both the validity of the finding and the amount of the fine before the Court of First Instance.

40. As regards the first aspect that Court's jurisdiction is confined to a review of legality, in which context it may verify whether the Commission has committed any manifest factual errors of assessment, but as regards the second it has unlimited jurisdiction to vary the fine. It is not however the Court of First Instance's function to reconsider the case as if it were the Commission, but rather to verify whether the decision is vitiated by any defects which are either raised by the applicant or are matters of public policy which the Court should raise of its own motion.

41. On appeal, the jurisdiction of the Court of Justice is considerably more limited. It

may not review the facts, unless there is a distortion of the clear sense of the evidence or the facts have been wrongly categorised in law;¹⁶ its role is confined to determining whether the appellant has identified any errors of law committed by the Court of First Instance in its own review of the validity of the Commission's decision.

silence on the part of the Commission, as the Court of First Instance noted in paragraph 80 of its judgment. A fortiori, no conclusion can be drawn, from the Commission's silence on matters notified to it, as regards the compatibility of matters not explicitly referred to in such notification.

42. In the present appeal JCB appears in many instances to regard the Court of First Instance as the author of the finding that it infringed competition law and as the imposer of the fine, and to request the Court of Justice to re-examine all the evidence. However, the scope of this Court's review is limited as described above.

First ground of appeal: rights of defence and presumption of innocence

44. JCB submits that the Court of First Instance infringed Community law by violating (i) its rights of defence and (ii) its right to benefit from the presumption of innocence.

43. Second, it is clear from the procedural arrangements set up by Regulations No 17, No 27 and No 99/63¹⁷ that, whilst the Commission may issue negative clearance (or a comfort letter) in response to a notification which reveals no infringement of the competition rules, it is not required to do so. However, since provision is made for them, only such communications may give rise to a legitimate belief that the practices notified do not constitute an infringement; no conclusion can be drawn from mere

Rights of defence

The judgment under appeal

45. At first instance, JCB submitted that the Commission had failed to fulfil its obligation to act within a reasonable time, an obligation deriving both from a general principle of Community law enshrined in the case-law and from Article 6(1) of the European Convention on Human Rights.

¹⁶ — See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 47 et seq.; see also points 73 and 74 below.

¹⁷ — See point 7 et seq. above.

46. The Court of First Instance distinguished between the examination of the agreements notified in 1973, leading to the rejection of the application for exemption, and the investigation of the complaint made in 1996, dealt with in the remainder of the operative part of the contested decision.¹⁸

47. With regard to the 1973 notifications, it recognised that by taking 27 years to adopt a decision the Commission had failed to act within a reasonable time, but considered that the failure could not have affected the lawfulness of either the rejection of the application for exemption or the finding that there was an infringement.¹⁹ The mere fact that the application for exemption was not rejected within a reasonable time could not render the rejection unlawful.²⁰ Failure to act within a reasonable time cannot justify annulment unless it is established that the delay has adversely affected the ability of the undertakings concerned to defend themselves effectively.²¹ The contested decision did not base any finding of infringement on notified matters but on practices which differed from those stipulated by the notified agreements; the delay thus could not affect the lawfulness of the proceedings relating to those practices.²² In any event, JCB did not

argue that the delay had resulted in any particular procedural irregularity, merely that the Commission's conduct revealed poor management of the file.²³

48. As regards the 1996 complaint, the total duration of the procedure did not appear excessive given the complexity of the case, but again could entail annulment only if it were established that it infringed the applicant's rights of defence, and JCB merely argued that the length of the procedure revealed the Commission's partiality and mismanagement of the file.²⁴

Argument

49. In the appellant's submission, the Court of First Instance erred in law by ignoring the repercussions of the Commission's violation of its rights of defence. It adopted an unduly restrictive reading of JCB's arguments, in breach of (i) its obligation to respond to the issues raised and (ii) the principle of *iura novit curia*, according to which the Court, where its attention is drawn to a specific violation, should itself assess the contours of such violation and the nature of the rights intended to be vindicated. JCB contends that it expressly raised the Commission's failure

18 — Paragraph 37 of the judgment.

19 — Paragraph 38.

20 — Paragraph 39, citing Case T-26/99 *Trabisco v Commission* [2001] ECR II-633, paragraph 52, and Case T-62/99 *Sodina v Commission* [2001] ECR II-655, paragraph 94.

21 — Paragraph 40, citing Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and Others v Commission* [1999] ECR II-931, paragraph 122.

22 — Paragraph 41.

23 — Paragraph 42.

24 — Paragraphs 43 to 45.

to respect its rights of defence in relation to the procedure of notification; it emphasised the obligation to take account of the duration of each stage of the notification procedure; and it underlined the excessive duration of the procedure in its entirety as being unreasonable. It was therefore clearly invoking its inability to defend itself effectively.

very nature it was an infringement of an essential procedural requirement.

52. The Commission considers that the Court of First Instance could not have raised of its own motion any concrete issue concerning the rights of defence attributable to the duration of the procedure because such issues are not generally manifest and were not manifest in the present case.

50. The Commission considers that JCB invoked its rights of defence before the Court of First Instance merely in a general manner in relation to the allegedly excessive duration of the notification and infringement procedures without defining how its ability to defend its position had been affected in either. Its attempts to amplify its arguments on appeal are inadmissible. The maxim *iura novit curia* cannot require the Court to supplement laconic arguments which may only be accepted if they are supported by factual evidence. The appellant's claim is of non-respect for proper procedures, unrelated to the delay in completing the exemption procedure, or to the argument presented at first instance.

Assessment

53. The Court of First Instance regarded the delay between the first notifications made by JCB to the Commission in 1973 and the adoption of the contested decision in 2000 as regrettable, but not as having affected JCB's rights as a defendant.

54. That view seems to me to be correct.

51. In the alternative, JCB submits that the excessive delay should have been raised by the Court of First Instance of its own motion, as a matter of public interest, since by its

55. To the extent that the decision found that JCB had infringed Article 81 EC, it is clear that no aspect of the finding was based exclusively on the simple implementation of the agreements correctly notified in 1973

and 1975. Even though the Commission considered that the restrictive effects of the notified provisions were reinforced by the unnotified restrictions,²⁵ it is clear that all the practices in respect of which an infringement was found and a fine imposed were based either on the terms of agreements which had not been correctly notified or on conduct which was not related to any agreement.²⁶

dialogue with the Commission and to bring proceedings for the Commission's failure to act; but neither of those rights could be affected by the mere passage of time, and JCB remained free to notify, in the correct form of which it was aware, further agreements and practices in which it engaged.

56. To the extent that the decision rejected the 1973 application for exemption and required JCB to bring certain practices to an end, the only effect of the delay was to allow JCB to continue its conduct for longer.

59. Consequently, the length of time which elapsed between the initial notifications and the adoption of the contested decision had no effect whatever on JCB's rights of defence, and there is no need to consider whether the Court of First Instance should have raised of its own motion any further issue in that regard. It may simply be pointed out that the Court of First Instance did consider JCB's arguments and decided that its rights of defence were not in issue.²⁸

57. To the extent that the decision imposed a fine on JCB, it is clear that the agreements correctly notified in 1973 were excluded from the assessment of the amount, which was based solely on other agreements or conduct.²⁷

58. Nor has JCB given any other satisfactory explanation of how its rights of defence might have been affected by the delay in question. It mentions its right to engage in

60. Nothing in that assessment should be taken to condone in any way the Commission's extraordinary delay in dealing with JCB's request for exemption, which was well beyond the bounds of acceptable administrative practice; however, that delay did not affect JCB's rights of defence as alleged.

²⁵ — See point 205 of the contested decision.

²⁶ — See in particular points 149, 158, 163, 171, 175 and 252 of the contested decision.

²⁷ — See point 231 et seq. of the contested decision.

²⁸ — Paragraph 45 of the judgment under appeal.

Presumption of innocence

nothing in the conduct of the administrative procedure to indicate that the Commission had interpreted the documents and the facts in a tendentious or biased manner or exhibited partiality in its conduct towards JCB.²⁹

The judgment under appeal

61. At first instance, JCB submitted that the Commission had not observed the principle of the presumption of innocence, and had considered the facts with partiality, failing to take account of evidence in its favour and presuming its guilt, in breach of the principle of the benefit of the doubt.

Argument

64. JCB contends that the judgment under appeal impaired its right to a presumption of innocence, which entails that any reasonable doubt as to the evidence must be resolved in favour of the accused party pursuant to the related principle of *in dubio pro reo*.

62. The Court of First Instance considered that a general presumption of guilt could be attributed to the Commission only if the findings of fact it made in the decision were not supported by the evidence it furnished.

63. It also examined four examples of alleged partiality adduced by JCB — an internal memorandum dated 16 May 1995, an internal letter dated 13 April 1995, two judgments of French courts, and the transcript of an interview between Commission officials and a JCB distributor on 6 November 1996 — and concluded that there was

65. First, the Court of First Instance wrongly concluded from the issuance of a second statement of objections that a general presumption of guilt could be attributed to the Commission only if the findings of fact in the decision were not supported by the evidence it furnished. It should have recognised rather that an initial statement of objections based on notified agreements already violates the presumption of innocence if it does not at least bring evidence that the conduct in question did not fall ‘within the limits of the activity described in the notification’.³⁰

²⁹ — Paragraphs 53 to 60 of the judgment under appeal.

³⁰ — See Article 15(5)(a) of Regulation No 17, cited in point 14 above.

66. Second, with respect to the 1995 memorandum and letter and the 1996 transcript,³¹ the Court of First Instance failed to take account of evidence which had been ignored or misinterpreted by the Commission, in breach of its duty to ensure that the presumption of innocence had been respected.

67. Third, the Court of First Instance rejected the relevance of decisions of various national courts and inadequately reasoned that rejection. The Paris appeal court had recognised that the refusal to supply Central Parts was solely rooted in Central Parts' unlawful behaviour. The Court of First Instance cannot rely on JCB's alleged behaviour vis-à-vis parallel imports by Central Parts with a view to finding that JCB had infringed Article 81 EC,³² and simultaneously deny the relevance of the appeal court's decision. JCB also cites a judgment of the Nîmes commercial court and decisions of the French and Irish competition authorities, all of which it claims were favourable to its defence.

68. Fourth, JCB argues that the Court of First Instance ignored a fax of 1996 and a memorandum of 1997, both of which it claims constituted exculpatory evidence, again violating the presumption of innocence.

69. The Commission considers that JCB is confusing the maxim *in dubio pro reo*, which is a standard for the assessment of evidence, and the more general rule of the presumption of innocence, which is in issue here. A breach of the latter requires more than mere error in the assessment of the evidence.

70. The 1995 memorandum³³ is not exculpatory in the absence of evidence that it was acted upon, and the Court of First Instance held that there was sufficient evidence of continuing restrictions on passive export sales up to 1998. Further, the Court of First Instance found that the Commission's explanation for excluding the 1996 transcript was entirely plausible.

71. The national decisions referred to were considered by the Court of First Instance but rightly found to be irrelevant to the distinct infringements at issue in this case. The decisions of the French and Irish competition authorities were not mentioned in this connection before the Court of First Instance; the arguments in that regard are thus inadmissible. The remaining arguments seek a review of the Court of First Instance's assessment of the facts, and are also inadmissible.

31 — See point 63 above.

32 — At paragraphs 92 and 98 of the judgment under appeal.

33 — Point 63 above.

Assessment

72. JCB's argument is essentially that the Court of First Instance wrongly concluded from the evidence that the Commission had not shown bias against JCB in violation of the presumption of innocence which it should have accorded.

73. In the broad sense at least JCB is thus seeking a new assessment of the evidence before the Court of First Instance. Since appeals are limited to questions of law, it is not in principle for the Court of Justice to make such an assessment. It will only consider whether the Court of First Instance has distorted the clear nature of the evidence or whether a substantive inaccuracy in the findings is apparent from the documents in the case-file.³⁴

74. Neither of those situations appears to pertain here. Although JCB cites the case-law concerning distortion of the clear sense of the evidence and manifest substantive inaccuracy, the aspects of the judgment which it criticises concern conclusions which the Court of First Instance drew from its examination of the evidence and which in my view lie well within the bounds of a normal assessment and reveal no distortion.

At no point does JCB identify any material inexactitude in the Court of First Instance's reading of the documents before it — in contrast to the cases in which the Court of Justice has found that there was distortion of the evidence.³⁵

75. JCB's specific arguments may be dealt with briefly.

76. On the one hand, the issuance of a statement of objections cannot in any circumstances be regarded in itself as evidence of a presumption of guilt; if it were, the initiation of any criminal or quasi-criminal proceedings or investigation could be objected to. It is only the subsequent conduct of the procedure which can provide such evidence, and in this case the oversight in the first statement of objections was corrected in the second.

77. On the other hand, the Court of First Instance examined the evidence which JCB cited as examples of the Commission's alleged partiality (in that the Commission failed to take account of their allegedly exculpatory nature). The conclusion which it drew was not that the evidence was in no way exculpatory but that there was nothing

34 — See, for example, Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, paragraph 42; Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 47 to 49; and, most recently, Case C-40/03 P *Rica Foods v Commission* [2005] ECR I-6811, paragraph 60.

35 — See, by way of example, Case C-164/98 P *DIR International Film and Others v Commission* [2000] ECR I-447, paragraphs 43 to 48; Case C-277/01 P *Parliament v Samper* [2003] ECR I-3019, paragraphs 45 to 49; Case C-197/99 P *Belgium v Commission* [2003] ECR I-8461, paragraphs 64 to 67.

in the Commission's treatment of it which showed bias. JCB's argument on appeal however is directed to showing that the evidence was exculpatory, an entirely different matter. The mere existence of exculpatory evidence does not always require a favourable finding when there is other evidence of a different nature; nor can it lead ineluctably to a conclusion of bias in the event of an unfavourable decision.

Prohibition on passive sales in France, the United Kingdom and Ireland

The judgment under appeal

78. I am therefore of the view that the first ground of appeal is inadmissible and/or unfounded, and should be dismissed.

80. At first instance, JCB argued that the Commission had not established the existence of restrictions on passive sales by authorised distributors in the United Kingdom, Ireland, France and Italy to end-users and authorised distributors outside their exclusive territory, and that the only express prohibition in the agreements concerned sales to unauthorised distributors.

Second ground of appeal: violation of Article 81 EC

79. JCB submits that the Court of First Instance erred in law by (i) 'condemning' it for imposing a general prohibition on passive sales in France, the United Kingdom and Ireland, (ii) 'condemning' it for restricting sources of supply of distributors in France and Italy, and (iii) refusing to annul the rejection of its application for exemption.

81. With regard to the United Kingdom, the Court of First Instance noted that Clause 4 of the agreement amended in 1975 contained no such general prohibition, but that the Commission's contention was that it had been interpreted as entailing one. The Court of First Instance examined various documents from which the Commission had reached its conclusion³⁶ and concluded that 'in the United Kingdom, restrictive practices going beyond the provisions of the notified agreements were implemented'.³⁷

³⁶ — Detailed in points 84 to 91 of the contested decision.

³⁷ — Paragraphs 86 to 89 of the judgment under appeal.

82. With regard to Ireland, the Court of First Instance followed a similar analysis. The agreements notified in 1973 and 1975 contained no clause prohibiting wholesale sales to unauthorised agents but an unnotified 1992 agreement prohibited both active and passive sales except to an approved sub-dealer. Again the Court of First Instance examined the documents on which the Commission had based its decision³⁸ and found them sufficient to establish the restrictions imposed on passive out-of-territory sales. The exemption granted by the Irish Competition Authority, invoked by JCB, was irrelevant to the exercise by the Commission of the powers conferred on it by Community law, but was in any event based on an agreement not notified to the Commission.³⁹

83. With regard to France, the Court of First Instance found that the unnotified standard dealership contract did contain an express prohibition on passive out-of-territory sales. In any event, the documents cited by the Commission⁴⁰ established the existence of a restriction in practice. A decision of the French competition council cited by JCB was irrelevant since it concerned a separate distribution network and dealership agreement.⁴¹

Argument

84. With regard to France, JCB argues that the dealership agreement cannot be construed as expressly prohibiting passive sales; that one of the three documents considered — a letter concerning service support fees — was elsewhere⁴² regarded as insufficient evidence by the Court of First Instance; and that another of those documents recognised the existence of competitive pressure between distributors encroaching on each others' territories.

85. The Commission responds that the contested decision was in any event not based on an allegation of an express prohibition in the dealership agreement but on the effective application of the agreement; that the Court of First Instance did not question the probative value of the letter concerning service support fees; that the other document referred to clearly states the existence of agreements on territorial sales; and that JCB makes no submission as regards the third document examined both in the decision and in the judgment.

86. With regard to the United Kingdom and Ireland, JCB argues essentially that the Court

38 — Point 122 of the contested decision.

39 — Paragraphs 90 to 95 of the judgment under appeal.

40 — In particular at point 113 of the contested decision.

41 — Paragraphs 96 to 100 of the judgment under appeal.

42 — At paragraphs 139 to 145 of the judgment under appeal.

of First Instance misinterpreted the various communications which it examined; that, in the Commission's submission, is a camouflaged attempt to obtain a reassessment of the evidence.

89. However, as the Commission has pointed out, that possible distortion concerns a point not relevant to the validity of the contested decision, which was based not on the terms of the agreement but on its implementation.

Assessment

87. I can find nothing in this part of JCB's argument which concerns any possible violation of Article 81 EC. What the appellant seeks to demonstrate is that the Court of First Instance has drawn the wrong conclusions from the evidence. As I have recalled, the Court of Justice is not competent to review the drawing of such conclusions unless there is distortion of the clear sense of the evidence.

90. For the rest, it is clear that JCB merely seeks a reassessment of the evidence before the Court of First Instance, and it is not for this Court to carry out such a reassessment on appeal.

Restriction of sources of supply in France and Italy

The judgment under appeal

88. In this instance, it appears possible that the Court of First Instance distorted the sense of the French dealership agreement⁴³ when it concluded that there was an express prohibition on passive sales.

91. At first instance, JCB submitted that the Commission had misinterpreted the agreements in France and in Italy as obliging authorised distributors to obtain supplies solely from the national JCB subsidiary and prohibiting cross-supplies, whereas the purpose of the clauses at issue was merely to ensure that distributors marketed only JCB products, and that the Commission did not investigate whether the contested clauses had actually been implemented.

43 — The relevant clause in which reads: 'The appointed distributor also undertakes not to sell nor distribute JCB products and parts from a place of establishment, subsidiary or warehouse located outside the territory. The appointed distributor undertakes not to promote JCB products and parts directly or indirectly outside the territory.'

92. The Court of First Instance found that the unnotified agreements had a restrictive purpose, that they were implemented in France if not in Italy but that in view of the purpose their actual effect was irrelevant;⁴⁴ therefore the Commission was right to take the view that this element of the infringement was established.⁴⁵

Argument

93. JCB submits that the Court of First Instance's finding in that regard was contrary to the block exemption under Regulation No 1983/83,⁴⁶ and previously under Regulation No 67/67,⁴⁷ from which the relevant clauses of the agreements could have benefited.

94. The Commission contends that this submission is entirely new and therefore inadmissible; that at first instance JCB had implicitly conceded that its French and Italian agreements did not benefit from the

block exemption; and that in any event Article 3(c) and (d)(2) of Regulation No 1983/83 require access to alternative sources of supply outside the contract territory.

Assessment

95. JCB has not sought to deny that this is a new argument not raised before the Court of First Instance, or to assert that it concerns a matter of public policy which the Court of First Instance should have raised of its own motion. The argument is clearly directed at the validity of the Commission's decision, and the Court of First Instance cannot be criticised for not having examined it. Consequently, it is not only inadmissible⁴⁸ but also and in any event fails to identify any error of law in the judgment under appeal.

Refusal to annul the rejection of the application for exemption

The judgment under appeal

96. At first instance, JCB argued that its application for exemption was justified because, in line with the requirements of

⁴⁴ — In accordance with the case-law: Joined Cases 56/64 and 58/64 *Consten and Gründig v Commission* [1966] ECR 299; Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, paragraphs 30 and 31; Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraphs 13 to 15; and Case 56/65 *Société Technique Minière* [1966] ECR 235.

⁴⁵ — Paragraphs 111 to 118 of the judgment under appeal.

⁴⁶ — See point 15 above.

⁴⁷ — 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).

⁴⁸ — See for example *Brazzelli Lualdi*, cited in footnote 34, paragraph 59.

Article 81(3) EC,⁴⁹ the combination of territorial exclusivity and the selectivity of dealers did not prejudice consumers but on the contrary improved product distribution, and that the Commission had put forward no valid reason for rejecting the application. It cited as comparable in particular two cases — BMW and Ivoclar⁵⁰ — in which exemptions had been granted.

Argument

98. JCB submits, first, that the Court of First Instance wrongly limited its consideration to only one of the notified agreements, whereas the application for exemption covered all those agreements, together with amended versions, notified between 1973 and 1995.

99. Second, the Court of First Instance contradicted itself by endorsing the Commission's reasoning in points 201 to 222 of the contested decision which were based *inter alia* on three alleged infringements which the Court of First Instance considered elsewhere⁵² to have been insufficiently established.

97. The Court of First Instance found that JCB confined itself to stating generally that the agreement in question (the standard distribution-export agreement for Ireland, Sweden and the Channel Islands notified in 1973) fulfilled the requirements for exemption, without indicating what precise advantages would qualify it for such a decision. The Commission's reasons for rejecting the application were amply stated in points 201 to 222 of the contested decision. Moreover, the exemption decisions referred to by JCB had been demonstrated by the Commission not to be comparable.⁵¹

100. Third, the Court of First Instance misinterpreted the rules regarding exemptions. There was no restriction on passive sales, so the principles underlying the BMW and Ivoclar decisions should have been applied by analogy and should have led to an exemption.

101. Finally, the Court of First Instance was wrong to state⁵³ that JCB had not indicated

49 — See point 6 above.

50 — Commission Decision 75/73/EEC of 13 December 1974 relating to a proceeding under Article [81] of the EC Treaty (IV/14.650 — Bayerische Motoren Werke AG) (OJ 1975 L 29, p. 1) and Commission Decision 85/559/EEC of 27 November 1985 relating to a proceeding under Article [81] of the EC Treaty (IV/30.846 — Ivoclar) (OJ 1985 L 369, p. 1).

51 — Paragraphs 160 to 169 of the judgment under appeal.

52 — At paragraphs 133, 145 and 154 of the judgment under appeal.

53 — At paragraph 166.

the precise advantages provided by its distribution network. Those advantages were listed in points 207 and 208 of the contested decision itself, and the applicant was entitled to avail itself of them.

infringements which the Court of First Instance considered⁵⁵ to be of central importance and which were relevant to the conclusion that the criteria of Article 81(3) EC were not met.

102. The Commission submits that JCB is merely seeking a general reopening of the Court of First Instance's review of the Commission's complex factual and economic assessment; the arguments should be dismissed as inadmissible on that ground alone.

103. On the specific arguments it considers, first, that the Court of First Instance's reference to only the standard distribution-export agreement for Ireland, Sweden and the Channel Islands notified in 1973 was a simple clerical error of no consequence since the Commission's analysis concerned all the notified agreements and was confirmed by the Court of First Instance, which, moreover, ensured that no fine was imposed in respect of any notified agreement.

104. Second, the reference to points 201 to 222 of the contested decision was for reference purposes only. The Court of First Instance's substantive analysis is separate. In any event, the decision referred⁵⁴ to other

105. Third, JCB seeks to question again the finding of restrictions on passive sales, which distinguishes its situation from that in the BMW and Ivoclar cases. Moreover, the exempted BMW agreements also allowed active out-of-territory sales subject to fulfilment of promotional obligations. The JCB agreements restrict both active and passive sales and cross-supplies, and are not comparable. The Ivoclar agreements concerned multi-brand outlets, and the exemption was not renewed.

106. Finally, the Court of First Instance's reference to the advantages entailed by the agreements relates to the cumulative requirements of Article 81(3) EC or to the sharing of those advantages with consumers. The Court of First Instance rightly found that JCB had not proved satisfaction of those requirements but had in that regard confined itself to general assertions.

⁵⁴ — At points 209, 214, 215 and 218.

⁵⁵ — At paragraph 185 of the judgment under appeal.

Assessment

107. I agree with the Commission that it is not for this Court to examine JCB's arguments in so far as they seek merely a new review of the Commission's analysis in the contested decision. There are, moreover, other difficulties with those arguments.

108. On the first point, JCB's criticism appears to be irrelevant. It seems clear from points 201 to 222, in particular point 205, of the contested decision that the Commission evaluated all the agreements notified, in conjunction with the way in which they were implemented. The Court of First Instance approved that evaluation without limiting its scrutiny to one agreement. It is therefore of no consequence that it — erroneously or otherwise — stated that the application related to only one agreement.

109. On the second point, the fact that in paragraph 161 of its judgment the Court of First Instance stated that 'the general question whether JCB's distribution system could be the subject of a decision under Article 81(3) EC ... is dealt with in recitals 201 to 222 of the contested decision', coupled with the fact that it approved the overall conclu-

sion drawn therefrom, cannot be taken to imply that it was approving each individual step in the Commission's reasoning in that portion of the decision, particularly when it found elsewhere that some parts of that reasoning were not valid. JCB itself states that the decision relied 'inter alia' — and thus only in part — on the three alleged infringements rejected by the Court of First Instance as insufficiently established in law.

110. On the third point, JCB's argument could be relevant only if the factual finding of the existence of restrictions on passive sales were overturned, and it is not for this Court to examine such matters on appeal.

111. On the final point, it is clear that in points 207 and 208 of the contested decision the Commission listed certain benefits entailed by JCB's distribution system and passed on to consumers. The decision then goes on to list other features which pass on no such benefit, together with restrictions which are not indispensable, leading to a finding, in points 221 and 222, that not all the cumulative conditions of Article 81(3) EC were fulfilled, and an exemption could not be granted. In order to overcome that conclusion, JCB would have had to demonstrate that *all* the cumulative conditions were fulfilled. It does not claim to have done so, and the perhaps unfortunate formulation of paragraph 166 of the judgment under appeal is of no consequence in that regard.

112. I am therefore of the view that the second ground of appeal is inadmissible and/or unfounded, and should be dismissed.

Third ground of appeal: imposition and calculation of the fine

The judgment under appeal

113. At first instance, JCB argued that the facts did not establish the existence of an infringement and were in any event based on notified agreements, in respect of which no fine could be imposed. Moreover, the fine was disproportionate in comparison with fines imposed in comparable circumstances on Volkswagen and Opel.⁵⁶ The Commission exaggerated the gravity of the alleged infringements and did not take account of their actual effect, of the extent to which restrictions were actually implemented, of their varying intensity over time, or of mitigating circumstances such as the individual exemption granted by the Irish Competition Authority or the judgment of the Paris appeal court.

⁵⁶ — Commission Decision 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 Commission Decision 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), referred to in paragraph 171 of the judgment under appeal.

114. The Court of First Instance noted that, under Article 15(5)(a) of Regulation No 17, fines could not be imposed in respect of acts which fell within the limits described in the agreements notified in 1973 and 1975. Since moreover certain infringements had not been established, the fine must be assessed solely by reference to the restrictions on passive sales referred to in Article 1(a) of the contested decision, which went beyond the provisions of the notified agreements, and to the restrictions on sources of supply referred to in Article 1(b), which were not covered by the notification.⁵⁷

115. The amount must take account of the circumstances and the gravity of the infringement. Pursuant to Regulation No 17 and its own Guidelines on the method of setting fines, the Commission fixed the fine at EUR 39 614 000 — EUR 25 000 000 in the light of the gravity of the infringement, plus EUR 13 750 000 (5% per year) in the light of the estimated duration of 11 years and EUR 864 000 for aggravating circumstances.⁵⁸

116. The infringements established were serious because they damaged the smooth operation of the internal market by their object and effect of partitioning national

⁵⁷ — Paragraphs 175 to 177 of the judgment under appeal.

⁵⁸ — Paragraphs 178 to 180.

markets, and therefore warranted a high fine. JCB was moreover a relatively important undertaking in the European Community and in the sector concerned.⁵⁹

approval', such an approach being alien to Community competition law. The decisions of the Irish Competition Authority and the Paris appeal court concerned different facts.⁶²

117. On the basis of the facts cited by the Commission, the total duration of the infringement should however have been 10 years, from 1989 to 1998 inclusive, rather than 11.⁶⁰

120. The aggravating circumstance which the Commission found in a penalty imposed by JCB on a subsidiary for breach of a clause of a properly notified agreement should however not have been considered as such.⁶³

118. The fines on Volkswagen and Opel were imposed in different circumstances, and the Commission is not bound to calculate fines as a percentage of turnover, to follow its previous practice in detail or to apply a precise mathematical formula; consequently, the fact that the fines on Volkswagen, Opel and JCB amounted to different percentages of their respective turnovers is not evidence of discriminatory treatment.⁶¹

121. Because the increase for aggravating circumstances was not justified and three elements of the infringement found in the contested decision were not proved, the Court of First Instance, in the exercise of its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17, held that the fine should be reduced to EUR 30 million.⁶⁴

119. As regards mitigating circumstances JCB could not validly claim that the Commission's failure to take a formal position on its agreements amounted to 'implied

122. JCB now submits that the Court of First Instance (i) violated fundamental principles — sound administration, protection of legitimate expectations and equal treatment —

59 — Paragraphs 182 and 183.

60 — Paragraphs 184 and 185.

61 — Paragraphs 186 to 189.

62 — Paragraph 190.

63 — Paragraphs 191 and 192.

64 — Paragraphs 193 and 194.

applicable to the imposition of fines and (ii) misapplied the rules governing the calculation of fines, with regard to the gravity and duration of the infringement and the existence of mitigating or aggravating circumstances.

125. Third, the Court of First Instance infringed the principle of equal treatment by not responding to JCB's contention that the fine was disproportionately high compared with the Volkswagen and Opel fines imposed in comparable circumstances, and by not reducing the fine to the level which could have been imposed at an earlier stage if the Commission had acted diligently.

Fundamental principles applicable to the imposition of fines

Argument

123. JCB argues, first, that breach of the principle of sound administration, which the Court of First Instance recognised in the excessive delay in replying to the notifications, should have led to a substantial reduction of the fine.

126. The Commission stresses, in reply to the first two points and the second part of the third point, that no fine was imposed in respect of the agreements as notified but only in respect of conduct which went beyond those agreements and was not notified. The administrative procedure was thus not excessively long in that regard; no legitimate expectation could be derived from any attitude adopted or not adopted by the Commission vis-à-vis the notified agreements; and the Commission could not have imposed a fine at any stage before it received the complaint from Central Parts concerning the unnotified conduct.

124. Second, the Court of First Instance failed to take account of JCB's legitimate expectation that, following notification and the initial correspondence with the Commission, and in the light of the decisions of national courts and competition authorities, there was a serious possibility that its distribution agreements would benefit from an exemption.

127. With regard to the Volkswagen and Opel fines, the Commission asserts that the Court of First Instance responded to JCB's argument by providing a reasoned assessment in paragraphs 187 to 189 of its judgment.

Assessment

128. I agree with the Commission that, however reprehensible it may be, the delay in examining and rejecting the application for exemption of the notified agreements can have no effect on the assessment of the fine.

129. The Court of First Instance made it clear in paragraphs 175 to 177 of its judgment that, in accordance with Article 15(5)(a) of Regulation No 17, it would not take account of any conduct falling within the limits of the activity described in the agreements notified in 1973 and 1975. It examined the lawfulness of the decision on the fine solely by reference to the restrictions imposed on passive sales referred to in Article 1(a) of the contested decision, which went beyond the provisions of the notified agreements,⁶⁵ and to the restrictions on sources of supply, referred to in Article 1(b) of the contested decision, which were not covered by the notification.

130. That limitation of the scope of the examination seems quite correct. It follows that the Court of First Instance could not lawfully take account of the Commission's delay in order to reduce the fine for conduct

in respect of which there was no undue delay in investigation;⁶⁶ JCB could not derive from that delay any legitimate expectation in respect of conduct which it had not notified;⁶⁷ and there can be no justification for reducing the fine to a level which might have been imposed if the Commission had been made aware of the conduct earlier.

131. As regards the comparison with the Volkswagen and Opel fines, it is clear that the Court of First Instance did respond to JCB's argument in paragraphs 186 to 189 of its judgment, and JCB has not challenged that Court's reference to the Commission's discretion in taking account of the numerous factors involved. It seeks rather to have a rigid formula applied, in contradiction to the case-law cited by the Court of First Instance,⁶⁸ which again JCB does not call in question.

Rules governing the calculation of fines

Argument

132. JCB submits that in considering the amount of the fines imposed the Court of

⁶⁶ — See also points 47 and 55 above.

⁶⁷ — See also points 7 et seq. and 43 above.

⁶⁸ — *Ferriere Nord v Commission*, cited above in footnote 44; Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraphs 234, 236 and 279; and Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 119.

⁶⁵ — See also paragraphs 86 to 89 of the judgment under appeal.

First Instance should have followed the Commission's Guidelines,⁶⁹ as it did in *Archer Daniels Midland*.⁷⁰ By not doing so, it committed a number of errors of law.

133. First, it committed a formal error by stating that the practices at issue constituted 'serious' infringements while upholding a fine for 'very serious' infringements. But in any event, neither the nature nor the impact of the alleged practices justifies a categorisation as 'very serious'.

134. Second, it incorrectly concluded that the duration of the infringement was 10 years. However, the duration should be assessed in the light of the Commission's negligence; the latter's long silence led JCB reasonably to believe that its distribution network did not violate the competition rules. If the Commission had acted diligently, no unlawful practice would have occurred. In that context, duration should not be used to increase the amount of any fine. In any event, the evidence relied upon by the Court of First Instance in its findings of the existence of infringements does not support a finding of a duration of 10 years, and it should not have referred in paragraph 184 of its judgment to other evidence relied on by the Commission.

135. Third, the Court of First Instance failed to take account of the existence of mitigating circumstances. The alleged unlawful practices were not committed deliberately but were a result of the Commission's negligence and maladministration; JCB did not implement the same practices in Italy; and it was entitled to hold a reasonable doubt as to whether the conduct constituted an infringement.

136. Finally, the Court of First Instance made an incorrect assessment of alleged aggravating circumstances, in particular of internal staff communications concerning cartel rules.

137. The Commission observes that the Guidelines express its policy in setting fines in the light of Regulation No 17. It thereby imposes additional rules of a general nature on itself, but on no other institution, and only until such time as it withdraws or varies them; neither the Court of First Instance nor the Court of Justice is bound.

138. In any event, JCB's first formal point is purely semantic, and the practices in question fall clearly within the category of 'very serious' infringements within the meaning of the Guidelines.

69 — See point 12 et seq. above.

70 — Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597, paragraph 42.

139. As regards the duration of the infringement, the excessive delay in the examination of the notified agreements is irrelevant to the investigation of infringements which had not been formally notified.

140. As regards mitigating and aggravating circumstances, JCB again wrongly seeks to link the delay over the notified agreements with the investigation of the unnotified practices; and the internal communication concerning cartel rules shows that JCB was aware of the rules, but there is no evidence it was acted on.

Assessment

141. It is clear that the Commission's Guidelines cannot bind the Court of First Instance in the exercise of its unlimited jurisdiction when varying the amount of a fine. Nor does JCB claim to have alleged at first instance any departure from the Guidelines by the Commission which it would have been incumbent on that Court to sanction.

142. That being so, the Court of First Instance's use of the term 'serious' cannot be regarded as referring strictly to the category of 'serious' rather than 'very serious'

infringements in the Guidelines. In any event, the infringements found are clearly covered by the definition of very serious infringements as: '... practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets ...' and which have '... a [wide] market impact, ... with effects in extensive areas of the common market ...'.⁷¹ Consequently, there was no reason for the Court of First Instance to fix the fine at a level appropriate for less serious infringements.

143. I agree with the Commission that the delay in responding to the notified agreements, unsatisfactory though it may be in itself, does not affect the duration of the infringements which consisted of practices which were either not notified or went beyond the scope of activities described in the notified agreements. Even if the Commission had responded promptly to the original notifications, its response would not have indicated to JCB whether practices other than those notified were permissible, either on their own or in conjunction with the notified agreements. Nor can such delay mitigate, directly or indirectly, the seriousness of the unnotified practices or justify any assumption or uncertainty as to their legality.

144. As regards the evidence that the infringement found lasted 10 years, JCB seeks to rely on the dates of the documents

⁷¹ — Paragraph 1.A of the Guidelines.

specifically cited by the Court of First Instance in an earlier part of its judgment as establishing the infringement. That appears to me to be misguided. The Court of First Instance was not obliged, when considering whether the Commission had established an infringement on the evidence presented, to list by date every document which supported the finding. Consequently, it was not precluded, when considering the duration of the infringement, from referring to other facts cited by the Commission, as it did at paragraph 184 of its judgment.

145. With regard to the Court of First Instance's alleged failure to take account of the fact that the practice was not implemented in Italy, JCB asserts that that Court 'acknowledges that passive sales out of exclusive territories were common', citing two paragraphs of the judgment under appeal. However, in those paragraphs,⁷² the Court of First Instance merely refers to JCB's own arguments to that effect, but makes no finding as to their accuracy.

146. Finally, as regards the internal memorandum which the Commission considered to be an aggravating factor but JCB argues was a mitigating factor,⁷³ it does not seem to me to be manifestly wrong to regard as an

aggravating factor, when an undertaking engages in anti-competitive practices, evidence of its awareness that such practices were contrary to Community law and should not be carried out.

147. I am consequently of the opinion that none of JCB's arguments on appeal has identified any error in law by the Court of First Instance in its judgment, and that the appeal should therefore be dismissed.

Cross-appeal: disregard of an aggravating factor

Judgment under appeal

148. In paragraphs 191 and 192 of its judgment, the Court of First Instance noted that in the contested decision the Commission had increased the fine by EUR 864 000 because it considered that a penalty imposed by JCB on a distributor for breach of Clause 4 of the United Kingdom dealership agreement (prohibition of sales to unauthorised resellers), and representing the loss of profits on sales of spare parts as a result of sales

⁷² — 102 and 117.

⁷³ — '... a memorandum of 16 May 1995 from the Sales Development Director, sent to the managers of the companies in the 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' (paragraph 54 of the judgment under appeal).

outside the territory allocated, was a retaliatory measure and thus an aggravating factor.⁷⁴ However, a clause in a notified agreement enjoys immunity from fines under Article 15(5) of Regulation No 17, so the Commission could not lawfully increase the fine on that account. The Court of First Instance therefore reduced the fine by the amount of the increase.

Argument

149. The Commission submits that the Court of First Instance erred in its interpretation of Article 15(5) of Regulation No 17. The aggravating circumstance was not Clause 4 as notified, but the reinforcement of its restrictive character by pecuniary penalties which according to JCB's express notification were not to be imposed and which thus do not 'fall within the limits of the activity described in the notification' according to Article 15(5)(a). That provision is intended to encourage undertakings to make complete disclosure in their notifications, and should not be interpreted so as to protect from fines unnotified practices which, when applied together with notified clauses, may enhance the restrictive character of the notified clauses taken on their own. The Commission asks the Court to quash the judgment under appeal to the extent that it reduced the fine by EUR 864 000.

150. JCB responds, first, that its request for compensation from its distributor constituted the implementation only of the clause concerned — the compensation was a form of 'extrajudicial contractual damages' — and not of an unnotified practice. The Commission's statement that JCB had expressly notified that there would be no sanctions against parties to the United Kingdom agreements was based solely on the fact that the other agreements notified included such sanctions. But parties are not obliged to specify at the time of drafting an agreement what penalties will apply in the event of a breach; if they do not, they may request damages where appropriate. Damages were necessary 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', since under the Guidelines such measures are those taken against 'other undertakings with a view to enforcing practices which constitute an infringement'.

Assessment

151. In point 40 of the contested decision, the Commission stated:

'In the two forms A/B filled in for the United Kingdom, JCB was requested to provide

⁷⁴ — The sum of EUR 864 000 is equivalent to double the amount of the penalty imposed by JCB on its distributor.

information as to the contents of the agreement or concerted practice 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 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.’

outside the territory allocated,⁷⁵ which clearly does not fall within implementation of a notified provision.

154. The Court of First Instance therefore erred on that point in paragraphs 191 and 192 of its judgment, which should be quashed in so far as it reduces the fine by EUR 864 000 on that account.

152. That statement was not questioned in the judgment under appeal, nor does JCB challenge the evidence of the forms A/B in question.

Costs

153. It seems to me clear that the response ‘No’ in the forms on which the United Kingdom agreements were notified means that sanctions such as the penalty imposed on the distributor in question fell outside the limits of the activity described in the notification, and could thus not benefit from the protection of Article 15(5) of Regulation No 17. In any event, the relevant clause of the notified agreement prohibited sales to unauthorised dealers, whereas the penalty in question was imposed in respect of sales

155. Under Articles 69 and 122 of the Rules of Procedure, read together, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party’s pleadings.

156. Since the Commission has asked for costs, JCB should be ordered to pay the costs of the appeal.

⁷⁵ — See paragraph 191 of the judgment under appeal.

157. The Court of First Instance ordered JCB to pay three quarters of its own costs and the Commission to pay its own costs and a quarter of JCB's costs, on the basis of Article 87(3) of its Rules of Procedure, because the action had been partially successful.

in the original action shifts slightly towards the Commission. However, the difference is slight and does not in my view justify any change to the order on costs in the judgment under appeal. Indeed, the Commission has not asked for any such change.

158. If the cross-appeal is successful, as I consider it should be, the 'balance of success'

Conclusion

159. I am therefore of the opinion that the Court should:

- dismiss the appeal brought by JCB;
- quash the judgment under appeal in so far as it reduces the amount of the fine imposed in the contested decision by EUR 864 000, and consequently fix the amount of that fine at EUR 30 864 000;
- order JCB to pay the costs of the appeal.