II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 December 2000

relating to a proceeding under Article 81 of the EC Treaty

Case COMP.F.1/35.918 — JCB)

(Notifications IV-28.694, IV-28.695, IV-28.696, IV-28.697, IV-28.700, IV-28.702)

(Notified under document number C(2000) 3887)

(Only the English text is authentic)

(2002/190/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty ([1]), as last amended by Council Regulation (EC) No 1216/1999 ([2]), and in particular Articles 3, 15(2) and 16(1) thereof,

Having regard to the application for negative clearance and the notification for exemption submitted by JC Bamford Excavators Ltd, pursuant to Articles 2 and 4 of Regulation No 17, of 30 June 1973,

Having regard to the complaint lodged on 15 February 1996 by Central Parts SA,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Regulation No 17 read in conjunction with Commission Regulations No 99/63/EEC and (EC) No 2842/98 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 ([3]),

Having consulted the advisory Committee on Restrictive Practices and Dominant Positions,

([1]) OJ 13, 21.2.1962, p. 204/62.
([2]) OJ L 148, 15.6.1999, p. 5.
([3]) OJ 127, 20.8.1963, p. 2268/63 and OJ L 354, 30.12.1998, p. 18.

Whereas:

I. FACTS

A. *INTRODUCTION: GENERAL*

(1) This case concerns the agreements and practices governing the distribution in the Community of construction and earthmoving equipment and spare parts manufactured and sold by the JCB Group ('JCB' hereinafter, unless a more specific name for a subsidiary is used). Following a complaint regarding JCB's behaviour, the case includes an examination of the agreements notified to the Commission by JCB since 1973. However, the case is limited neither to the complainant's allegations nor to the agreements notified. It also draws on evidence gathered through inspections, requests for information and JCB's factual and legal arguments throughout the procedure.

1. THE COMPLAINT AND THE PROCEDURE

(2) On 15 February 1996, Central Parts SA, a company incorporated under French law, lodged a complaint with the Commission. Central Parts was formed in 1984 for the purposes of importing and selling construction and earthmoving machinery. Its headquarters are near Orléans, and it has branches in France at Besançon, Bordeaux and Nîmes. Its turnover in 1995 amounted to some FRF 25 million (about ECU 4 million). Its activities focus on equipment manufactured by JCB. The complaint alleged that, from 1987, JCB had taken active steps to prevent Central Parts from obtaining supplies of

JCB equipment from sources in the United Kingdom, where prices were appreciably lower than in France ([4]).

(3) In order to check and supplement the information at its disposal, the Commission undertook an inspection at the premises of JCB, of its subsidiary company in France, JCB SA, and of two of its distributors in the United Kingdom, Gunn JCB Ltd in Altrincham and Watling JCB Ltd in Leicester, under Article 14(3) of Regulation No 17. That inspection began on 5 November 1996.

(4) On 24 March 1998, the Commission initiated the procedure and sent a statement of objections to JCB. In its written ([5]) and oral submissions at the hearing held on 16 October 1998, JCB pointed out, among other things, that the Commission had not recognised the earlier notification of its agreements. The Commission took into account JCB's comments and sent a new statement of objections on 30 July 1999, on which JCB presented written ([6]) and oral submissions at a hearing held on 16 January 2000.

2. THE PARTIES

(5) The JCB Group comprises 28 companies, excluding dormant companies, 26 of which are direct or indirect subsidiaries of Transmissions and Engineering Services Netherlands BV, the other two being owned directly by members of the Bamford family. Transmissions and Engineering Services Netherlands BV owns JCB Service, which, with the Bamford family, owns and controls directly (100 %) or indirectly (50 %, with the Bamford family also holding 50 %) the companies of the JCB Group. The principal activities of the JCB Group are the design, manufacture and distribution of excavating, earthmoving, materials handling and agricultural machines and the provision of related spare parts. Group sales in 1997 totalled more than GBP 770 million (ECU (1 150 million).

B. *THE RELEVANT MARKETS AND JCB'S POSITION*

1. PRODUCT MARKETS

(a) ***Construction equipment***

(6) Construction equipment covers a wide range of machines that are used in the preliminary phases of building construction and civil engineering. These machines excavate, remove, level and displace over a short distance earth, stones and other materials. They prepare the site where works are carried out.

(7) The Commission has repeatedly indicated that construction and earthmoving equipment include light equipment products, primarily used for small scale construction or maintenance works, and heavy construction products, primarily used for large scale construction and building works, including infrastructure works ([7]).

(8) JCB manufactures 57 different models of light equipment machines of five sorts: loaders, excavators, telescopic handlers, rough terrain forklifts and skid steers. Machines may be classified according to their traction, the degrees (180° or 360°) through which they can turn and, above all, the functions performed. Sales for each product group manufactured by JCB are not closely correlated to other groups in the EC. JCB's main commercial success is the backhoe loader. Its market share in the United Kingdom is [in excess of 40 %](*). Competitors' sales are also mainly driven by one particular group. Market leaders differ accordingly: wheeled loaders, tracked excavators for Caterpillar, skid steer loaders for Ingersoll Rand (Bobcat), mini excavators for Volvo ([8]).

(9) Documents copied at JCB's premises and other market surveys show statistics broken down by groups of machines. If competition took place equally over the

([4]) JCB has brought proceedings against Central Parts on grounds of unfair competition before the French courts. In a first judgment, the tribunal of Commerce in Paris described JCB's behaviour in France as clear attempts to create barriers to the free movement of products in the EC and awarded damages to Central Parts (Tribunal de Commerce de Paris, 1'ère chambre A, judgment of 11 December 1995 (Main file I, pp. 109-111)). This judgment has however been reversed in appeal by the Paris Court of Appeal on 8 April 1998. The judgment on appeal did not deal with these barriers any further, but found Central Parts guilty of unfair competition by deliberately misleading customers as to its status of unofficial JCB distributor, reversed the previous order awarding damages to Central Parts and awarded damages to JCB. According to JCB, the acts committed by Central Parts justify in themselves a refusal of supplies and indeed, JCB SA declared to the Court of Appeal that JCB's actions were aimed at curbing Central Parts' unlawful acts (e.g. in respect of JCB's trademark) and certainly not at preventing parallel imports made by Central Parts (Reply dated 6 July 1998 from JCB to the Statement of Objections, Appendix 14, Judgment dated 8 April 1998, p. 13, which reads: 'Considérant que la Société JCB SA … soutient que les actions qu'elle a dirigées contre celle-ci (Central Parts) sont essentiellement destinées à faire cesser les actes fautifs et déloyaux qu'elle a commis et *certainement pas à l'empêcher d'effectuer des importations parallèles*'). It is not appropriate in this decision to re-examine either the factual and legal allegations submitted or omitted by JCB ad Central Parts in that litigation or the judgments of the French courts.

([5]) Reply to the Statement of Objections dated 6 July 1998 ('RSO I' hereafter).

([6]) Reply to the Statement of Objections dated 13 December 1999 ('RSO II' hereafter).

([7]) Commission decision of 18 December 1998 in Case IV/M.1235 — New Holland/Orenstein & Koppel (points 8 and 13); Commission decision of 28 October 1999 in Case M-1571 — New Holland/Case, OJ C 130, 11.5.2000, p. 11 (points 55-56).

([8]) RSO I , pp. 17-19.

(*) Passages between brackets [] indicate business secrets or confidential information deleted.

whole of the construction and earthmoving machinery market, it would be useless to track down market shares at a lower level of aggregation. This is an indication, among others, of the existence of relevant product markets in which companies compete effectively.

(10) The Commission has also indicated that each product group, and in particular, the backhoe loader, forms a distinct product market, owing to a number of factors. In particular, no two products can perform exactly the same functions; for instance, backhoe loaders and rough terrain forklifts may be used for lifting whilst digging might be performed either with a backhoe loader or a small 360° excavator, but not with a forklift. Similarly, a telescopic handler may in no useful way perform the functions carried out with an excavator. Products within different groups are used by different customers. There are also substantial price variations from one product group to another. A small (5 to 10 %) but permanent relative price increase in either product group would not lead customers to switch to other products or combinations of products such as to make the price rise unprofitable ([9]).

JCB contests the Commission's view and argues that the relevant product market is that for earthmoving and construction equipment, which it would be inappropriate to further break down into individual product categories ([10]).

(11) The Commission has no reason to depart in this case from its previous assessment that each product group forms a distinct product market. In any event, the precise market definition needs not to be explored further. As further shown below, under JCB's proposed definition the likely effects of the agreements and practices within JCB distribution network on trade between Member States and competition would also be appreciable.

(b) ***Spare parts***

(12) Construction machines are primary products in respect of spare parts. Sales of spare parts are dependent on previous sales of machines, subject to frequency of use ([11]). Market shares in past sales of machines are a proxy of current market shares for all related spare parts. For instance, sales objectives on spare parts are based, among other things, on the stock of JCB machines operating in JCB distributor's territories, weighted by the age of such machines (the 'six-year park') ([12]).

(13) However, prices for spare parts are a low proportion of the prices for the machine and remain low in relation to the machins' residual value over a long period; a particular spare part amounts to a very minor proportion of that ration. Although producers are assumed to minimise abnormally the high demand for spare parts, machine use under demanding conditions makes it absolutely necessary to replace some parts, in situations where delays are costly. Accordingly, pricing policies on spare parts are less constrained by competition than for new machines. Though related to, their spare parts do not therefore, pertain to the product markets of each machine group.

(14) Spare parts fall into four broad categories, set out below in decreasing order, according to the degree of control held by the manufacturer of machines:

(a) parts manufactured by manufacturers themselves 'in house', like fabricated elements, booms, dippers, axles, transmissions;

(b) parts supplied by third parties on an original equipment manufacturer (OEM) basis in accordance with manufacturers' designs, specifically for their equipment, like oil coolers;

(c) parts and consumable items not specifically engineered or devised for specific manufacturers, but branded with a machine manufacturer's trademark, like engine parts, brakes, radiators;

(d) parts and consumable items not specifically engineered or devised for specific manufacturers and not branded with a machine manufacturer's trademark, like tyres, filters, hydraulic oil and batteries.

(15) The proportion of spare parts manufactures 'in house' and then assembled in each machine depends on the degree of vertical integration. JCB has an inventory of about 90 000 different parts. The value of JCB's parts

([9]) Commission decision in New Holland — Case (points 62-65 and 72-73). The final market delineation did not follow the parties' initial submission postulating a broader product market (paragraph 63). In its decision in New Holland — Orenstein Koppel (point 13), the Commission also mentioned strong indications that different categories of machines pertain to different product markets.

([10]) Letter from JCB to the Directorate-General for Competition dated 4 February 2000.

([11]) See the principles of assessment in paragraph 56 of the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997).

([12]) Internal JCB Document 1995 Dealer Review (Insp. file, pp. 2053-2106). The correlation between the stock of six-year old machines and the net sales of parts in each distributor's territory within the whole official distributor network in France is in a range between [0 and 1] from 1993 to 1995 ('Analyse résultat par CA/MC NET année 1994' dated 11.1.1995 (Insp. file, p. 1402); 'Activité pièces de rechange 1993' dated 20.1.1994 (Insp. file, p. 1964); 'Activité pièces de rechange 1995/94 à fin juin' dated 6.7.1995 (Insp. file, p. 1740); own calculations.

business is split into [between 0 % and 50 %] for 'in-house' parts, [between 0 % and 50 %] for third-party engineered parts in accordance with JCB's designs (both referred to below as 'JCB specific parts') and [between 50 % and 100 %] for non-specific parts and consumables ([13]).

(16) Competition patterns differ between specific and non-specific parts. Non-specific spare parts and consumables are substitutable with those of other makes. Within the official distribution network, exclusive purchase obligations may shelter JCB branded parts from competition with equivalent third-party branded parts. Brand loyalty puts machine manufacturers and official distributors in a favourable competitive position regarding purchases of non-specific spare parts. However, direct supply from third-party manufacturers acts as a competitive constraint in the market.

(17) These constraints do not play a significant role for JCB specific spare parts. For commercial, technical and safety reasons, any competing production of specific spare parts fitted in JCB machines is not conceivable in practice to a significant extent. There being no substitutes, it can be inferred that JCB holds considerable market power on such JCB specific spare parts, as regards the stock of JCB machines under operation.

(18) The relevant product markets as regards spare parts are, therefore, both the market for JCB specific spare parts fitted in JCB machines, on the one hand, and the market for non-specific spare parts and consumables assembled in or used in the operation of construction and earthmoving machines, on the other.

2. GEOGRAPHIC MARKET

(a) ***Construction equipment***

(19) As shown below, JCB's market share for each machine group is particularly high in the UK, where it has remained stable over twenty years, compared to other Member States. Were demand for machines to be EC-based to a predominant extent, the appointment of a limited number of exclusive distributors covering several Member States or centralised distribution from a single location in the EC would ensure timely distribution. Neither JCB nor its competitors organise distribution on such a supranational basis. The local scope of demand explains why JCB and its competitors set up dense distribution networks throughout the EC, structured on a national basis, through a subsidiary or an exclusive importer, without which market penetration would be minor.

(20) On the other hand, in its New Holland — Case decision, the Commission concluded that the markets for construction and earthmoving equipment are EEA-wide, owing to low transport costs, harmonised legal requirements and demand patterns, and assessed the concentration accordingly.

(21) In any event, with regard to the objections related to artificial market partitioning, the Commission has to take into account JCB's position in those national markets where the restrictive agreements or practices are effected.

(b) ***Spare parts***

(22) The market for spare parts is driven by demand for construction and civil engineering services, which is scattered, predominantly stems from small entities and follows national or regional patterns. The supply of spare parts relies essentially on local presence. Parts must be available rapidly to prevent costly delays in on-site works. The magnitude of search costs in proportion to the value of the parts and the need for installation services further confine demand within national or regional boundaries.

(23) Were demand for parts to be EC-based to a predominant extent, centralised distribution from a single location in the EC would ensure timely distribution. In order to cope with the local scope of demand, JCB and its competitors set up dense distribution networks in the EC, structured on a national basis, through a subsidiary or an exclusive importer, without which market penetration would be minor.

(24) In any event, with regard to the objections related to artificial market partitioning, the Commission has to take into account JCB's position in those national markets where the restrictive agreements or practices are effected.

(25) Moreover, whatever the geographic delineation for the 90 000 parts on JCB's list, EC for some parts ([14]) and national for others, the question can ultimately be left open with regard to JCB's market position.

3. JCB'S POSITION

(26) In 1995 JCB ranked fifth among manufacturers worldwide, with a share of 7,9 % of total sales (23,1 %

([13]) RSO I, p. 15.

([14]) The Commission indicated in its decision of 23 February 1998 in Case IV/M.1094 Caterpillar — Perkins Engines (OJ C 94, 28.3.1998, p. 23, points 22-23) that the upstream market for diesel engines supplied for construction equipment on an OEM basis cannot be enlarged beyond the EEA.

for backhoe loaders). Major competitors are Caterpillar (22,9 %), Komatsu/Fai (20,8 %), Ingersoll Rand (11,2 %), Case (9,6 %) and Hitachi (7,1 %).

(27) In 1995/96, JCB had a share of some 13 % to 14 % in volume of all construction and earthmoving machines sold in the EC, ranging between 2,4 % in Germany to 36,8 % in the United Kingdom and Ireland. This share has been roughly constant from 1993 to 1996 ([15]). In 1995, individual shares for other Member States were: 13,1 % in France, 15,2 % in Italy, 19,8 % in Spain, 22,8 % in Portugal, 6,5 % for Benelux, 12,8 % in Austria. In terms of value, JCB estimates its own share at 8,9 % in the EC and 23,7 % in the United Kingdom. ([16]).

(28) JCB's market shares for specific groups of machines within the EC and individual Member States were as follows (1995) ([17]):

— backhoe loaders: […] (range […] Sweden to […] UK and Ireland),

— tracked excavators 360°: […] (range […] Sweden to […] UK and Ireland),

— wheeled excavators 360°: […] (range […] Italy to […] UK and Ireland),

— skid steer loaders: […] (range […] Benelux to […] Finland),

— wheeled loading shovels: […] (range […] Denmark, Finland to […] UK and Ireland),

— mini tracked excavators: […] (range […] Sweden to […] Portugal).

(29) Such market shares in the EC have similar patterns as in 1974 to 1975. JCB's market share for backhoe loaders was in a bracket between […] in the United Kingdom and Ireland and […] in Italy. Market shares for other products were between […] EC-wide, the United Kingdom and Ireland being JCB's main market in those products as well. JCB has maintained its leadership in the backhoe loader product market over twenty years, especially in the United Kingdom and Ireland. Its market penetration was and remains far lower in other product markets dominated by its competitors ([18]).

(30) Sales of spare parts and attachments amounted in 1995 to a noticeable proportion [between 10 % and 20 %] of JCB's turnover ([19]), split between specific parts up to [between 0 % and 50 %] and non-specific parts up to [between 0 % and 50 %]. In France, the average turnover in spare parts and services within the distributor network was [between 10 % and 20 %] of the total in 1996 ([20]).

(31) JCB estimates its market share in non-specific parts and consumables for its six-year park of machines in operation to be less than [between 20 % and 40 %]. Consequently, its EC market share for such parts related to backhoe loaders would then be [between 10 % and 20 %], assuming that other makes of non-specific parts can be safely fitted in JCB backhoe loaders. Where only JCB specific parts can be safely used in JCB machines under operation, JCB's position and market power are much higher.

(32) As regards construction and earthmoving machines, whatever the product and geographic market definition among those outlined above, JCB's position is such that the effects of the agreements or practices described below on intra-Community trade and competition are appreciable ([21]).

(33) Regarding the secondary market for spare parts and, particularly, JCB specific spare parts, which are essential for the operation of JCB machines, whatever the geographic market defined (either EEA or national), taking account of JCB's position in the primary markets for machines, the importance of the part business for

([15]) JCB Group Business review 1995/96, Private and confidential document signed Sir A. Bamford (Insp. file, p. 1086).

([16]) RSO I, pp. 25-26 and Appendix 10, p. 78.

([17]) CECE Flash retails June 1996, Internal JCB memo dated 23.7.1996 (Insp. file, pp. 958-994). The CECE reports, which are distributed to most senior JCB management to monitor market penetration, record sales in volume and not in value.

([18]) Attachment to letter from ETD Leadbeater to DG IV dated 11 March 1976 (File IV/28.694, p. 66).

([19]) JCB Group Business review 1995/96, Private and confidential document signed Sir A. Bamford (Insp. file, p. 1086). According to JCB, this share is less than 10 %, excluding attachments (1997) (RSO, paragraph 3.13, p. 15).

([20]) Attachment to internal note from Mrs Rausch, JCB France to ETD Leadbeater dated 17 September 1996: French dealer profile (Insp. file, p. 1435).

([21]) See also Commission decision in New Holland — Case (points 72-75 and 90-92). The proposed concentration between New Holland and Case would have raised serious doubts as to its compatibility with the common market in relation to the EEA market for backhoe loaders, on which the merged entity and JCB would have had incentives and market power to carry out parallel anti-competitive behaviours, their positions not being likely to be challenged by actual or potential competitors. In order to allay these concerns, the parties undertook to divest the Fermec brand of backhoe loaders and its distribution assets to a third party. Subject to these undertakings, the operation was deemed not to create or to reinforce a dominant position in that distinct market.

JCB and its distributors and their position in respect of demand, the likely effects of the agreements or concerted practices described below on intra-Community trade and competition are also appreciable.

C. *THE NOTIFICATION OF JCB'S DISTRIBUTION AGREEMENTS*

(34) On 30 June 1973, JCB notified to the Commission its distribution agreements for the Member States of the EC at the time ([22]), except for France. JCB also notified its distribution agreements applicable in other countries which have since become Member States of the EC ([23]) or the EEA ([24]), as well as in other continents. In accordance with Commission Regulation (EEC) No 1133/68, the agreements were enclosed with form A/B, which described the activities being notified.

(35) On 18 December 1975, JCB furnished modified versions of the agreements to replace some of those notified in 1973. These new versions concerned the United Kingdom, on the one hand, and other Member States of the EC at that time, except France, on the other. On 18 March 1976, JCB provided a copy of its distribution agreement with its subsidiary in France ([25]). In 1980 and 1995, JCB furnished revised versions of its distribution agreements, which concerned only the United Kingdom.

1. THE CONTENTS OF THE AGREEMENTS NOTIFIED BY JCB ON 30 JUNE 1973

(a) ***Distribution agreements in the United Kingdom***

(36) As notified, distribution of JCB products in the United Kingdom was governed by two agreements, the Distributor Agreement with seven distributors each for a given territory of the United Kingdom ([26]) and a Main Dealer Agreement for one territory within the United Kingdom ([27]). Main dealers operated in part of the territory allocated to a distributor.

(37) The territory was defined in both the Distributor and Main Dealer Agreements as 'the Distributor's (Main dealer's) area of prime responsibility for the sale of JCB products and the service of JCB Machines' (clause 1 'Definitions').

(38) In connection with 'WHOLESALE AND RETAIL SALES' (clause 4), the Distributor Agreement read: 'The distributor hereby agrees to sell B products ([28]) wholesale only to, for resale by, a main dealer in the region or an approved sub-dealer in the territory and to sell A products (excavator loaders, loading shovels derivatives) and parts wholesale only to, for resale by, an approved sub-dealer in the territory and to sell retail within the United Kingdom'. For the same clause 4 the Main Dealer Agreement read: 'The main dealer hereby agrees to sell JCB products wholesale only to, for resale by, an approved sub-dealer in the territory and to sell retail within the United Kingdom'.

(39) In connection with 'SALES OUTSIDE THE UNITED KINGDOM' (clause 5), both the Main Dealer and Distributor Agreements for the United Kingdom notified on 30 June 1973 read: 'The main dealer (distributor) will not sell JCB products directly or indirectly outside the United Kingdom without the prior written consent of JCB unless, in the case of a JCB machine, 12 months have elapsed since the sale by a distributor or main dealer of such JCB machine to a purchaser in the United Kingdom and the hour meter on such machine shows a reading in excess of 1 000 hours. The main dealer (distributor) will take all reasonable steps to avoid selling JCB products to a purchaser in the United Kingdom for resale outside the United Kingdom. Where JCB's permission to sell any JCB products outside the United Kingdom is given to the main dealer (distributor) it will be given subject to such conditions as JCB may

([22]) Export Sales and Service Agreement DK (IV 28.694); Distributor Agreement Export IRL (IV 28.695); Distributor Agreement UK (IV 28.696); Main Dealer Agreement UK (IV 28.697); Distributor Agreement JCB International Inc. DE-BENELUX-IT (IV. 28.702).
([23]) Sweden (IV 28.695); Finland, Spain, Portugal (IV 28.694); Austria, Greece (IV 28.700).
([24]) Iceland, Norway (IV 28.694).
([25]) IV 28.694, pp. 68-72.
([26]) IV 28.696, pp. 12-17.
([27]) IV 28.697, pp. 12-18.
([28]) Excavators, four-wheel drive loaders, crawler loaders.

consider appropriate having regard to the best interests of retail customers in the country concerned'.

(40) In the two forms A/B filled in for the United Kingdom, JCB was requested to provide information as to the contents of the agreement or concerted 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' ([29]). 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.

(b) ***Distribution agreement notified on 30 June 1973 for other Member States***

(41) JCB notified four distinct distribution agreements for, respectively, (i) Ireland and Sweden (Distributor Agreement Export) ([30]), (ii) Belgium, Netherlands, Luxembourg, Italy and Germany (Contract) ([31]), (iii) Denmark, Finland, Spain, Portugal ([32]) (Export Sales and Service agreement) and (iv) Greece, Austria and other countries ([33]).

(42) The following provisions were included in the notified agreements:

— Article 4 of the agreement for Ireland and Sweden provided for the imposition of a service fee on transactions outside allotted territories. In the version initially notified, JCB itself was setting the amount of the fee, capped at 15 % of the retail price;

— Article 3(ii) of the Export Sales and Service agreement for Denmark (and other subsequent Member States of the EC) provided for an express prohibition on new machines being sold outside allotted territories. In the event of such sales; Article 3(iii) provided for a service fee of 15 % of the retail price to be payable to the distributor in whose territory the machine was operated. Article 3(iv) provided for resale prices to be set in agreement with JCB;

— exclusive purchase of JCB products only from JCB UK, thereby excluding purchases from other authorised distributors (clauses 3(vi) of the agreement for Denmark and 7 of the Distributor Agreement Export for Ireland).

(43) In the distribution agreements for five out of the initial six founding Member States of the EC, there was no restriction on sales to resellers within the EC. For other new Member States in 1973, such sales were prohibited or restricted by means of a high service fee. JCB UK was designated as exclusive supplier, thereby preventing cross-network supplies.

2. COMMISSION REACTION TO THE AGREEMENTS NOTIFIED ON 30 JUNE 1973

(44) By letter dated 27 October 1975, the Directorate-General for Competition informed JCB of its preliminary view that the agreements included restriction which appeared to contravene Article 85(1) of the EC Treaty (now Article 81(1)). Such restrictions, which are described below, did not appear to be indispensable to the attainment of the objectives set out in Article 85(3) (now article 81(3)), either individually or by their cumulative effect. JCB was therefore requested to amend or delete the provisions in question ([34]).

(45) More specifically, the letter reads: 'Such provisions are first those which prevent or impede your dealers from freely selling JCB products to customers and dealers outside specified areas and from purchasing such products from outside these areas. I refer specifically to the following provisions. In both distribution agreements for the UK (28.296, 28.697), Clause 5 expressly prohibits dealers from exporting JCB products from the United Kingdom. An export prohibition of this nature falls under Article 85(1) and cannot be exempted under Article 85(3). The clause should therefore be deleted and any present application of it suspended. Clauses 4, 8(iv) of both distributor agreements for the UK (28.296, 28.697) (…). Clauses 2(ii), (iii), 3(vi) of the

([29]) IV 28.694, p. 5.
([30]) IV 28.695, pp. 18-21.
([31]) IV 28.702, p. 14-22.
([32]) IV 28.694, p. 18-21.
([33]) IV 28.700, p. 12-18.

([34]) Letter from Mr D. Thompson, Director DG IV, to JCB Sales Ltd dated 27 October 1975 (IV 28.694, pp. 24-28).

Export Sales and Service Agreement (28.694). Clauses 4(ii)(b), 7(v) of the Distribution Agreement Export 28.695 (…)'.

(46) The provisions objected to concerned the following restrictions on direct or indirect export sales or purchases:

— obligations to 'take reasonable steps to avoid selling JCB products to a purchaser in the United Kingdom for resale outside the United Kingdom', to 'sell retail in the United Kingdom' and not to sell JCB new machines and spare parts 'directly or indirectly outside the United Kingdom without the prior written consent of JCB' (clauses 4 and 5 of the United Kingdom agreements), as well as prohibitions of new machines being sold outside allotted territories;

— service support fees with a fixed amount determined *ex ante* by JCB;

— resale prices set in agreement with JCB;

— exclusive purchase of JCB products only from JCB UK, i.e. excluding other authorised distributors.

(47) The letter dated 27 October 1975 also informed and provided JCB with a copy of the decision adopted on 13 December 1974 as regards BMW's distribution system in Germany ([35]). The letter stated that that decision provided guidance as to how far restrictions of competition in motor vehicle distribution agreements may be accepted under article 85(3).

(48) The BMW distribution agreements prevented official distributors from selling contract goods to unauthorised distributors, except spare parts for repairers, having branches or depots or selling to resellers outside their territory and, in particular, advertising or soliciting customers outside such territory if the undertaking to promote sales and after-sales service within their territory was not fulfilled. In other words, active sales outside their territories were allowed, provided sales and service were satisfactorily promoted ([36]).

3. SUBSEQUENT MODIFICATIONS OF THE NOTIFIED AGREEMENTS

(49) A meeting between staff from the Directorate-General for Competition and JCB took place on 18 December 1975. JCB brought revised versions of the agreements for the United Kingdom and other Member States of the EC at that time, except France ([37]). JCB declares that the amendments were made in the light of the BMW decision enclosed in the Commission warning letter ([38]).

(a) ***Distributor agreements in the United Kingdom furnished to the Commission between 1975 and 1994***

(50) In the modified agreements furnished on 18 December 1975, the definition of the territory in both the Distributor and Main Dealer Agreements (clause 1 'Definitions') was left unchanged compared to the version notified on 30 June 1973.

(51) Both agreements had been modified in similar terms. Regarding WHOLESALE SALES (clause 4), the Main Dealer Agreement read: 'The main dealer hereby agrees not to sell JCB products wholesale for resale except to an approved sub-dealer'. The Distributor Agreement read 'The distributor hereby agrees not to sell JCB products wholesale for resale except to an approved sub-dealer or in the case of B products to a main dealer'. That wording was present in the version notified on 30 June 1973 (clause 4).

(52) The previous clause 'SALES OUTSIDE THE UNITED KINGDOM', became in both agreements 'SERVICE

([35]) OJ L 29, 3.2.1975, p. 1.

([36]) BMW decision, paragraph 3(ii) and (iii).

([37]) The internal summary of the meeting between DG IV and JCB on 18 December 1975 reads: 'JCB brought to the meeting new forms of distributor and main dealer agreement (i.e. Distributor Agreement — Export, Distributor and Main Dealer Agreements — UK) to replace those which had been notified. The new agreements contained no express prohibitions on exports, nor did they protect dealers' territories. Distributors and "approved sub-dealers" were no longer of any economic importance in the UK. The JCB Distributor Agreement — Export would be used for EEC countries other than France. The new agreements and the information given at the meeting substantially answered the questions in our letter of 27 October 1975' (IV 28.694, p. 33).

([38]) RSO II, p. 6, paragraphs 20 and 51.

SUPPORT FEE — SALES OUTSIDE THE REGION OR TERRITORY' (clause 5). As stated in the clause, JCB's concern regarding sales outside the territory was that JCB distributors would not be in a position to provide prompt and efficient after sales service for JCB machines. To ensure that the purchaser received a high standard of service wherever the JCB machine was during the warranty period, main dealers and distributors undertook: 'to pay to the distributor or main dealer in whose territory or region the JCB machine then is, a service support fee to compensate such distributor or main dealer for assuming full responsibility for carrying out service during the warranty period. The amount of such service support fee shall be agreed between the distributor and the distributor or main dealer in whose territory or region the JCB machine has been sold or used or in default of agreement between the parties shall be the sum which JCB shall reasonably determine having regard to all the circumstances of the case, the cost of the service carried out and a reasonable profit element'.

(53) To meet Commission concerns, JCB lifted in December 1975 any restriction on direct (retail or wholesale sales abroad restricted by the previous clause 4) or indirect (sales in the UK to a reseller intending to export from the United Kingdom, restricted by the previous clause 5) exports on the part of its official distributors in the United Kingdom, which was the Member State where JCB had the highest market shares in the EC.

(54) Except for the rewritten clause 4, the service support fee (clause 5) and the obligation not to establish premises for the sale and service of JCB products outside the territory without the written consent of JCB (clause 9(i)), no other restrictions on out-of-territory sales, whether solicited or unsolicited, direct or indirect, were included in the notified agreements as regards sales to other Member States. In particular, unlike the BMW agreements subject to the Commission decision of 13 December 1974, the possibility of selling outside the allotted territory from premises based in the territory was unrestricted. Such sales were not made subject to any particular undertaking regarding promotion and services being fulfilled within the territory.

(55) Consequently, the Commission wrote to JCB on 13 January 1976. The letter stated that the new forms of distribution agreements notified on 18 December 1975 resolved many of the problems raised in its letter dated 27 October 1975. However, the letter stated that some amendments to the agreements or justifications were necessary before the Commission could consider an exemption under Article 85(3). For obvious reasons, no reference is made therein to clauses deleted in the newly notified agreements. Issues to be resolved before the Commission could consider an exemption which it identified in the letter related to sales of products, either machines or parts, competing with JCB's and the reservation to JCB of rights to sell to certain authorities and manufacturers.

(56) That the Commission relied on the principles laid down in the BMW decision dated 13 December 1974 to assess JCB's agreements is also apparent in the letter dated 13 January 1976 to JCB, which assessed the issue of restrictions on sales of products competing with JCB's with reference to relevant provisions in BMW's distribution agreements.

(57) By letter dated 11 March 1976, JCB provided detailed explanations regarding the outstanding issues identified in the letter dated 13 January 1976. A meeting between JCB and staff from the Directorate-General for Competition was held on 18 March 1976 to discuss these issues. No new version of the agreement was furnished shortly after the meeting.

(58) On its own initiative, JCB sent a new version of its Distributor Agreement for the United Kingdom on 6 March 1980 ([39]). No new form A/B was attached. No Main Dealer Agreement was enclosed. JCB outlined that minor alterations and additions had been made to the previously notified agreement. In particular, the allotted territory (i.e. as in the previous version, 'the distributor's area of prime responsibility for the sale of JCB products and the service of JCB machines' (clause 1. Definitions)) was therein defined by reference to postal codes.

([39]) Letter from JCB dated 6 March 1980 (IV 26.696, p. 33).

(59) The new version of the distribution agreement regarding the United Kingdom contained clause 4 specifying that JCB distributors in the United Kingdom were not allowed 'to sell JCB products wholesale for resale except to a dealer' (defined in the agreement as 'a person, persons or corporate body who with the approval of JCB has been appointed as a dealer by a Distributor') 'or approved sub-dealer' ([40]). Except for that limitation, that in clause 9(i) making the establishment of premises for the sale and service of JCB products outside the territory subject to JCB's agreement, and that of the service support fee (clause 5), no particular limitation was included as regards sales outside the territory.

(60) The Commission did not react to this newly furnished agreement for the United Kingdom.

(b) ***Current distribution agreements in the United Kingdom furnished to the Commission***

(61) By letter dated 29 December 1995, JCB sent to the Commission one copy of a new version of its Distributor Agreement for the United Kingdom. The principal change stated by JCB is that, to reflect changes in its organisation, the appointment of distributors of construction and industrial products would be separate from that of agricultural products. No new form A/B was attached.

(62) Pursuant to the United Kingdom Distributor Agreement, official JCB distributors, which cannot sell products competing with JCB's, are allocated exclusive territories within which JCB undertakes not to sell its products and not to enter into the same distribution agreements with other distributors (clause 10). The territory remains defined as 'the distributor's area of prime responsibility for the sale of JCB products and the service of JCB machines' (clause 1. Definitions) ([41]).

(63) Clause 4 reads: 'The Distributor hereby agrees not to sell JCB products supplied in pursuance of this agreement wholesale for resale except to a JCB Distributor or another JCB Dealer or an approved Sub Dealer appointed in each case in relation only to JCB products without JCB's prior written agreement which shall not be withheld without objectively valid reasons'.

(64) Under clause 10, JCB undertakes to pay or to give credit for work carried out by the official distributor and accepted by JCB under its manufacturer's warranty. Clause 5 ('service support fee') remains unchanged form the version that JCB furnished in December 1975 and March 1980. Except for the provisions of clause 9(i), which makes the establishment of premises for the sale and service of JCB products outside the territory subject to JCB's agreement, no other noticeable limitation is included as regards sales outside the territory.

(65) Official distributors in the United Kingdom agree also to purchase parts, equipment and ancillary products for use with or repair of JCB products only from JCB or from another JCB distributor or a JCB dealer or such other source as JCB may in writing authorise. Official distributors also undertake to use or to supply only JCB products in connection with warranty or modification work on JCB machines (clause 8(vii) and (viii)). These restrictions in the agreements were not amended, following JCB's arguments stressing that trade in earthmoving equipment should be treated differently from that in motor vehicles, which JCB raised in writing and during the meeting between JCB and Commission staff held on 18 March 1976.

(66) The Commission did not specifically react to this new agreement.

(c) ***Currently notified distribution agreements in other Member States than the United Kingdom***

(67) JCB submitted in December 1975 and March 1976 modified versions of the agreements to meet Commission concerns. Such concerns were obviously focused on those agreements applicable in EC Member States at that time. The agreements furnished for all Member States of the EC in 1976, except the United Kingdom, were split into two sorts, according to internal records: a single Distributor Agreement Export (standard form) ([42]), and the agreement between JCB

([40]) Version enclosed in letter from JCB dated 6 March 1980 (IV 26.696, pp. 33-53) and Article 4 JCB Distributor Agreement UK with Watling JCB dated 21 January 1992 (Insp. file, pp. 1123-1143).

([41]) Article 4 JCB Distributor Agreement copied at Watling JCB's premises (Insp. file, pp. 1146-1169).

([42]) IV 28.694, pp. 34-37.

and its subsidiary JCB SA France (signed on 17 February 1975) ([43]). No new form A/B was attached.

(68) The agreement with JCB France did not contain any direct or indirect restrictions on out-of-territory sales of JCB products, except JCB France's undertaking to use its best endeavours to promote such products within its territory (clause 4(b)). Pursuant to these intra-group arrangements, JCB France was appointed exclusive distributor (clause 2) and agreed to purchase and resell JCB products from JCB UK (clause 3(1)) on its own account (clause 4(a)), i.e. not acting as JCB UK's agent (clause 5(b)). According to clause 2(2), the prices of JCB products sold to JCB France by JCB Sales UK (intra-group pricing) were not to exceed the net ex-works prices charged by JCB Sales to United Kingdom distributors.

(69) In the new version of the Distributor Agreement Export furnished by JCB, following the Commission warning of 27 October 1975 referred to above, the provision regarding the service fee had been amended. As in the new United Kingdom agreement, which had the same wording, the amount of the fee was first to be agreed between official distributors, instead of being set by JCB at the outset, except where the distributors concerned failed to agree (clause 4 SERVICE SUPPORT FEE — SALES OUTSIDE THE TERRITORY). The territory is defined as 'the Distributor's area of prime responsibility for the sale of JCB Products and JCB Machines' (clause 1 DEFINITIONS) into which the distributor agrees to sell JCB products and to use its best endeavours to promote the sales and the service of such products (clause 5 SALES OBLIGATION OF THE DISTRIBUTOR). The distributor also agrees not to establish premises for such sales and service outside the territory without JCB's prior consent (clause 8(iv) GENERAL OBLIGATIONS OF THE DISTRIBUTOR).

(70) Official distributors also agree to purchase parts, equipment and ancillary products for use with or repair to JCB products only from JCB or from another JCB distributor or a JCB dealer or such other source as JCB authorises in writing (clause 7(v)).

(71) No obligation similar to that included under clause 4 of the United Kingdom Distributor Agreement regarding supplies wholesale for resale was included in the Distributor Agreement Export. The Commission files do not contain any letter by which JCB informs the Commission that the provisions of the agreements notified for the United Kingdom were applicable in other Member States.

(72) The Commission's letter to JCB dated 13 January 1976 informed JCB that some amendments to the agreements or justifications were still necessary before the Commission could consider an exemption under Article 85(3). However, no new version concerning the agreement for other Member States than the UK following that of 1975 and, for France, following that of 1976, has been furnished. The agreements furnished for Germany, Benelux, Italy and France concerned Member States where JCB has incorporated subsidiaries. Their distribution agreements within their national territories have never been notified.

(73) The Commission has not adopted a definitive position either by way of a decision or by sending a comfort letter regarding the agreements notified or furnished by JCB, prior to this decision.

D. *JCB'S CURRENT DISTRIBUTION NETWORK IN EUROPE AND INTRA-GROUP PRICING*

(74) The JCB Group has operating subsidiaries in France, Germany, Belgium, the Netherlands, Italy and Spain and six main manufacturing sites in the United Kingdom, where its headquarters are also located. JCB maintains an EC network of 135 to 140 independent approved distributors, which are allotted exclusive territories ([44]). As a result, the official JCB network services covers each geographic area of the EC. JCB Sales Ltd (UK) or the relevant national subsidiary appoint such official distributors and draw up their distribution agreements in national territories. In this latter case, orders from official distributors within the JCB network are addressed to the local JCB subsidiary.

(75) Prices invoiced by JCB UK to each national JCB subsidiary are generally lower than those invoiced to official distributors in the United Kingdom. In 1993, intra-JCB prices for spare parts applied to JCB France and to JCB Italy were, respectively, [between 50 % and 100 %] of those applied to official distributors in the UK. In other words, if the French JCB subsidiary charged its network distributors a [between 25 % and 50 %] mark-up on the price paid to JCB UK, official French distributors would have had the same purchase costs as the United Kingdom official distributors.

([43]) IV 28.694, pp. 68-72. Agreement sent following request for information dated 13 January 1976.

([44]) In the United Kingdom and Ireland, such official distributors use the acronym JCB after their commercial denomination (e.g. Watling JCB, Gunn JCB, etc.).

(76) However, whilst being at a lower stage in the distribution chain, distributors in the United Kingdom were frequently able to supply at lower prices than those of the national JCB subsidiaries between 1989 and 1996. Possible reasons among others include, combined or in isolation, more efficient business responses to a strong bargaining position of purchasers in the United Kingdom, fluctuations in the pound sterling with regard to other currencies or lower operating margins ([45]); for instance, in 1997, pre-tax profit margins for official distributors in France, at [between 0 % and 10 %], however low, were [between 1 and 10] times higher than in the UK, at [between 0 % and 10 %]; differences may however appear from one year to another: in 1996, such margins were [between 0 % and 10 %] in the United Kingdom and [between 0 % and 10 %] in France.

(77) An internal review of the gross profitability of various JCB subsidiaries conducted in 1993 shows that the retail price of a representative basket of spare parts in France was [between 0 % and 100 %] higher than in the United Kingdom. It is therein recognised that: 'The fact remains that on all types of parts, European prices are much higher than the United Kingdom and that France would appear to have much higher prices than the others, although France do operate a generous rebate scheme for achieving target performance which will reduce this apparent high GP % somewhat'. As a result, gross profits achieved by JCB for spare parts in France were [between 0 and 30] percentage points higher than those of JCB UK and [between 0 and 30] points higher than those of JCB Germany in 1993 ([46]). In other words, sales of identical spare parts were more profitable in France than in the UK for the JCB Group.

(78) Price differences were still apparent in 1995, as shown by an internal note as follows: 'You will note that the prices of some parts vary greatly between the four countries and, therefore some variation between the special prices will probably remain. The summary of dealer net and retail pricing for "the group of parts" discussed in January, will help to identify the variances country by country, prior to any discounted code changes' ([47]). In a confidential internal note regarding JCB subsidiaries' purchase prices in Europe, Germany, Spain, France and Italy, the objective: 'to harmonise customer achieved pricing with the end of ending up with a [between 0 and 20 %] band of maximum variation' was set forth in 1995 ([48]).

(79) As an illustration of these price differences, in 1996 a French official distributor purchased new machines and spare parts initially sold by official distributors in the United Kingdom, instead of from JCB's subsidiary in France ([49]). Despite lower ex-work prices paid by the subsidiary and integration within the JCB Group, JCB France was, in practice, in competition with official United Kingdom distributors regarding supplies to French official distributors.

(80) Evidence shows that JCB France compensated its official distributors on deals for machines lost in competition with parallel traders ([50]) and provided ad hoc support for margins where parallel traders were also bidding in competition with those official distributors. Such special support was also provided for spare parts, for which JCB set up guaranteed fixed gross margins or lower purchase prices ([51]). Evidence of retail pricing levels out

([45]) RSO I, paragraph 5.8, pp. 32-33, and RSO II, p. 32.

([46]) Internal JCB note from N. D. Allen to J. Patterson dated 30 June 1994 (Insp. file, pp. 722-731).

([47]) Internal memorandum from A. D. L. Shaw to T. Fernández dated 24 February 1995 (Insp. file, pp. 1718-1719).

([48]) Internal confidential note from J. Bradley to T. Fernández dated 11 October 1995 (Insp. file, pp. 1704-1707).

([49]) Letter from F. Rausch, JCB France to Mr Malecot, SEM CEDIMA dated 21 June 1996 (Insp. file, pp. 2155-2156).

([50]) Letter from F. Rausch, JCB France to R. Pain, BPV dated 5 June 1996 (Insp. file, pp. 2157-2160), which reads: 'Nous sommes prêts à poursuivre notre soutien jusqu'au 31 décembre 1996 de façon à ne pas laisser échapper des ventes sur ce marché parallèle et nous vous garantissons une marge de 30 000 FF dans la mesure où vos prix sont de 10 000 FF supérieurs à ceux du marché parallèle. Par ailleurs, dans le cas où vous perdriez une chargeuse pelleteuse face à un marché parallèle, nous vous allouerons une commission de service de 10 000 FF'. Letter from P. Tellier, JCB France to BPV dated 31 March 1995 (Insp. file, p. 440).

([51]) Note from E. de Montarnal, JCB France to R. Pain, BPV dated 8 December 1995, which reads: 'Dans la mesure où BPV est obligé de rapprocher son prix de vente de celui de Central Parts, JCB s'engage à garantir une marge de 20 % pour toute pièce facturée plus de 5 000 F et une marge de 30 % pour toute pièce facturée moins de 5 000 F ceci à la condition expresse que BPV transmette à JCB l'information complète une fois par mois: nom du client, références de la pièce JCB et Central Parts, prix tarif de Central Parts'. (Insp. file, p. 475) Letter from P. Tellier, JCB France to BPV dated 12 April 1994 (Insp. file, p. 450), letter from P. Tellier to COLOMAT dated 1 August 1995 (Insp. file, pp. 463-464).

of touch with competition exists also for Germany, where JCB set the objective that 'cost and selling prices are related' ([52]).

(81) Those internal JCB records highlight the fact that profits and prices were above the average in some Member States like Germany and, especially, France. A system of compensation for lost sales or lower margins granted to official distributors whose territory was exposed to competition from parallel traders was, in all likelihood, profitable overall for the JCB Group. In any event, such price differences on both machines and spare parts have created obvious incentives for parallel trade, from 1989 to 1996. It is plain that such parallel trade was likely to diminish those higher profits.

E. *AGREEMENTS AND PRACTICES IN THE OPERATION OF JCB'S DISTRIBUTION NETWORK*

In general, JCB alleges that the Commission has misrepresented the facts, selectively chosen documents or cited them out of context. Therefore, its legal assessment proceeds, according to JCB, from a wholly mistaken view of the facts.

The Commission has taken into account JCB's comments and has accordingly reviewed and, where appropriate, reassessed the documents on which its objections were based. Nevertheless, the very considerable number of facts and documents which are still cited in this decision illustrates the existence of restrictive agreements and support, in the Commission's view, the finding of an infringement. Factual elements regarding JCB's allegations in respect of specific documents are provided below, by no means exhaustively.

1. RESTRICTIONS ON DIRECT OR INDIRECT EXPORT SALES FROM THE UK TO OTHER MEMBER STATES

(a) ***Statements from official United Kingdom distributors on sales to other Member States***

(82) As evidenced in numerous letters shown below, official United Kingdom distributors have refrained from selling new machines and spare parts outside the United Kingdom.

Contrary to the Commission's interpretation, JCB relates the behaviour of official distributors in the United Kingdom, and their statements, to the enforcement of clause 4 of their agreement as notified (RSO II, pp. 41-45).

(83) In a fax sent from Gunn JCB to JCB France on 17 May 1995 concerning a machine sold by the former which was found in France, Gunn declares that: 'We cannot be held responsible for this customer's actions, but as a result from this sale we will not be trading with this customer again' ([53]). A letter from Heritage Disposals, a reseller based in the United Kingdom purchasing from Gunn JCB, explains the reasons why they could not carry on supplies to France: 'It is because someone notified to JCB that I was exporting new machines to you. This was the reason we had to be very careful when we were sending you machines, because as soon as JCB registered the serial numbers on machines, they would have immediately traced them back to us, and would not have supplied us with more machines' ([54]).

(84) In reply to a query from JCB UK as to whether Gunn JCB was supplying machines at low prices to Lyomat, an official distributor in France, Gunn JCB justified the transaction by stating that the machine was not new ([55]). Another letter from Gunn JCB to JCB refers to its involvement in exports of new machines to Austria, complained of by the Austrian official distributor: 'In January of this year, you instructed us to cease supply of machines to the above (Sunrise Ltd). This was on the basis that our "Austrian friends" had pointed the finger at Sunrise and Gunns, and accused us of supplying new machines to Austria' ([56]).

([52]) Report on visit to JCB GmbH Germany on 19 May 1994 (Insp. file, pp. 1702-1703).

([53]) Insp. file, p. 317.

([54]) Letter from Heritage Disposals to Central Parts dated 24 October 1994 (Main file I, p. 13).

([55]) Faxes from M. J. Butler, JCB Sales UK to P. Leboucher, JCB France and to D. Barton, Gunn JCB, dated 20 November 1992 and letter from D. Barton to M. J. Butler dated 30 November 1992 (Insp. file, pp. 355-357).

([56]) Letter from D. Barton, Gunn JCB to C. Ingram, JCB Sales UK dated 19 May 1989 (Insp. file, p. 880). The 'Austrian friends' referred to in the document are, most presumably, employees from Terra, JCB's official distributor in Austria. A communication dated 21 March 1989 between Gunn JCB and JCB attributes the deal being lost by Gunn JCB to unsubstantiated claims from Terra (Insp. file, p. 878).

According to JCB, the mere fact of Gunn JCB's sales to Lyomat in France referred to in paragraph 84 was not called into question, but the fact that it had been apparently made at a below-cost price, possibly predatory (RSO II, p. 41). Gunn's justification shows that either exports from the United Kingdom to France of new machines for resale within the official JCB distributor network or full freedom to set resale prices may be restricted.

(85) Similarly, in applying for the Queen's Awards for Export Achievement 1993, Watling JCB's Chairman recognised: 'I am proud to have lead a team that has achieved the following export performance. (…) Given that the company is unable to sell new machines outside its United Kingdom territory, I hope that you will agree with us that the used machine export achievement of Watling JCB limited is deserving of recognition' ([57]).

Regarding Watling JCB's declarations that they are unable to export new machines from the United Kingdom referred to in paragraph 85, according to JCB, the extract does not show that Watling considered that it was prohibited from exporting new machines. Watling was allegedly making its application by reference to its success in increasing its exports of used machines. Since in relation to exports of new machines Watling was restricted in its ability actively to market exports, its export success could not be fairly judged by reference to new machines (RSO II, pp. 42-43). The wording of the letter is however very clear and does not make such a distinction. This letter clearly evidences that Watling JCB has effectively restricted all its export sales of new machines, whether active or passive and whether the purchaser was an end-user or a reseller, authorised or not. Furthermore, there is no particular clause in the distribution agreement between JCB and Watling JCB copied at the latter's premises under which active sales may be restricted, except the definition of the allotted territory in clause 1 as 'the distributor's area of prime responsibility for the sale of JCB products and the service of JCB machines' (Watling JCB Distributor Agreement 1996 (Insp. file pp. 1146-1169)). The interpretation of this clause as allowing JCB to restrict active cross-border sales is patently abusive.

([57]) Letter from Mr. Davis, Watling JCB to the Secretary of the Queen's Award Office dated 26 October 1992 (Insp. file, pp. 1048-1057).

(86) Referring to JCB France about a dispute on a service commission claimed by the latter, Watling JCB stated that: 'we are disputing this service commission as this machine was sold in good faith by ourselves as part of a deal totalling 10 units to A&C Equipment in August 1994, prior to this order they took delivery of 15 units in 1993 and none of these units to our knowledge have been exported. We cannot be held responsible for our customer exercising their legal right to sell machines at six months old or even less'. Watling JCB further made clear to JCB France that: '(…) we have not and will not knowingly sell machines abroad without JCB Sales prior agreement' ([58]).

(87) In a letter copied at JCB's premises, Central Parts asked Watling JCB why they refused to supply Central Parts in France. A handwritten note addressed to C. Coutts with a copy to J. Patterson, both JCB executives, reads: 'Have suggested to Watling that they just ignore this request. Do you agree?'. Watling JCB's refusal was confirmed following JCB's instructions ([59]). JCB's agreement has been invoked thereafter as a precondition for effecting supplies to Member States other than the United Kingdom ([60]).

(88) Watling JCB also decided to stop supplying spare parts to another reseller competing with JCB France, in the following terms: 'It has come to our notice that JCB parts we have supplied to you may have been supplied indirectly to certain customers of JCB France. We

([58]) Letter from J. Davis, Watling JCB to F. Rausch, JCB France dated 9 March 1995 (Insp. file, p. 1695).

([59]) Letter from M. Vairon, Central Parts to M. Martin, Watling JCB dated 16 December (Insp. file, p. 1717). The handwritten note is dated 19 December. On 19 December 1994, Watling JCB replied to Central Parts that they 'do not wish to supply parts to you or any other company who is not a JCB user or dealer. If we did, it would only cause us trouble with JCB', (Main file I, p. 48).

([60]) Handwritten note from Parts and Service Director, Watling JCB in letter from M. Vairon to Watling JCB dated 25 January 1996 (Main file I, p. 50).

cannot allow this to happen because of our contract with JCB Service UK Ltd. Therefore we must terminate your account with this company' ([61]).

(89) Berkeley JCB, another independent JCB distributor in the United Kingdom, recognised that: 'Because of our geographic location, near to the channel ports and differential pricing overseas, it is inevitable that we will be continually approached by both and users and agents. We will therefore adopt a policy of referring all doubtful enquiries to JCB Service (…) and they can tell us whether or not we should supply' ([62]). Furthermore, a paragraph in the same letter to JCB states: 'Further to our recent discussions, I have made clear to our regional managers and Group Parts Manager that we must not sell products outside our territory in breach of our Dealer Agreement'. When asked for supplies, Berkeley states on a different occasion: 'Thank you for your enquiry. Regret that we cannot supply parts for what may be for resale in other countries'; the purchaser was requested to turn to an official distributor in a French territory ([63]).

According to JCB, the letter from Berkeley JCB referred to in paragraph 89 recognises that Berkeley JCB was entitled to sell to overseas purchasers who were not 'doubtful', i.e. genuine end-users and authorised distributors (RSO II, p. 43). In this declaration made to JCB, Berkeley is refraining from selling to final customers, or their agents, located in other Member States. As to the 'doubtful' character of such enquiries, Berkeley does not merely commit itself to asking, in the case of a purchasing agent, for proof that the agent is entitled to purchase on behalf of its principal end-user. Neither is it clear how JCB Service can, better than Berkeley, check that an end-user asking for supply is effectively an end-user or that an agent has been duly authorised. Berkeley's statement shows that it does not have autonomy to carry out sales to end-users from other Member States, which may depend on JCB's approval.

(90) In reply to a letter from JCB France regarding five machines that operated in French territory, a UK distributor, Scott JCB, replied in May 1996 that the machines in question: 'were sold to volume customers of Gunn JCB and the decision as to whether we continue to supply these customers lies with UK Sales' (i.e. the JCB sales department in the United Kingdom) ([64]).

(91) In response to a request from Central Parts asking why an order had not been supplied, TC Harrison JCB pointed out: 'JCB's strict guidelines concerning the export of spare parts and the golden rule (is that you should) deal with local agencies when purchasing parts' ([65]). Since Central Parts was located in and requesting supplies to France, 'export' means supplies from the United Kingdom to a different Member State.

(92) These examples come from all but one of JCB's official distributors in the United Kingdom. They concern both spare parts and machines. Their declarations are made in the context of, or relate to, requests from resellers or final users from other Member States. Supply was effectively refused or restricted on the grounds that their agreements with JCB prevented them from doing so, the key reason being implicitly or explicitly the geographic destination of sales, along with the status of the purchaser.

(b) ***Statements by JCB on sales from the United Kingdom to other Member States***

(93) JCB's views as regards export sales of machines from the United Kingdom are expressed in a letter sent by the JCB UK Sales Director to one of its official distributors in the United Kingdom, in the following terms: 'During recent conversations with a number of United Kingdom

([61]) Letter from M. L. Smithers, Watling JCB Ltd to MJT Contracts Ltd dated 12 May 1994 (Insp. file, p. 298).

([62]) Letter from Mr Roddy, Berkeley JCB to J. Patterson, JCB Sales dated 13 April 1995 (Insp. file, p. 249).

([63]) Fax from F. de Gennaro, Berkeley JCB to Michel Vairon, Central Parts dated 21 November 1995 (Main file, p. 21).

([64]) Letter from S. C. J. Briant, Managing Director, Scott JCB to F. Rausch, JCB France dated 21 May 1996 (Insp. file, pp. 326-329).

([65]) Letter from TC Harrison JCB to Central Parts dated 21 November 1995 (Main file I, p. 24).

Distributor Principals the subject of Grey exports, Contract Hire and Multiple Deal Support arose. It became evident during my discussions that it is necessary for me to confirm JCB's position on these points. 1. Grey Exports. There is no change in JCB's position. We *actively* discourage any new machines sold overseas whether through a UK Distributor or a third party Plant Hire company' ([66]). These views regarding cross-border sales from the United Kingdom are further explained as follows: 'Obviously, as the manufacturer, we are anxious to protect our distributors, wherever they are, from unfair competition from whatever source, on all products' ([67]).

(94) Regarding parts, having acknowledged that resellers had access to genuine JCB parts obtained from United Kingdom official distributors, JCB states that official distributors should act uniformly to: 'ensure that your Parts Managers are aware of the problem and instructed not to supply to anyone suspected of involvement with spurious operations' ([68]). The main targets of a strategy to fight spurious parts activity in France, Germany and Spain were Interparts, an independent reseller, and Central Parts ([69]). A document copied at JCB's premises refers also to a campaign against 'Spurious competition', including, among other measures: 'to cut off the source of supply to spurious outlets' ([70]).

(95) However, there is evidence of negotiations between JCB and Central Parts, on JCB's initiative, to purchase Central Parts' assets and to appoint it as official distributor in France, when a territory for an exclusive dealership was free ([71]).

(96) When suspicions arose in 1994 of high volumes of machines and parts being diverted towards other Member States by Gunn JCB, [([72]) ([73])].

(97) JCB's own statements show that its interpretation of its agreements is consistent with that of its United Kingdom official distributors. Their implementation is not therefore unilateral conduct. Their interpretation is identical to JCB's own interpretation and consistent with JCB's implementation.

(c) ***The 'Multiple Deal Trading Support' system in the United Kingdom: description***

(98) JCB has since 1977 put into operation a system of allowances granted to its official distributors in the United Kingdom ([74]). This system is known as 'Multiple Deal Trading Support'. It consists basically of a reduction in ex-works prices paid by official distributors intended to allow them to be more competitive in transactions with large customers involving significant numbers of new machines. According to JCB, allowances for trading support are provided, having regard to a range of factors including the number of machines, the mix of products sold, the composition of the fleet, the newness of the business relation with the purchaser, the number and type of trade-in machines and the identity of competitors for the transaction. The allowance is granted on condition that the machines are sold to an end-user. JCB justifies this condition on the basis that its official distributors in the United Kingdom are not entitled to sell to unauthorised resellers and other official distributors would not be entitled 'under the agreements as notified to switch to competing brands' ([75]).

([66]) Letter from G. Greenshields, JCB UK Sales Director to Mr Davis, Watling JCB dated 2 June 1992 (Insp. file, pp. 3-4).

([67]) Letter from C. Y. Ingram, JCB UK Sales Director to D. Barton, Gunn JCB dated 23 May 1989 (Insp. file, p. 368). JCB states that its letter is not directed at cross-border sales, but deals with the impact of unfair competition generally (RSO II, p. 45).

([68]) Letter from N. D. Allen, JCB Parts Director to J. Davies, Watling JCB dated 22 October 1990 (Insp. file, pp. 2457-2458).

([69]) Confidential JCB Memo from J. Patterson to M. Coyne dated 9 March 1994 (Insp. file, p. 19).

([70]) Draft JCB Discussion Document: 'Spurious Competition' (Insp. file, pp. 251-265).

([71]) Internal note from J. Patterson to P. Leboucher dated 1 July 1996 (Insp. file, pp. 2284-2285); fax from F. Rausch to J. Patterson dated 15 July 1996 (Insp. file, pp. 99-102); internal note from J. Patterson to Sir Anthony Bamford dated 25 October 1996 (Insp. file, p. 2282); JCB France document: Construction re-engineering plan dated 10 October 1996 (Insp. file, pp. 218-210); note from F. Rausch, JCB France to J. Patterson, JCB dated 14 October 1996 (Insp. file, p. 2241).

([72]) […].

([73]) […].

([74]) RSO I, Appendix 12 and RSO II, p. 39. Other documents in the commission file would indicate that a similar unnotified allowance system exists in France. Reference is made by Mrs F. Rausch, JCB France in a note to Mr L. Forget dated 21 June 1988 to the fact that sales made outside territories will not receive support ('faire l'objet d'aide') (Insp. file, p. 84).

([75]) RSO I, point 7.2, p. 43 and RSO II, p. 39.

(99) The amount is determined on an ad hoc basis for each transaction, except for backhoe loaders, which have a fixed although scaled amount. On average, the allowances amount to [between 0 % and 10 %] of ex-works prices of all JCB machines and [between 0 % and 10 %] of the price of backhoe loaders, for the transactions concerned. Support has been provided on [between 0 % and 50 %] of JCB sales in the United Kingdom ([76]).

(100) Clarifications or instructions regarding the implementation of the 'Multiple Deal Trading Support' system are made through circular letters to the United Kingdom distributor network ([77]). United Kingdom distributors are entitled to claim and have been granted the allowances, subject to the above conditions being fulfilled. As shown in paragraph 96, where allowances have been paid by JCB and one essential condition to obtain support is not fulfilled (e.g. that the purchaser must be an end-user), such payment is viewed by both JCB and the official distributor as a breach of their agreements ([78]).

(101) The 'Multiple Deal Trading Support' system is therefore part of the commercial conditions agreed between JCB and its official distributors in the UK under which the latter may purchase JCB machines and, hence, of their remuneration.

(d) ***Implementation of the Multiple Deal Trading Support system in the United Kingdom***

(102) In a letter to one of its United Kingdom official distributors in 1992, JCB states: 'Machines are only eligible for support if they are for use within the distributor franchised territory unless a tripartite agreement has been reached with the selling distributor, JCB Sales and the distributor in whose territory the machines will be working'. The letter adds 'Should a distributor conclude a deal with a company who has a number of locations throughout the UK, it is the selling distributors responsibility to determine where the machines will be working. If these machines go into another distributor territory without prior agreement then JCB Sales reserves the right to withhold all or part of the support' ([79]).

According to JCB (RSO II, p. 52), the letter referred to in recital 102 is addressing the topic of deal support for contract hire, under which the machine remains in the distributor's ownership. Despite JCB's allegations, the letter states: 'JCB distributors as well as the competition have used contract hire as a tool to achieve sales' and further makes it clear that: 'Any machine which is subject to a contract hire agreement and receives support from JCB must be clearly identified in the seven day report (…)'. Contract hire is clearly used to increase sales, which the support may or may not stimulate. Such JCB distributors' sales are obviously not stimulated if the support is withdrawn when there is no agreement between distributors in different territories, as requested by JCB.

(103) In 1992, JCB also gave similar instructions in a document titled 'EXERCISING CAUTION', which was addressed to each manager within the official distributor network: 'It is obviously not in JCB's interest to support deals that may go into another distributor's territory, either in the United Kingdom or overseas, whether machines are purchased as in the example above or on contract hire or rental with option to purchase transaction (nationals excluded). It is in everyone's interest to exercise extreme caution when circumstances are outside the norm and I would ask you for cooperation in this matter'. A possible explanation of 'everyone's interest' in JCB's letter is given in the first paragraph: 'These machines obviously received Multiple Deal Support and are currently being offered by the

([76]) RSO II, p. 39.

([77]) Private and confidential letter from G. Greenshields, United Kingdom Sales Director to Messrs Moreton, Roddy, Barton, Hillman, Shaw, Bryant, Meace, Osborne, Shields and Davis (executives from each United Kingdom official distributor) dated 18 March 1992 (Insp. file, p. 246).

([78]) RSO I, Annex 12, points 7.2, p. 43 and 7.14-20, pp. 48-49.

([79]) Letter from G. Greenshields, United Kingdom Sales Director to Mr Davis, Chairman of Watling JCB dated 2 June 1992 (Insp. file, pp. 3-4).

used equipment dealer at below current market prices in the Scottish market' ([80]).

Regarding its document 'Exercising caution', referred to in recital 103, JCB stresses that the distributor which was selling on the Scottish market was an unauthorised reseller (RSO II, pp. 52-53). The distributor in question operated as both reseller and plant hirer, which shows that support granted to contract hire may be used to resell the machines. JCB's concern in the document cited is not whether the distributor was authorised, but the lower prices at which machines are sold in respect of the 'Scottish market' price and the trouble caused in another distributor's territory.

(104) A similar connection between the Multiple Deal Trading Support system and resale outside allotted territories is evidenced in a fax from JCB to Gunn JCB: 'Re: Greyhound Plant, — Trading support. Due to the continued flow of new machines being retailed into export territories by the above company all registered trading support on machines that have not been delivered has been withdrawn'. JCB also stated the following conditions to be agreed by Greyhound Plant, an unauthorised reseller, for future support: 'At the point of purchase, there is a £ 1 500 surcharge added on to the customer achieved price which is held by Gunn JCB. If machines are held for 6 months or 400 hours, whichever is the first, the customer will be reimbursed with the £ 1 500 surcharge. If machines are retailed by the customer under the stated period or hours worked the £ 1 500 will be transferred to the export distributor in which the machine has been retailed' ([81]).

([80]) Private and confidential letter from G. Greenshields, United Kingdom Sales Director to Messrs Moreton, Roddy, Barton, Hillman, Shaw, Bryant, Meace, Osborne, Shields and Davis (executives from each United Kingdom official distributor) dated 18 March 1992 (Insp. file, p. 246).

([81]) Fax from G. T. Boulton, Distribution Manager, JCB to Mr Shaw, Gunn Midland dated 12 May 1992 (Insp. file, p. 269).

(105) Similarly, it was established that [… ([82])].

2. RESTRICTIONS ON SOURCES OF SUPPLY AND/OR PASSIVE SALES IN MEMBER STATES OTHER THAN THE UNITED KINGDOM

(a) ***Italy***

(1) **Exclusive purchase from a JCB subsidiary**

(106) In Italy, the unnotified standard agreement between JCB SpA and official distributors includes an exclusive purchase obligation, which limits purchases to the local subsidiary. Under clause 4(v), distributors undertake not to sell or to be involved in sales of new products which would be in competition with those supplied by JCB SpA without the latter's written consent. Under clause 6(v), official distributors agree to purchase spare parts and attachments exclusively from JCB SpA, or other sources that JCB SpA may in writing authorise. Such consent is thus needed to source supplies from other official distributors in other Member States supplying JCB machines in competition with JCB SpA. However, according to JCB, Italian distributors have neither been prevented from sourcing nor sought to source outside Italy since prices in Italy have been 15-20 % lower than in other major Member States ([83]).

(2) **Sales outside the territory**

(107) Under Clause 4(iii), official distributors in Italy undertake to sell only within their allotted territory. Under clause 8, JCB SpA retains the right to sell directly or through other resellers within the allotted territory to several types of customer and, in particular, to big companies and customers purchasing for export, unless the distributor is directly involved in securing the sale ([84]). Thus, JCB SpA controls exports through

([82]) […].

([83]) RSO II, p. 38.

([84]) Note from G. Bonvincini, JCB SpA to C. E. Coutts, JCB Sales dated 28 June 1993 and annex (Contratto distribuzione). Clause 4 reads: 'Il distributore si impegna: (…) iii) a vendere I Prodotti JCB solo entro il Territorio. v) a non vendere o essere coinvolto sia direttamente sia indirettamente, nella vendita di Prodotti nuovi che siano in qualsiasi modo in concorrenza con quelli forniti dalla JCB (i.e. exclusively JCB SpA as defined in clause 1), se non abbia ricevuto prima il consenso scritto della JCB'. Clause 6 reads: 'Il Distributore se impegna nel Territorio v ad acquistare parti di ricambio, attrezzature e prodotti sussidiari per l'uso o le riparazioni di Prodotti JCB solo dalla JCB o da altra fonte, previa autorizzazione per iscritto da parte dalla JCB'. Clause 8 reads 'La JCB si riserva la facoltà di vendere direttamente o a mezzo di terzi prodotti JCB nel Territorio alla Clientela appartenente a una delle seguenti categorie: i) Grandi imprese (oltre 10 miliardi di lire di fatturato annuo) salvo che ci sia un diretto coinvolgimento del Distributore nel procurare la vendita; ii) clienti che aquistano per esportare, salvo che ci sia un diretto coinvolgimento del Distributore nel procurare la vendita.' (Insp. file, pp. 540-559).

resellers, direct exports from the official distributor being prohibited by the obligation to sell exclusively within the allotted territory.

(108) Regarding sales made by an official distributor in Italy in the territory of another official distributor (Terra, distributor for Austria and Slovakia), JCB UK stressed to JCB Italy that: 'As employees of JCB, we cannot promote the sale of new machines directly or indirectly into another dealer's territory. Equally, enquiries of this nature should be directed to the appropriate dealer in that country, in this case Terra. In the case of used machines, dealers are free to sell whatever they wish. (…) Secondly, SOFIM need to be advised that they cannot sell into another dealers territory, either directly or indirectly through a secondary trader' ([85]). Whilst restating its obligations towards official distributors, JCB is also making a statement on official distributors' commercial conduct in general and on SOFIM's, in particular. This statement requesting that they do not sell into another distributor's territories is fully consistent with the unnotified JCB agreement between JCB Italy and its network of official distributors, whereby sales are only possible within allotted territories.

JCB considers that active and passive sales are not restricted in Italy and that passive sales outside a distributor's own territory have been both permitted and common (RSO II, pp. 38 and 49). This is contrary to the express wording of clause 4(iii) of the unnotified Italian distributor agreement referred to in paragraph 107 and the evidence of its implementation cited in recital 108. Recital 124 adduces more evidence contrary to JCB's contention.

(b) ***France***

(1) **Exclusive purchase from a JCB subsidiary**

(109) Under article 2.2 of the unnotified distribution agreement with JCB's subsidiaries in France, JCB SA and JCB Service, official JCB distributors agree to obtain supplies of JCB machines and spare parts exclusively from JCB SA and JCB Service (JCB France). As a distinct obligation, they also agree not to sell competing new machines or spare parts ([86]).

(110) In a letter sent by JCB France to one official distributor in France, reference is made to the fact that the latter had obtained supplies of both new JCB machines (about ten machines) and genuine JCB spare parts from United Kingdom distributors, instead of JCB France. JCB viewed this purchase policy as contrary to the continuation of the dealership, and threatened to terminate the agreement ([87]). Another official JCB distributor within the French distributor association also confirms that such an exclusive purchase obligation is included in the

([85]) Private and Confidential Memo from J. Patterson, JCB to G. Bonvincini, JCB SpA dated 24 March 1994 (Insp. file, p. 18).

([86]) The relevant provision in French reads (Article 2.2): 'Sans préjudice de ce qui est dit à l'Article 4 ci-après, le concessionnaire s'engage, pour la durée du contrat et à titre de condition essentielle de celui-ci, à s'approvisionner en produits JCB et en pièces JCB exclusivement auprès, respectivement, de JCB SA et de JCB Service et à ne pas vendre, diffuser ni promouvoir — directement ou indirectement — pendant la durée du présent contrat et sur le Territoire, des produits directement ou indirectement concurrents des produits JCB (à l'exception des machines d'occasion) ni des pièces JCB'. JCB Spare Parts are defined as those pertaining to JCB machines and included in JCB catalogues (Annex 1, point 2, Contrat de Concession, Insp. file, pp. 52-83).

([87]) Letter from F. Rausch, JCB SA to P. Malecot, SEM-CEDIMA dated 21 June 1996 (Insp. file, pp. 2155-2156). The relevant passages read: 'Entre-temps, nous avons appris et vous l'avez d'ailleurs confirmé à Monsieur Dominique Fontana, que vous avez acheté des machines neuves JCB non pas à nos sociétés Françaises, mais à des Sociétés anglaises. Il semble que cela concernerait une dizaine de machines. Par ailleurs, vous nous avez également confirmé qu'il vous arrivait de vous approvisionner en pièces d'origine JCB auprès de Sociétés britanniques. Nous comprenons donc, tant du fait de cette politique d'achat qui appelle au demeurant nos plus expresses réserves, que d'après les derniers entretiens téléphoniques que nous avons eus, que vous ne croyez pas pouvoir envisager de mettre en œuvre le projet de collaboration tel que nous l'avons défini dans notre courrier du 23 avril 1996, qui est resté à ce jour sans réponse. En conséquence, nous vous indiquons et, en tant que de besoin, nous vous notifions, qu'à compter du 31 décembre 1996, les Sociétés JCB SA, JCB manutention et JCB Service cesseront toutes relations commerciales avec vos Sociétés, SEM-CEDIMA et K. Malecot'. JCB states that a fax from F. Rausch, JCB France to C. E. Coutts, JCB UK states in connection with these purchases: 'I confirm that the following machines have been sold direct by GUNN to one of our dealers called SEM-CEDIMA/Malecot. I would like to know at what price those machines have been sold and if they have been supported by JCB Sales. In any case, it is creating a major problem to me. Serial numbers are 443680: transferred from BERKELEY to GUNN retailed on 2.04.96 to Greyhound, 443826: sold to GUNN retailed on 2.4.96 to GREYHOUND' (RSO II, p. 35, Annex 2).

agreement and enforced within JCB's network in France ([88]). Official JCB distributors in France are therefore not allowed to purchase machines or spare parts directly or indirectly supplied by other official JCB distributors in other Member States. This restriction on access to the whole JCB network in the EC as a source of supplies allegedly prevented official distributors from being competitive compared to unofficial distributors in France, given the attractive price conditions that official JCB distributors in the United Kingdom were in a position to offer and the fact that French official distributors were not free to source supplies from the cheapest market ([89]).

According to JCB, the exclusivity referred to in clause 2.2 of the French distributor agreement attaches to JCB products and parts (as the other side of the coin to the obligation not to sell competing products) rather than to the source within the official network. JCB states that there is no evidence of the enforcement of an exclusive purchase obligation in France which precluded sourcing from approved JCB distributors in other Member States (RSO II, pp. 34-36). The text of the unnotified agreement cited in recital 109 does, however, clearly state two distinct obligations: first, that JCB products must be purchased exclusively from JCB SA and JCB Service and, second, that the distributor cannot sell products which compete with JCB's. The letters cited in recital 110 show that JCB France is only concerned by the breach of the agreement.

(2) **Sales outside the territory**

(111) Under Article 2.3 of the standard unnotified agreement with JCB France, official distributors undertake not to sell or to distribute JCB machines or spare parts by means of branches or depots outside their territory. This agreement, according to a letter from JCB France to the 'Bureau des concessionaires', had been revised in 1989 based on Regulation (EEC) No 1983/83 so that exclusivity of the territory 'supposes that the distributor does not promote the JCB card externally but he cannot be prevented from responding to an order from an external customer if the latter asks it'.

(112) A different interpretation of the obligation not to sell outside allotted territories in France is apparent in letters from JCB to official distributors. Without any reference to active canvassing, JCB finds the simple fact of selling outside the territory to be contrary to the distributor agreement in France. In two letters addressed to different JCB distributors in France, JCB stated: 'More precisely, for the sake of your own interest, we would wish that you liaise directly with each other to avoid this kind of practice in the future. Rather than allowing customers to take advantage of a competitive environment, it would be preferable that you exchange information regularly or that you negotiate between yourselves these common deals' ([90]). In these instances, JCB has encouraged collusion between its distributors to negotiate, between themselves, orders from outside allotted territories.

(113) The obligation to refrain from selling outside the territory, i.e. not to carry out passive sales, is additional to the obligation not to distribute by means of branches or depots outside the territory, as shown by JCB's request that an offer made by an official distributor to a

([88]) Letter from (confidential) to DG IV dated 10 February 1999 (Main file, pp. 2205-2243). The letter reads: 'Approvisionnement en machines et pièces dans un pays de la CEE. Si JCB n'a jamais tenu à formaliser par écrit les interdictions d'achats de pièces de rechange et les matériels de la marque en dehors des sources d'approvisionnement de JCB France, celle-ci a effectué des pressions sur le réseau et sur notre société en utilisant les moyens disponibles d'un concédant vis à vis d'un concessionnaire pour empêcher cette source d'approvisionnement autre. Ces interdictions faites par JCB sont néanmoins aussi contractuelles puisque inscrites dans le contrat de concession (Annexe 1, including the distributor agreement between 1992 and 1995)'.

([89]) Letter from Mr R. Pain, BPV (official distributor in France) to F. Rausch, JCB France dated 17 April 1996, which reads: 'L'existence de plusieurs réseaux pirates n'est pas compatible avec un réseau concessionnaires tel que vous le souhaitez. Trois solutions nous semblent envisageables: 1) Ajuster les prix de cession — pièces et matériels — France avec les prix de cession Angleterre, 2) Ajuster les prix de cession Angleterre avec les prix de cession France, 3) laisser la possibilité à vos concessionnaires d'une vraie libre concurrence et notamment de s'approvisionner sur le marché le plus attractif' (Insp. file, pp. 508-509).

([90]) Letter from E. de Montarnal, JCB SA to Mr Pain, BPV dated 4 July 1995. The letter reads: '(…) nous sommes intervenus auprès de la société Technicentre pour lui rappeler que, contractuellement, les concessionnaires JCB sont engagés à ne pas vendre ni diffuser des produits JCB (neufs ou démonstration de moins de 6 mois) en dehors de leur territoire' (Insp. file, p. 87). The same interpretation of the relevant provision, with the same wording, is also found in the letter from Mr R. Caujole, JCB SA to Messrs Matton and Mella of Société Philippe MTP dated 10 January 1995 (Insp. file, p. 88). Whilst 'diffuser' (promote) refers to active sales, 'vendre' (sell) includes passive (unsolicited) sales. As regards encouragement of collusion, both letters have the same wording: 'Nous souhaiterions plus concrètement que, dans vos intérêts communs et bien compris, vous vous mettiez directement en relation pour éviter dans l'avenir ce genre de pratiques. Il est en effet préférable d'échanger régulièrement des informations ou de négocier entre vous ces affaires communes plutôt que de faire bénéficier le client de ce climat concurrentiel'.

customer pertaining to the neighbour distributor's territory be withdrawn ([91]) or requests that offers made by JCB Ile de France be diverted to the latter ([92]). JCB Ile de France has an exclusive territory in France. Insofar as JCB Ile de France is integrated in the JCB Group, the request that such offers be diverted may be legitimate, except that JCB Ile de France competes actually or potentially with other distributors in France. However, the letter from the distributor requests that orders emanating from its territory and addressed to another official distributor should be diverted towards itself. If such out-of-territory sales take place, official distributors may receive a lower allowance compared to those on sales within their territory ([93]).

According to JCB, the incidents referred to in France relate to active and not passive sales (RSO II, pp. 36-37 and Appendix 3), the former being in breach of an entirely legitimate provision of the agreement in France. The letters cited in paragraph 112, which, according to the Commission, show restrictions on out-of-territory sales and encouragement of collusion among dealers to the customer's detriment, are taken out of context. They were primarily aimed at reminding the distributors in question that active sales out of territory were prohibited, furthermore making it clear that it did not want to arbitrate a dispute involving an end-user. The distributors would need to negotiate who was to be responsible for the costs of after-sales service (RSO II, p. 59). The wording of JCB's letters and their anti-competitive object are however clear and do not offer room for interpretation.

(114) Similarly, in another letter, JCB asks SEM-CEDIMA, one of its official distributors, not to canvass or to effect direct or indirect (for instance, through an intermediary) sales outside its exclusive territory, in particular, in the territory recently allocated to another official distributor. The same letter refers to an agreement between JCB and SEM-CEDIMA to make sales outside the allotted territory, in a specific territory where there was no official distributor, dependent upon JCB's approval ([94]). As evidenced above, SEM-CEDIMA used to purchase from the United Kingdom, at lower prices than those of its competitors within the French distribution network. This illustrates JCB's control over passive and active sales, even where there are no possible conflicts with exclusive rights conferred to another distributor, since there was no such distributor in the French territory referred to. As soon as a distributor was appointed, direct and indirect sales were no longer possible.

According to JCB, JCB France's letter cited in recital 114 is taken out of context insofar as it records the ending of a temporary and exceptional arrangement with SEM-CEDIMA in 1997, according to which the latter was authorised to sell in the Loire Valley 'dans des zones provisoirement libres' through the intermediary of Kleber Malecot, the former official JCB distributor in that area. According to JCB, this exceptional arrangement and, particularly, the right to carry out active sales in that area, came to an end as soon as a new distributor, Telliez, was appointed in that area, as recorded in JCB France's letter dated 17 November 1998. (Letter from Mr Hargreaves, JCB dated 6 June 2000). Under the agreement referred to, JCB's approval is not given once and for all on active out-of-territory sales; its approval is necessary for each transaction, irrespective of whether the transaction resulted from active or passive marketing. However temporary and exceptional, the agreement between 1997 and 1998 aims at controlling and restricting out-of-territory sales, which were not possibly conflicting with exclusive rights held by another official distributor.

(c) ***Benelux***

(115) In an internal letter between JCB NV and JCB SA (France), the former described price arrangements applied to exports of machines which were making them attractive to traders involved in exports from

([91]) Letter from R. Caujole, JCB France to Société Philippe MTP dated 10 January 1995 (Insp. file, p. 2154).

([92]) Letter from G. Dorval and B. Cazalbou, Pinault Equipement to JCB dated 31 January 1996 (Insp. file, p. 2171): 'Il apparaît que nous sommes de plus en plus fréquemment concurrencés, en matière de pièces de rechanges, par votre filiale Ile de France. En effet, celle-ci livre directement des distributeurs Aquitains (…). Nous vous demandons d'intervenir énergiquement auprès de JCB Ile de France afin que les demandes de pièces de l'Aquitaine nous soient immédiatement répercutées conformément à nos accords'.

([93]) Reference is made by Mrs F. Rausch, JCB France in a note to Mr L. Forget dated 21 June 1988 to the fact that sales made outside territories will not receive support ('faire l'objet d'aide') (Insp. file, p. 84).

([94]) Letter from E. de Montarnal, JCB France to S. Malécot, SEM CEDIMA dated 17 November 1998: 'Suite à plusieurs entretiens que vous avez eus avec Monsieur Desmoulières, il avait été convenu que lorsque vous auriez une opportunité de vente hors du territoire de votre concession, dans une zone non couverte par un concessionnaire JCB, vous nous en informeriez et ne concluriez aucune affaire commerciale avant d'avoir reçu un accord initial de JCB France. Aujourd'hui nous vous confirmons … que JCB a nommé l'entreprise Thelliez à Mer (41) comme concessionnaire dans la région Centre-Val-de-Loire (départements 45, 41, 37, 16). En fonction de ce qui précède, nous vous demandons de ne plus réaliser de prospection ni de ventes directement ou indirectement — par exemple par un intermédiaire — en dehors du territoire exclusif de SEM-CEDIMA qui vous a été concédé … Vous remerciant de respecter le point important ci-dessus évoqué …'.

Belgium and the Netherlands. The letter goes on to say: 'We investigated why one of the traders had a quick growing turn-over of parts, without growth of machine sales. This is how we discovered that this trader is, among other things, exporting to France to a firm named Central Parts. We regret that this happened and of course we stopped supply to this trader immediately' ([95]). Central Parts' name is apparently unknown to JCB NV. The decision to stop supplies is taken because the trader is exporting to France. It follows that neither the trader in question nor Central Parts or clients in France could any longer benefit from the price arrangements set forth by JCB NV that made supply from the Netherlands and Belgium attractive, compared to French prices.

(116) Similar arrangements of JCB NV concerning export sales of machines and spare parts to resellers in Greece were similarly discontinued, despite assurances given to JCB UK that such transactions through 'grey channels' were 'managed and controlled and there was no pricing competition with the subject importer' ([96]). The letter shows that, provided the grey market (i.e. sales to parallel traders in Greece) 'was managed and controlled and that there was no price competition' with the official distributor in Greece, sales to parallel traders were carried out by JCB NV. These sales were challenged by JCB UK. Moreover had JCB NV lost control over such sales or price, competition raised problems with the local official distributor, such sales would not have been carried out.

(117) Regarding the Benelux, an internal review of various subsidiaries states JCB UK's concerns, as follows: 'Benelux (…). There still remains some major tasks to achieve, the most vital being the conversion of a "grey dealer" to a JCB Compact and Service dealer. Currently "Carma" are importing new and used machines, valued at over GBP 1 000 000 and parts valued at over GBP 100 000 from Berkeley Hemel Hempstead. The more worrying aspect is however that they insist on selling below JCB NV's retail parts price and with a retail service rate below the neighbouring JCB dealer's price. The next 6 weeks should see this matter resolved along with possible spurious parts supply into Luxembourg (ADLS's next visit in mid-May)' ([97]). Before appointing it as an official JCB distributor, Carma's sales at prices below those of its JCB competitors and to Luxembourg, which were made possible by direct purchase from the United Kingdom instead of from JCB's subsidiary, were thus worrying aspects to be resolved.

(d) ***Germany***

(118) An internal memorandum dated 31 March 1993 from JCB Landpower to JCB Sales in the United Kingdom describes actions taken to stop grey exports to Germany as follows: 'Landpower have been working closely with JCB GmbH to prevent United Kingdom machines being exported and have stopped Holt JCB supplying R N Lawton'. JCB's concern is clarified two paragraphs later: 'Could I please ask that any future construction deals for Farm Specials are viewed with extreme caution as clearly these grey exports are giving us severe pricing problems in Germany' ([98]).

(119) JCB's concern is further elucidated in a fax from its German subsidiary to JCB UK Sales: 'We have been informed that the above machine was sold via Berkeley JCB Ltd and Newland Plant Hire to our former dealer BMH. We kindly ask you to stop these grey imports because BMH is a competitor to our present dealer

([95]) Letter from A. Krug, JCB NV to J. P. Guillemard, JCB France dated 4 June 1992 (Insp. file, p. 90).

([96]) Letter from F. J. Zeevenhooven, JCB NV to C. E. Coutts, JCB Sales Ltd dated 17 March 1995.

([97]) Internal note from A. D. L. Shaw, JCB Service (Parts) to Mr N. D. Allen dated 3 May 1994 (Insp. file, p. 1681).

([98]) Note from D. R. Bell, Managing Director JCB Landpower to G. Greenshields dated 31 March 1993 (Insp. file, p. 854).

Draeger+Bastian. For the abovementioned machine, please credit us with 5 % service fee' ([99]). In another fax addressed to its German subsidiary regarding a machine which had been resold from the United Kingdom to Germany, JCB declares: 'We are determined to eliminate any grey market machines and I have spoken direct with the Regional Director of Berkeley JCB about this service support fee claim' ([100]).

(120) In view of the fact that 'Many dealers in Germany are believed to be purchasing from local suppliers and there is evidence that some are in contact with United Kingdom dealers', an internal note from JCB UK to JCB Germany states in 1994 that: 'An investigation must be started in Germany to confirm where Interparts and our major dealers are obtaining their parts. The use of a private investigation company should be considered' ([101]).

According to JCB, the need for an investigation in Germany referred to in recital 120, which was never actually carried out, arose out of complaints from JCB Germany that Interparts and major distributors were receiving parts from unauthorised resellers, who had been supplied in breach of clause 4 of the United Kingdom agreement (RSO II, p. 51). This would imply that the words 'United Kingdom dealers' do not refer to official United Kingdom distributors. JCB Germany's concern over clause 4 of the United Kingdom agreement is less plausible than its concern about its official German distributors purchasing from the United Kingdom market, where prices were lower than those charged by JCB Germany. In any event, the parts in question had been initially sold by official distributors in the United Kingdom and were purchased by official distributors appointed by JCB in Germany, allegedly on the basis of their ability to meet JCB standards of service. The same is true also for parts and machines purchased by official French distributors, also challenged by JCB.

(e) ***Austria***

(121) A letter from Gunn JCB to JCB refers to the latter's involvement in exports to Austria: 'In January of this year, you instructed us to cease supply of machines to the above (Sunrise Ltd). This was on the basis that our "Austrian friends" had pointed the finger at Sunrise and Gunns, and accused us of supplying new machines to Austria' ([102]). JCB's reply stresses its protection from cross-border sales as follows: 'Obviously, as the manufacturer, we are anxious to protect our distributors, wherever they are, from unfair competition from whatever source, on all products' ([103]).

(f) ***Ireland***

(122) An official distributor in Ireland, ECI JCB, requested another United Kingdom distributor, Watling JCB, to eliminate the possibility of new machines sold by the latter ending up in Ireland and to ensure that none of these 'highly unsatisfactory transactions took place', such transactions having involved 'indirect sales to end-users' ([104]). ECI JCB, in close coordination with JCB,

([99]) Fax from G. Bohnenkamp, JCB GmbH to G. Greenshields, JCB Sales UK dated 11 May 1995 (Insp. file, p. 951).

([100]) Fax from R. Price, District Sales Manager JCB to G. Bohnenkamp, JCB GmbH dated 15 May 1995 (Insp. file, p. 950).

([101]) Internal memorandum from A. D. L. Shaw, JCB Sales UK (Parts) to G. Pauls, JCB GmbH dated 19 May 1994 (Insp. file, pp. 1702-1703); 'Parts & attachments report — March 1994' dated 15 April 1994 and note from N. D. Allen, JCB to A. D. L. Shaw regarding the report dated 19 April 1994 (Insp. file, pp. 1800-1806).

([102]) Letter from D. Barton, Gunn JCB to C. Ingram, JCB Sales UK dated 19 May 1989 (Insp. file, p. 880). As shown later on in the document, the 'Austrian friends' referred to are, most presumably, employees from Terra, JCB's official distributor in Austria. A communication dated 21 March 1989 between Gunn JCB and JCB on this issue attributes the deal being lost by Gunn JCB to unsubstantiated claims from Terra (Insp. file, p. 878).

([103]) Letter from C. Y. Ingram, JCB Sales Director to D. Barton, Gunn JCB dated 23 May 1989 (Insp. file, p. 368).

([104]) Letter from D. O'Sullivan, ECI JCB to J. Davis, Watling JCB dated 26 January 1996 (Insp. file, p. 115).

has been consistent in applying to itself the discipline it requested from other distributors by refusing to supply Central Parts when the latter asked ECI JCB to supply a list of spare parts in 1996 ([105]). In other instances, ECI JCB have transmitted to JCB orders from parallel traders involved in trade with France for authorisation ([106]).

3. ACTUAL IMPLEMENTATION OF THE SERVICE SUPPORT FEE IN THE UNITED KINGDOM, FRANCE, GERMANY AND SPAIN

(123) That JCB is involved in setting the amount of the service fee is evidenced in a fax sent to one of its official distributors in France, as follows: 'we could negotiate an after-sales fee of [between FRF 5 000 and FRF 10 000] for this customer, that we reserve for you once you confirm your agreement' ([107]). Out of 39 service fees charged by JCB France to United Kingdom distributors in 1995, 33 have the same amount of [between FRF 5 000 and FRF 15 000]. Other examples in 1995 and 1996 further show that JCB, acting through its fully owned subsidiary in France, determines the amount of and charges the fee to official United Kingdom distributors which had sold the machines, in the absence of and prior to any disagreement between them and the French official distributors in whose territory the machines were operated ([108]).

According to JCB, the similarity of the levels of service support fee is to be expected, given that they relate to the same machines and the amount represents a reasonable estimate of the expected costs associated with such a machine (RSO II, pp. 62-65 and Appendix 1). JCB also stresses that in many instances UK distributors have not actually paid the fees invoiced to them. Similarly, JCB views as consistent with the provisions notified 'that JCB should seek to establish a formula for calculating a reasonable level of service support fee, which could be used both as guidance to dealers and by JCB itself when determining the fee in accordance with clause 5 (…). Once an amount has been accepted as a reasonable estimate of the costs of after sales care for a particular machine, there is no reason why an exporting dealer should pay more or an importing dealer accept less, whether the amount is determined by the dealers or by JCB' (RSO II, p. 65). According to JCB, an of [between FRF 5 000 and FRF 15 000] fee on backhoe loaders referred to in recital 123 is reasonable in relation to the costs incurred by an official distributor in France and not reimbursed by JCB (of [between GBP 500 and GBP 1 500]) in servicing it having regard to a reasonable profit element. Such costs are estimated as labour and travel hours (30 h) and travel distance (600 miles) to which uniform rates are applied (RSO II, Appendix 1). These hours, distances, rates and profit elements for their services necessarily vary depending on the official distributor and customer's location. JCB's unilateral setting of such costs in lieu of its distributor illustrates its control over pricing elements of export sales. Under the notified agreements, such setting by JCB should take place only in the event of disagreement between the distributors concerned.

(124) JCB's views regarding the service support fee are outlined in an internal memorandum: 'John Patterson has asked me to convene a meeting to establish the policy that we should implement to deal with the identification of grey export machines and the establishment of a suitable service support fee to be levied against the exporting dealer' ([109]). Such fixed service fee, or 'penalty' as referred to in JCB's correspondence where the fee is found not to be high

([105]) Fax from C. E. Coutts to F. Rausch dated 31 January 1995 and attachments (Insp. file, pp. 2332-2338).

([106]) Fax from J. O. Lomasney, ECI JCB to J. Bradley, JCB dated 31 January 1995 (Insp. file, pp. 2256-2262); fax from A. Nicholson, ECI JCB to C. Coutts, JCB Sales dated 30 March 1995 (Insp. file, pp. 917-921).

([107]) Fax from F. Rausch, JCB France to A. Bois dated 25 May 1994. The French text reads: '(…) nous avons pu négocier pour ce client une commission après vente de 8 000 FF, que nous te réserverons dès que tu nous auras confirmé ton accord sur ce qui précède' (Insp. file, p. 819). See also fax from G. Greenshields, JCB Sales to J. Davis, Watling JCB dated 9 February 1995 (Insp. file, p. 301).

([108]) Doc. 'Machines pirates' ACG dated 22 December 1995 (Insp. file, p. 3565); letter from J. Davis, Watling JCB to F. Rausch, JCB France dated 5 March 1995 (Insp. file, p. 438); faxes from F. Rausch, JCB France to G. Greenshields, JCB Sales UK dated 22 May 1996 (Insp. file, p. 322) and 28 May 1996 (Insp. file, p. 323-325); letter from J. Davis, Watling JCB to F. Rausch, JCB France dated 9 March 1995 (Insp. file, p. 1695).

([109]) Note from C. Y. Ingram, Export Sales Director to Mr G. Greenshields dated 29 March 1993 (Insp. file, p. 856).

enough to act as a deterrent for parallel exports from Italy if profit margins are high ([110]), is levied 'against' the exporting distributor. It may amount to a substantial share of a distributor's commercial margin. In settling a dispute between an Irish official distributor on the amount of service fees for seven machines sold in Ireland, a United Kingdom distributor, TC Harrison JCB, stated an amount of fees that represent 57 % of its gross profit on the transaction ([111]).

According to JCB, its correspondence in paragraph 124 is not concerned with deterring export sales (RSO II, p. 64). Yet, for instance, the fax between JCB UK and JCB Italy cited in that paragraph reads: '(…) There appears to be little doubt that Sofim are indeed aggressively promoting the JCB product into Southern Austria'. Several instances of machines being resold 'in disruption to the market price', at prices 19-25 % lower than those of the Austrian JCB distributor Strobl are provided as example, and the fax concludes: 'It would seem that Sofim are quite determined to continue trading outside of their territory or in contravention of their agreement for resale. I would appreciate your comments as to what can be done. Obviously with such a large price differential the imposition of a small service support fee is unlikely to be a deterrent'. Sofim sales into Austria are clearly export sales (see also recitals 107 and 108 above as to the JCB agreement in Italy, which obliges official distributors to sell only within their territory).

(125) The effects are also described in a letter from one official JCB distributor, as follows: 'In this example, if we had sold Brown SA a new machine we would have had to pay in excess of GBP 2 000 to the French JCB distributor for him to provide warranty and after sales service to the owner of the machine. There was never any intention for Brown SA to buy this machine because: a) with the Service Support Fee our price would not have been competitive, he could have bought one cheaper in France (…)' ([112]).

(126) Calculation methods are also illustrated in a reply from JCB Sales UK to JCB's German subsidiary dated 15 May 1995. JCB Germany was seeking a 5 % service fee from JCB UK, which replied: 'A support fee is normally calculated as 4 % of the local customer achieved price and this payment should be requested directly from Berkeley JCB' ([113]). In Spain, JCB's subsidiary consulted JCB UK on a fee, which: should be negotiated at around the level of 5 % of the dealer's purchase price ([114]). In these instances, JCB indicates the amount in lieu of its distributors and irrespective of their actual costs.

(127) These letters evidence attempts to apply a fixed amount of fee. In none of the cases outlined above is there any link between the actual costs of the service which the French distributor concerned (i.e. not JCB France) had actually provided or was likely to provide to the user and the amount requested ([115]). According to JCB, such costs, which are not reimbursed under its warranty as manufacturer, include pre-delivery inspection (tests), installation at the customer's site, 100 hour service and other unrecovered warranty costs ([116]).

([110]) Note from F. Rausch, JCB SA to L. Forget dated 21 June 1988 (Insp. file, p. 84A), or also fax from C. Y. Ingram, JCB to C. Fiorentini, JCB SpA dated 14 February 1996 (Insp. file, p. 2598).

([111]) Letter from B. Sutton, TC Harrison JCB to ECI JCB dated 29 February 1996 (Insp. file, pp. 924-925).

([112]) Letter from D. W. Stone to Mrs Gibbs, Horwood & Company Solicitors dated 21 March 1994 (Insp. file, pp. 243-245).

([113]) Fax from R. Price, District Sales Manager JCB UK Sales to G. Bonnenkamp, JCB GmbH dated 15 May 1995 (Insp. file, p. 950), in response to the latter's fax dated 11 May 1995 (Insp. file, p. 951).

([114]) Fax from G. Smith, JCB Maquinaria to C. E. Coutts, JCB UK dated 27 July 1994 (Insp. file, p. 953).

([115]) RSO I, p. 67.

([116]) RSO II, Appendix1.

4. INVOLVEMENT IN DISTRIBUTORS' PRICING ON THE PART OF JCB IN THE UNITED KINGDOM AND FRANCE

(a) ***The United Kingdom***

(128) The minutes of a Dealer Principal Meeting bringing together the Association of JCB distributors in the United Kingdom on 21 May 1991 state that: 'To avoid confusion and cross-border disputes, the following arrangements were agreed for dealer discounting:

Category 1 (Sales Agent Only) 3 % commission for Sales Lead.

Category 2 (Sub-dealer — No stock in yard, no demos-promotions, distributor to carry out all warranty, sub-dealer takes the part exchange). 20 % discount on machines.

Category 3 Full JCB Landpower dealer (carries stock machines, does demonstrations, full advertising and promotions, trains engineers, does warranty) 27 % on machines. The Secretary was requested to write to JCB Landpower to obtain confirmation that the overall margin on the Fastrac was 31 %'.

Regarding 360° machines and Joint venture, the minutes further state: 'It was agreed that gross margins should be maximised on this new product range and also that product specifications should be standardised across the dealer network' ([117]).

(129) Less than one month later, JCB expressed its disappointment to the Secretary of the Dealer Association regarding the discounts agreed by the Association: 'Discounts to agricultural dealers. Several meetings were arranged with Distributors and I believed we had an agreement with at least Holt, Berkeley and TCH. It was therefore very disturbing to hear the Dealer Association had agreed a 20 % discount level which is very different to our discussions and is I believe unworkable' ([118]).

(130) The conflict was settled at a subsequent meeting of the JCB Dealer association held on 18 July 1991, attended by Mr Greenshields from JCB, the minutes of which state: 'It was agreed that the Secretary draft matrix be adopted for wholesale discounting to the agricultural dealers, with the following amendments:

(a) The requirement to place a 2 months forward order and provide a cheque to obtain 27 % discount, be replaced by "pay for machines on collection/delivery",

(b) A note be added that all dealers (and distributors) trade solely within their Landpower franchised territory.

([117]) Minutes of the Dealer Principal Meeting held at the Motorcycle Museum, Birmingham, Tuesday 21 May 1991 (Insp. file, pp. 673-676).

([118]) Letter from D. R. Bell, Managing Director JCB Landpower to P. Shields, Secretary of the Dealer Association dated 19 June 1991 (Insp. file, pp. 661-662).

The basic principles for 27 %, 25 %, 22,5 % and 3 % discounts for wholesales is now agreed' ([119]). The matrix, which establishes the criteria to obtain the four categories of uniform agreed discounts, is attached to the minutes of the meeting.

According to JCB, who deny that the discussions among all JCB distributors in the United Kingdom referred to in recitals 128 to 130 concerned resale price maintenance, the reason for its involvement was that the amount was too low (i.e. wholesale prices to distributors were too high), official distributors being free to apply higher discounts (i.e. lower prices) (RSO II, pp. 55-56). Available evidence does not show that JCB was contesting as to its principle the application of the discount in which it is involved, which, as described in the minutes dated 21 May 1991, was intended 'to avoid confusion and cross-border disputes'. To avoid such disputes, the next meeting, on 18 July 1991, agreed, in the presence of Mr Greenshields from JCB, that 'a note be added (to the draft matrix adopted) that all dealers (and distributors) trade solely within their Landpower franchised territory'. In that matrix, the condition 'Must trade solely within JCB Landpower Franchised Territory' is ticked with a X as necessary for getting the agreed discounts of 27 %, 25 %, 22,5 % and 3 %. Nor could JCB be unaware that, when jointly set by all its official United Kingdom distributors, the discount was necessarily uniform, as there would be little point in setting and agreeing in common a discount that would not be applied across the board. As stated in the minutes dated 18 July 1991 Mr D. Meace from TC Harrison was entrusted: 'to speak to all the relevant Agricultural Principals with a view to (…) advise that they must only operate within their Landpower franchised territory. Advise that the consensus view is that a retail discount level of a maximum of 15 % would seem to be appropriate'. Indeed, in the letter dated 19 June 1991 from Mr Bell to the Secretary of the Dealer Association referred to in recital 129, the former complains that the 'Agricultural Dealer Price List (…) was issued without reference to JCB Landpower to agree prices and specification'. These documents make it therefore clear that uniform discounts were agreed at the various levels of the distribution chain: distributors to dealers and dealers to end-users.

(131) In a confidential letter to Watling JCB dated 11 January 1993, the Secretary of the JCB Dealers Association declares: 'Individually we have all been advised (by JCB Sales) of the need to achieve higher prices for machines' ([120]). The Secretary of the JCB Dealers Association reiterated the same concern on 20 January 1993 in another letter to Watling JCB, which states that: 'From previous discussions and correspondence, we know that JCB wants to improve their achieved prices', which were allegedly falling. In this context, the Secretary of the JCB Dealers Association was requested, regarding 180° machines in the United Kingdom: 'to coordinate an exercise on the movement in ex-works and achieved pricing across the United Kingdom dealer body' ([121]).

(132) Regarding parts pricing in the United Kingdom, in 1991, JCB undertook calculations to set up its price lists, which were also discussed with the Secretary of the JCB Dealers Association. On a request to clarify the logic behind JCB parts pricing moves, JCB declares: 'Our objective was to increase the average United Kingdom dealer parts gross profit percentage by two percentage points'; accordingly: 'We chose to concentrate on those parts which already have a dealer gross profit of [between 25 % and 50 %] and above excluding attachments, breakers and tyres. All these were uplifted to provide a 5 % higher dealer margin' ([122]). If JCB list prices were merely recommended prices, it would be

([119]) Minutes of the Dealer Principal meeting held at the Motorcycle Museum, Birmingham, Thursday 18 July 1991 (Insp. file, pp. 664-668).

([120]) Letter from P. Shields to J. Davis, Watling JCB dated 11 January 1993 (Insp. file, p. 138).

([121]) Letter from P. Shields, Secretary of the JCB Dealer association to J. Davis, Watling JCB dated 20 January 1993 (Insp. file, pp. 677-678).

([122]) Letter from N. D. Allen, JCB Parts Director to P. Shields, Holt JCB dated 16 July 1991 (Insp. file, pp. 669-670).

useless to increase them with a view to increasing 'United Kingdom dealer parts gross profit'. Increases of gross profits cannot be achieved if the retail price is not either set forth or influenced by JCB through its price list or a fixed multiple of such JCB list prices.

According to JCB, the letter cited in recital 132 was referring to an increase in the difference between the price charged by JCB to distributors and the recommended resale price, which involved no assumption that the distributors would sell at the list price or otherwise guaranteed distributor margins. More generally, JCB states that recommended retail price lists were and always had been mere recommendations (RSO II, p. 57). In this context, gross margins or profits would refer to maximum or theoretical margins. This assertion is not in line with the evidence relied upon and commented by JCB. The letter from Mr Allen makes clear that JCB's calculations were made on the basis of actual sales by all United Kingdom distributors in 1990 and that distributor margins were uplifted in the calculations 'in line with the Dealer Parts and Service Committee recommendations'. Furthermore, these calculations and margins were communicated to all United Kingdom distributors through the Association and discussed at the meeting of the association three days later. The concern expressed in the minutes dated 19 July 1991, which enclosed the letter from Mr Allen, was that some distributors believed that 'JCB had provided the 2 % extra margin' and others 'believed that they had not'. The fact that the secretary was instructed 'to pursue the issue on behalf of the Association' indicates that the so-called 'recommended price list' works among the distributors as a clear basis for setting resale prices, for otherwise distributors would have simply taken note of JCB's new list of recommended prices. On the other hand, available evidence shows that, collectively, JCB may advise all its United Kingdom distributors to achieve higher prices on certain machines from time to time. This is also evidenced in the minutes of the meeting dated 21 May 1991, as follows: 'The meeting has previously agreed that all Principles were adopting a policy of maximising gross margins and it was further agreed that the new 4CX should be sold at the maximum price to further promote gross margins'. The association works as a horizontal forum in which JCB participates. As a result of the meetings and correspondence evidenced above, such collective price increases, based upon JCB's lists and called on by JCB, are collectively agreed with JCB.

(b) ***France***

(133) The objective of harmonising prices among territories was also pursued in France, where resale price maintenance is apparent on a number of occasions:

— in a letter from an official distributor to JCB, the former declares: 'Please find attached a copy of our invoice regarding Malnati for an exceptional price of FRF 315 000 as agreed by you, having regard to the conditions below in this case. This dealing follows an order for a new 4CX with fork addressed to Central Parts by this customer at FRF 310 000 net of tax (amount of lease)'. Obviously, the amount of FRF 315 000 relates to the retail price, which is set by JCB in agreement with its official distributor ([123]).

JCB states that sales to Malnati involved the provision of support from JCB France to Souffelmat to enable it to sell at an exceptionally low price, which otherwise would have made it sell at a loss (RSO II, pp. 57-58). However exceptional, the evidence of resale prices being set in agreement with JCB France is not contestable;

— available evidence shows that JCB's Managing Director warned a distributor against low prices (i.e. a retail price of FRF 187 800 for a JCB 1CX Drott), as follows: 'may I remind you that, on this range of

([123]) Letter from T. Weil, Souffelmat to M. Caujole, JCB dated 23 October 1995: 'Nous vous prions de trouver en annexe copie de notre commande Malnati pour un prix exceptionnel de Frs 315 000 selon votre accord, vu les conditions ci-dessous mentionnées dans ce dossier. Cette affaire fait suite à une commande passée par le client chez Central Parks, d'un 4CX neuf au prix de Frs 310 000 HT avec fourches (montant du crédit-bail)' (Insp. file, p. 2170).

machines, we have no competitor, thus it is out of the question to sell them for 177 800 FF' ([124]).

JCB contends that FRF 177 800 was the selling price to the distributor and not the retail price and relies on a letter dated 6 July 1994 from Mr Montenay to JCB France asking for a purchase price of FRF 177 800 enabling it to resell at FRF 187 800. JCB France may be legitimately refusing to set a selling price to its distributor of FRF 177 800, necessary to match, with an FRF 10 000 margin, the price quoted. However, the distributor had to justify its low reselling prices and to indicate why such a price was lower than a reference of FRF 205 000 that JCB would have found appropriate for machines for which JCB had no competitor. In its letter relied upon by JCB dated 6 July 1994 to JCB, Mr Montenay stated that four other machines could follow suit if the first machine was sold to Zanetti. Such a sale could be likely to compensate afterwards for the lower price proposed;

— similarly, reverting to JCB UK on a future deal with HE Services in 1996, JCB France also stated: 'their objective is to operate about 100 machines before 1997 and those machines will be coming from the United Kingdom. (…) 3. Parts pricing: they informed us that any time they would like to buy parts, they would ask JCB Ile de France or United Kingdom dealers a quotation. We need to coordinate' ([125]). Such coordination refers to prices quoted by official United Kingdom distributors, to be coordinated by JCB UK with prices quoted by JCB France, to avoid HE taking advantage of price competition between them.

According to JCB, the coordination referred to was between the two companies in the JCB Group, JCB France and JCB Sales, since HE wanted to buy spare parts on the same terms and conditions wherever the purchase took place. The coordination between the two group companies was allegedly wanted by JCB France so that its subsidiary company JCB Ile de France could offer a price for parts that was competitive with the price levels being charged by United Kingdom distributors (RSO II, p. 59). However, JCB France clearly refers to United Kingdom distributors. In any event, if, as JCB states, this coordination would occur between two companies in the JCB group, this necessarily implies that selling prices to those distributors were to be increased each time that they received an order from HE Services to make them closer to those in France. This also implies that JCB UK was able to track down to which purchasers or end-users United Kingdom distributors make quotations in order to avoid that these purchasers take advantage of price differentials between France and the United Kingdom. Whether the coordination would take place within the JCB group or directly between JCB France and United Kingdom distributors, the outcome is that price quotations to HE Services were artificially harmonised.

F. *AWARENESS OF EUROPEAN COMMUNITY LAW*

(134) The discussions and exchanges of letters that took place between 1975 and 1976 following the notification of its agreements to the Commission made it clear to JCB that the Commission did not accept the clauses of its initially notified agreements involving direct or indirect export restrictions between Member States. Thereafter, it is apparent from internal documents that JCB was fully aware of provisions of EC law applicable to distribution agreements, in which the developments were followed very closely ([126]).

(135) In particular, as regards distribution of construction and earthmoving machinery, a draft reply from JCB's Sales Development Director to a letter from an official distributor copied at JCB's premises is very telling. As a reminder to the official distributor, the draft reads: 'Article 85(3) allows that this (Article 85(1)) can be

([124]) Fax from F. Rausch JCB France to Mr Montenay dated 18 July 1994. The text reads: 'Suite à votre courrier concernant l'affaire Zanetti, nous sommes surpris que vous ayez pu donner un prix de 187 800 FF pour 1 JCB CX Drott, alors que c'est à peu près le prix concessionnaire. Je vous rappelle que sur ce type de machines, nous n'avons pas de concurrent et il n'est pas question de vendre ces machines à 177 800 FF. De plus ces machines sont vendues à des loueurs de plus grande importance que Zanetti à 205 000 FF pour un équipement similaire. Pourrez-vous me donner des explications sur la façon dont vous avez calculé votre prix?' (Insp. file, p. 2264).

([125]) Fax from F. Rausch, JCB France to G. Greenshields, JCB UK dated 10 June 1996 (Insp. file, pp. 847-848).

([126]) Internal memo from C. E. Coutts to E. Eckerts et al dated 16 May 1995 (Insp. file, p. 331); letters from C. Coutts, JCB to J. Davis, Watling JCB dated 1 and 21 December 1994 (Insp. file, pp. 198-199); fax from F. Rausch, JCB France to A. Bois dated 25 May 1994 (Insp. file, p. 819); and, more recently, article on exclusive distribution by Mrs F. Rausch, formerly Managing Director of JCB SA, Expert before the Paris Court of Appeal and Chairman of the Legal Committee of the Fédération des Entreprises Industrielles et Commerciales Internationales de la Mécanique et de l'Electronique in 'La Tribune', dated 12 November 1998 (Main file, p. 2181).

declared inapplicable in certain cases when the benefits to the consumer exceed the disadvantages. Exceptions are possible either on an individual basis, or through one of the block exemptions, which for our industry is best regarded under Regulation 83/83. Block exemption 83/83 permits the establishment of a selective distribution network, provided that neither party makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market … This has been repeated *inter alia* in the Commission decision of 15.12.92 in the Ford Agricultural Case (…)' ([127]).

(136) That decision found that Ford had infringed Article 85 in prohibiting or restricting parallel trade. Ford had been applying Regulation (EEC) No 123/85 regarding motor vehicle distribution to the distribution of tractors until the Commission made it definitely clear that those products were not covered by the block exemption (see paragraphs 18 and 23). Like other manufacturers, Ford had brought its distribution agreements into line with the provisions of Regulation (EEC) No 1983/83 in 1990/91, except for the restrictions on parallel trade, which were found to infringe Article 85 ([128]). This decision made it clear that the benefit of block exemption regulations regarding car distribution was no longer extended to vehicles no less different from cars than tractors, such as construction and earthmoving machines.

II. **LEGAL ASSESSMENT**

A. *ARTICLE 81(1) OF THE EC TREATY*

(137) Article 81(1) of the EC Treaty prohibits all agreements between 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, and in particular those which directly or indirectly fix selling prices or any other trading conditions and share markets or sources of supply.

1. AGREEMENTS BETWEEN UNDERTAKINGS OR CONCERTED PRACTICES HAVING AS THEIR OBJECT OR EFFECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION

(138) Distributors appointed as official JCB distributors, on the one hand, and the JCB Group, comprising its subsidiaries controlled by JCB Service, on the other, manufacture or purchase products for resale. They are therefore undertakings within the meaning of Article 81(1).

(139) Agreements and concerted practices between JCB and official JCB distributors and, in particular, those described hereafter, therefore, constitute agreements and concerted practices between undertakings. In particular, instructions given by JCB to its contractual distributors within the official network, who acquiesce them, are not unilateral acts which would escape the prohibition contained in Article 81(1). Admission to JCB's network, governed by an agreement drawn up in advance, implies acceptance by distributors of the policy communicated by JCB, which they have followed by adjusting their behaviour in the market according to these instructions.

(140) As is further shown below, JCB and its official distributors have implemented various agreements or concerted practices which have as their individual object or effect the restriction of competition in different Member States, within the meaning of Article 81(1). They are also elements of a broader agreement restrictive of competition within the meaning of Article 81(1) which governs the distribution of JCB machines and spare parts in the EC. Such elements, which need not be defined precisely as either agreements or concerted practices insofar as both are caught by Article 81(1), are the following:

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

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

— the implementation, at least in the United Kingdom, of the remuneration system named 'Multiple Deal Trading Support', which makes allowances granted

([127]) Draft letter from C. E. Coutts, Sales Development Director, JCB to Donal O'Sullivan, ECI JCB (Insp. file, pp. 785-786) in response to a letter from Donal O'Sullivan to G. Greenshields, JCB dated 19 February 1996 (Insp. file, p. 789).

([128]) OJ L 20, 28.1.1993.

to distributors dependent on the destination of sales and limited to sales to end-users;

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

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

(a) ***Restriction of sales by official JCB distributors outside their allotted territory***

(1) **Existence and duration of the agreement**

(141) In the distribution agreements that JCB furnished to the Commission for the United Kingdom, Italy, Germany, Benelux, Denmark and Ireland, territories are exclusively allocated to official distributors as areas of prime responsibility for sales and service ([129]). This provision is combined with JCB's undertaking not to appoint another distributor in the same territory. Furthermore, the distribution agreement in the United Kingdom prevents official distributors, unless authorised by JCB, from selling JCB machines and spare parts wholesale for resale except to a JCB distributor or an approved sub-dealer ([130]).

(142) Besides the very wording of the agreement, official United Kingdom distributors have restricted out-of-territory sales, in particular to purchasers from other Member States. Such distributors point out that export sales are not possible to other Member States, or that such sales are dependent upon JCB's approval. This general restriction on out of territory sales is broader than a ban on sales to unauthorised distributors inherent to a selective distribution system. Selective distribution systems which, unlike JCB's in the United Kingdom, are only based on purely qualitative selection criteria, are not necessarily restrictive of competition within the meaning of Article 81(1).

(143) For instance, Berkeley JCB commits itself to referring to JCB doubtful orders from overseas end-users or their duly appointed agents ([131]). TC Harrison refers to a golden rule within the distribution network regarding exports of dealing with local official distributors in the relevant Member State ([132]). Questioned by JCB, Gunn JCB had to justify sales made to other official distributors in other Member States on the grounds that the machines were not new, which implies that it is unable to export new machines ([133]). Similarly, Watling JCB recognises that they are unable to export new machines from the UK ([134]) or assures JCB that, in general, sales of new machines abroad are subject to JCB's approval ([135]).

(144) In those instances, official JCB distributors in the United Kingdom do not effect export sales owing to the geographic origin of the purchaser or the final destination of sales. The restriction is applied irrespective of whether purchasers are end-users or resellers, authorised or not. It covers both passive and active sales.

(145) The standard agreement between JCB and its official distributors in Italy also includes a prohibition on selling outside allotted territories and, hence, to other Member States. Official distributors are restricted in their ability to make export sales from Italy; such sales are in principle reserved for JCB. Evidence of the implementation of the agreement also shows JCB requesting that official distributors be advised not to sell into another distributor's territory in a different country ([136]).

(146) In France, the agreement between JCB and its official distributors, as effectively applied, prevents or restricts such distributors from selling outside their allotted territories ([137]). Purchasing in Benelux for resale in other Member States, like France and Greece, prevents the purchaser from obtaining subsequent supplies of JCB products ([138]). Similarly, in Austria ([139]) and Ireland ([140]), official JCB distributors view sales made outside allotted territories as contrary to the agreement entered into with JCB, or refer such sales for approval to JCB.

(147) These initiatives by official distributors are not unilateral conduct. According to JCB's own records, JCB actively discourages sales of new machines and spare parts

([129]) Recitals 62 and 69 (references to recitals are also references to footnotes and documents therein). Such references are provided as an illustration of the facts assessed. They are not necessarily exhaustive, as other documents quoted in this decision may also refer to the same or similar practices.

([130]) Recitals 63 and 71. The words 'wholesale for resale' designate sale for resale in practice, irrespective of the quantity sold, as opposed to sale for own use.

([131]) Recital 89.
([132]) Recital 91.
([133]) Recital 84.
([134]) Recital 85.
([135]) Recital 86.
([136]) Recitals 107, 108 and 124.
([137]) Recitals 111 to 114.
([138]) Recitals 115 to 117.
([139]) Recitals 121 and 124.
([140]) Recital 122.

overseas (i.e. in other Member States), whether through a United Kingdom distributor or a third party or actively works to prevent exports from the United Kingdom to Germany ([141]). JCB also states this policy in respect of sales made into an Austrian territory by official distributors in the United Kingdom or Italy ([142]). JCB also states its concern about a future official distributor in the Netherlands purchasing in the United Kingdom for resale into Luxembourg or United Kingdom distributors also selling to German distributors ([143]). Similarly, JCB views sales made by official distributors from the United Kingdom as contrary to the territorial protection to which German official distributors are entitled ([144]).

(148) JCB's attitude and action merely confirms that its official distributors follow JCB's instructions and distribution policy. The prohibition or restriction on official JCB distributors, within their allotted territories, supplying requests from other Member States is therefore part of the agreement between, and implemented by, JCB and its official distributors. Such prohibition or restriction, which is applied by distributors irrespective of the status of the purchaser, concerns, at least, the United Kingdom, France, Italy, Benelux, Germany, Austria and Ireland either as the origin or the destination of export sales.

(149) Evidence that JCB has warned official distributors in the United Kingdom against cross-border sales to other Member States dates back to 1989. Proof that such distributors were effectively restricted from exporting or selling outside their allotted territories dates back to 1992 in the United Kingdom, to 1993 in Italy, to 1992 in France and to 1995 in Ireland. The latest evidence appears in France in 1998. There is evidence of the agreement from 1989 to 1998 at least.

(2) **Restrictive object or effect**

(150) JCB regards overseas sales as unfair competition with its local distributor in other Member States and declares that it actively discourages such sales ([145]). For instance, the prohibition of export sales is invoked by JCB regarding sales made by an Italian distributor (SOFIM), in order to protect the territory of another distributor (TERRA) ([146]). Similarly, supplies from the United Kingdom to Germany are opposed by JCB because they cause severe pricing problems locally ([147]). The undercutting of official distributors' prices is viewed by JCB as an impediment to becoming an official JCB distributor in the Benelux area ([148]). In France, JCB has encouraged official distributors having different exclusive territories to negotiate together out-of-territory sales, expressly to prevent customers taking advantage of competition between them ([149]).

(151) Over and above the clear anticompetitive intent stated by JCB in those declarations, the prevention or restriction of both active and passive sales aims at sheltering exclusive territories from sales made by other official distributors. The restriction is on a purely geographic basis. It concerns therefore sales to all possible purchasers, including sales to resellers both within and outside JCB's distribution network and to final users who are located in a different territory and, especially, in a different Member State.

(152) The restriction has prevented almost all official UK distributors from maximising their potential sales to other Member States ([150]). In a context of wide price differentials within the common market between 1989 to 1996, the restriction of export sales prevented official JCB distributors from selling at lower prices, for instance in the United Kingdom, to resellers competing with JCB distributors or to final users in other Member States ([151]). As a result, official JCB distributors, for instance in France, Germany, Austria, Ireland and Greece, have been artificially sheltered from competition directly or indirectly stemming from official JCB distributors, notably in the United Kingdom or Italy.

(153) These prohibitions or restrictions have been implemented under duress. The compensation that Gunn JCB paid to JCB on its sales of spare parts to other Member States between 1988 and 1993 shows that they were severely enforced ([152]). This compensation penalises transactions with customers in other Member States, compared with transactions within the allotted territory. Consequently, official distributors either abstain from such transactions or charge higher prices allowing for deduction of the compensation. As a

([141]) Recitals 93 and 118.
([142]) Recitals 121 and 124.
([143]) Recitals 117 and 120.
([144]) Recitals 118 and 119.
([145]) Recital 93.
([146]) Recitals 108 and 124.
([147]) Recital 118.
([148]) Recital 117.
([149]) Recital 112.
([150]) Recitals 83 to 91.
([151]) Recitals 75 to 81, 86, 108 and 112, for instance.
([152]) Recital 96.

result, official distributors in other Member States face less severe price competition and end-users suffer in consequence.

(154) This is not to say that JCB may have actually succeeded in preventing all export sales. However, it is clear that the agreement between JCB and its official distributors aims at preventing or restricting competition within the various territories allocated to official distributors in the common market. This is clearly a restriction by object.

(b) ***Imposition of a service fee on sales made outside the allotted territories***

(1) **Existence and duration of the agreement**

(155) The clauses included in standard distributor agreements as notified to the Commission, which provide for a service support fee, are part of the agreement between JCB and its official distributors in those Member States for which they have been notified ([153]).

(156) Besides the notified clauses, internal instructions within JCB state that the amount of the fee applicable by official distributors throughout Germany and Spain should be, respectively, 4 % of the local customer achieved price and 5 % of the distributor's purchase price ([154]). Similarly, it is apparent that JCB, i.e its subsidiaries in France or Germany, negotiates with United Kingdom official distributors the payment and the amount of the fee due on machines operated in those Member States. In France, the fee is recurrently set by JCB France at of [between FRF 5 000 and FRF 15 000] for backhoe loaders sold from the United Kingdom ([155]).

(157) Therefore, the setting by JCB of a fixed amount or scale for the service fee as well as the direct negotiation by JCB with official distributors of the fee in the case of sales into the territories of other official JCB distributors is part of the agreements or concerted practices implemented by JCB and its official distributors in the United Kingdom, France, Germany and, possibly, Spain.

(158) The notified part of the agreement stating that the amount is first to be negotiated between the distributors involved dates back to 1975. JCB's involvement in setting the amount of the service support fee is already evidenced in 1988 and visible between 1994 and 1996. The application of a fixed scale is apparent in 1995.

(2) **Restrictive effect**

(159) The charging of a fixed amount does not conform to the stated objective of covering costs incurred in providing services, in particular when the fee is calculated ex ante as a percentage of purchasing or selling prices. JCB explicitly describes the service support fee as a penalty levied against an exporting distributor, or refers to its deterrent effects ([156]). Services under JCB warranty are reimbursed by JCB ([157]). According to JCB, the recurrent charging of the same amount of fee is explained by the fact that the fee relates to the same kind of machine and, in France, reflects the normal costs incurred by servicing distributors plus a reasonable profit element ([158]). However, servicing costs necessarily differ between distributors according to differences in wages, distances travelled and efficiency in performing the tasks. The imposition of a fixed service fee on the same type of machine harmonises selling prices irrespective of actually and necessarily different costs and stifles competition between distributors.

(160) The fee amounts to a substantial share, for instance 57 %, of a distributor's gross margin, which lessens the appeal for official distributors to supply machines to territories other than theirs, including other Member States ([159]). The difference between the actual costs incurred by the servicing distributor and the amount of the service fee constitutes a de facto profit pass-over clause which deters export sales. It penalises exporting official distributors, makes their remuneration dependent on whether they sell within or outside their territory and, therefore, reinforces the territorial protection of other official distributors.

(161) It is also a direct consequence of the service support fee that the selling prices of such supplies become artificially closer to those of the local official distributor. As actually implemented, insofar as the service fee is not negotiated between the official distributors concerned and its amount is not that of the actual costs of the service provided, the service fee has also the effect of distorting or restricting price competition between distributors and territories.

([153]) Recital 52, 64 (United Kingdom) and 69 (other Member States of the EEC in 1975, except France).
([154]) Recital 126.
([155]) Recitals 86, 119, 123, 124 and 127.
([156]) Recital 124.
([157]) Recital 64.
([158]) Recitals 64 and 127.
([159]) Recitals 124 and 125.

(c) ***Remuneration system referred to as the 'Multiple Deal Trading Support'***

(1) **Existence and duration of the agreement**

(162) Under the 'Multiple Deal Trading Support' system, all official JCB distributors in the United Kingdom receive financial support on certain specific transactions, provided certain conditions are met. JCB has sent circular letters to all United Kingdom official distributors clarifying the implementation of the trading support, in particular as regards out-of-territory sales. JCB and one of its official distributors view false declarations and allowances being obtained without the above conditions being met as a breach of their agreement ([160]).

(163) The 'Multiple Deal Trading Support' is therefore part of the agreements between JCB and its official distributors, at least in the United Kingdom. It has been applied since 1977. Evidence that, to obtain the allowance, the machines concerned must be operated within the territory allotted to the selling distributor dates back to 1992.

(2) **Restrictive effect**

(164) In general, multiple trading support allows official distributors to react to inter-brand competition. However, communications from JCB to all its official distributors in the United Kingdom and actual examples of its implementation show that an essential condition for the allowances to be paid, or a repayment not to be claimed by JCB, is that the machines are operated in the allotted territory of the selling official distributors. Otherwise, the allowance is either made subject to the agreement of the official distributor in whose territory the machine is operated or withdrawn by JCB ([161]).

(165) Payment of the allowance for machines operated in territories other than that of the selling distributor, subject to the agreement of the distributors involved, acts as a profit pass-over clause. Moreover, evidence shows that JCB may exert its discretion in withdrawing the allowances when machines traded outside the territory undercut local pricing conditions ([162]).

(166) Official distributors' remuneration of up to [between 0 % and 10 %] on average of their purchase prices are thereby made dependent upon the final destination of sales ([163]). As a result, such sales to final users in competition with other JCB distributors are made less profitable. Both JCB's discretion in granting the allowance subject to allotted territories being respected and the condition itself that machines are operated within the allotted territory of the distributor who sold them, in the absence of agreement between the distributors involved, restrict competition between them in different territories. These conditions make their remuneration dependent on whether they sell within or outside their allotted territory.

(167) It is also a direct consequence that selling prices of such supplies might become artificially closer to those of supplies from the official JCB distributor in whose territory the machines are operated, in particular in other Member States.

According to JCB, the Multiple Deal Trading Support must be necessarily limited to sales to end-users, excluding unauthorised resellers or official distributors, who would not be entitled to switch to competing marques under the agreements as notified. JCB's right to withdraw support if machines went out of territory without agreement being reached with the distributor in whose territory they are going is needed to reimburse the latter for providing all services. According to JCB, this right is also needed to ensure that appropriate servicing is available to the users wherever the machines may be (RSO II, p. 14-16).

The reimbursement of services carried out on machines sold out of territory is made possible already by direct payments from JCB and by the service support fee. JCB does not identify which additional services are covered by the Multiple Deal Trading Support. The practical effect of the support system is that, since active sales by United Kingdom distributors are restricted and sales to other official distributors from other Member States cannot be granted support under the system, the allowances are limited to sales in the United Kingdom and cannot be indirectly made available to purchasers from other Member States. This reinforces the market-partitioning effect of the agreements.

(d) ***Resale price maintenance***

(1) **Existence and duration of the agreement**

(168) The minutes of a meeting held on 21 May 1991 and attended by all official JCB distributors in the United Kingdom describe the arrangements agreed by such distributors in respect of the remuneration and discounts applicable by all of them for wholesale supply

([160]) Recitals 98 to 100.
([161]) Recitals 98 to 100 and 102 to 105.
([162]) Recital 103.
([163]) Recital 99.

to the various categories of resellers in order to avoid cross-border disputes. The minutes further state the common objective of maximising gross margins on other categories of products ([164]).

(169) Regarding the discounts, JCB's initial reaction is to object only to their level, insofar as it is different from the level agreed with three such official distributors, but not to the very principle of uniform discounts ([165]). The agreement on the principle of uniform discounts and, afterwards, their level, is further conformed less than two months later by the minutes of the next meeting of all JCB official distributors, which, in the presence of JCB executives, adopted a different scale (matrix) for wholesale discounting to the various categories of distributors, including also a retail discount level ([166]). JCB's instructions agreed to by official distributors were a concerted basis to achieve higher margins or profits in respect of both machines and parts in the United Kingdom ([167]).

(170) It is also apparent that, in France, JCB has limited official distributors' freedom to set their resale prices, by occasionally setting retail prices in agreement with those distributors. JCB has warned them if their resale prices were too low or below a certain reference point. JCB France has also encouraged collusion between official distributors to avoid customers taking advantage of competition or itself sought collusion with United Kingdom distributors to harmonise prices between France and the UK when asked for a quotation ([168]).

(171) Compliance with minimum or fixed price levels and discounts agreed upon between JCB and its official distributors regarding machines and spare parts for resale is, therefore, part of the agreements in the United Kingdom or at least the concerted practices in France. The agreement between JCB and its official distributors on discounts or prices applicable to resale is apparent from 1991 to 1993 in the United Kingdom and from 1994 to 1996 in France.

(2) **Restrictive object**

(172) The agreement in question in the United Kingdom, or, at least, the concerted practices in France, has the object of fixing resale prices and artificially harmonising selling prices and discounts between territories, thereby restricting or distorting price competition.

(173) An agreement, initially concluded between all United Kingdom distributors in the presence of JCB executives, amended following indications from JCB, necessarily influences those distributors in the course of their business conduct. The same is true for requests from JCB, made known to and agreed by distributors, to achieve higher or fixed prices and to maximise margins. Such prices would have been different otherwise, irrespective of the exact degree to which the agreement has been implemented. This is a restriction by object.

(e) ***Exclusive purchase, preventing cross-network supplies***

(1) **Existence and duration of the agreement**

(174) The distributor agreement for the United Kingdom notified to the Commission in 1975 and last furnished in 1995, states that official distributors must obtain their supplies of JCB products exclusively from JCB, within the official JCB network or from another source authorised by JCB ([169]). The distributor agreement export for Ireland, Denmark and other EC Member States in 1976 does not prevent intra-network purchases either. However, unlike these agreements, the unnotified JCB's distributor agreement in France designates JCB's subsidiaries in France as exclusive suppliers of JCB products for French JCB distributors, thereby excluding other sources of supply such as other JCB distributors in other Member States ([170]). The unnotified standard agreement for official distributors in Italy also includes this exclusive purchase obligation between JCB's Italian subsidiary and its distributors ([171]). Similarly, JCB has been concerned with purchases of spare parts by official German distributors from official distributors in the UK instead of from JCB's German subsidiary ([172]). Moreover, a breach of the obligation prompts JCB to threaten termination of an official dealership in France, which would not be conceivable had an agreement not existed ([173]).

(175) Therefore, the obligation on official distributors to obtain their supplies of JCB machines and spare parts exclusively from JCB's subsidiary in France between 1992 and 1996 or in Italy since 1993 is a part of the agreement entered into between and implemented by JCB and its official distributors.

([164]) Recital 128.
([165]) Recital 129.
([166]) Recital 130.
([167]) Recitals 131 and 132.
([168]) Recitals 112 and 133.
([169]) Recitals 65 and 70.
([170]) Recitals 109 and 110.
([171]) Recital 106.
([172]) Recital 120.
([173]) Recital 110.

(2) **Restrictive object or effect**

(176) In principle, a national subsidiary within the JCB Group would hardly be in competition with its 130 to 140 official JCB distributors throughout the common market as source of supply of JCB machines and spare parts. Distributors are at a lower stage in the supply chain and charge their commercial margins. In practice, levels of intra-group pricing, gross margins charged by JCB's subsidiary, the efficiency of some such distributors, lower profit margins or better logistic services, particularly in the United Kingdom, may explain why such distributors are actual competitors of the national subsidiary as sources of supply.

(177) The obligation on official distributors in France and Italy to obtain supplies exclusively from JCB's national subsidiary excludes other potential suppliers of new JCB machines and spare parts within or outside the JCB official distributor network. Therefore, within JCB's distribution network, this obligation has the object of preventing official distributors in those Member States from having access to other potential sources of supply of genuine JCB products in other Member States. This obligation is implemented in France to prevent imports and cross-supplies of machines and spare parts from one Member State to another within the network. It shelters the entire French and Italian distribution networks from such cross-supplies, thereby restricting competition.

(178) The exclusive purchase obligation prevents, at least, French official distributors from purchasing genuine JCB machines and spare parts where it is cheaper to do so, in Member States other than France, and notably in the United Kingdom. As a result, such distributors are not capable of offering competitive prices in comparison with other non-official resellers that obtain supplies in the United Kingdom. The interest of such resellers in arbitrage between the United Kingdom and France, and repeated attempts to curtail it, are partly explained by this exclusive purchase obligation, which, according to French official distributors, exposes them to unfair competition with parallel traders.

2. RESTRICTIVE OBJECT AND EFFECT OF THE AGREEMENTS AS A WHOLE: PARTITIONING OF NATIONAL MARKETS AND ABSOLUTE TERRITORIAL PROTECTION

(179) Between 1989 and 1996, prices of identical JCB machines and spare parts varied considerably between Member States, for instance by up to [between 0 % and 100 %] between France and the UK in the case of spare parts and by up to [between 0 % and 50 %] for new machines. Meanwhile, internal JCB notes highlight the fact that JCB's profits also varied considerably between Member States and were particularly high in France, where retail prices were also highest ([174]).

(180) Price differences between Member States that result from normal market functioning are not a competition law problem. However, the context of differences in prices and profits across Member States for JCB machines and parts sheds light on JCB's and some of its official distributors' interests in partitioning national markets and fixing resale prices or discounts within the common market so as to prevent purchasers from taking advantage of wide price differentials across the EC.

(181) The various elements identified above as restrictions of competition have as their common denominator that they limit out-of-territory sales effected by authorised distributors. As further described below, the combination of the above restrictions in the agreement between JCB and its official distributors consistently pursues the object of partitioning national markets within the common market with a view to providing absolute territorial protection. This is a restriction by object.

(182) By their very nature, the arrangements on the discounts to be applied, as well as the objective of maximising gross margins agreed by JCB and its official distributors across the United Kingdom, distort and harmonise market prices across territories. The same is true in respect of the special financial support offered by JCB in France to distributors, who competed with parallel traders. JCB has occasionally agreed with its official French distributors special allowances and financial support in those territories which were subject to competition from unauthorised resellers ([175]).

(183) This support has as its sole object the limitation of competition from parallel traders. It entails the concerted implementation of differential pricing across territories, on JCB's initiative, with the object of protecting certain territories from indirect competition stemming from United Kingdom official distributors. Coordination between JCB France and United Kingdom distributors on the prices to quote to a single purchaser operating in these two Member States is also aimed at distorting market prices and artificially harmonising them across Member States with a view to restricting competition from United Kingdom distributors.

([174]) Recitals 75 to 80, 106, 110 and 124.
([175]) Recital 80.

(184) In some Member States, like the United Kingdom or Ireland, although not in France or Italy, JCB distribution agreements combine territorial exclusivity with restrictions on out-of-territory sales and selective aspects, like the prohibition on selling to unauthorised distributors, in particular in other Member States. They prevent arbitrage by unofficial distributors purchasing JCB construction and earthmoving machines for resale, thus restricting their direct competition with official distributors and, indirectly, competition between official distributors in different territories or Member States. Demand from end-users of construction and earthmoving machines and spare parts is not fully mobile throughout the EC. Incumbent official distributors are not subject to competition from unauthorised resellers and final users do not effectively discipline pricing behaviour from one Member State to another, in a context of large price differentials across the EC. In this market context, such a combination has the effect of partitioning national markets.

(185) On the other hand, the availability of a territory as a precondition for, and hence a restriction on, becoming an official JCB distributor does not directly relate to the quality of the service to be provided. A distributor located in an area where an official JCB distributor operates to JCB's entire satisfaction would not become a JCB distributor, irrespective of its potential or actual merits. As a result of this limitation the number of distributors, and competition derived therefrom, is quantitatively limited by the condition that they are allocated a territory. This limitation in JCB's selective distribution system, which is neither of a qualitative nature nor laid down uniformly for all potential resellers, may be caught by Article 81(1).

(186) As previously stated, the agreement whereby official JCB distributors are prevented from or restricted in effecting passive cross-border sales restricts competition. Being on a purely geographic basis, it restricts such sales to resellers, authorised or not, and to users in other Member States. The restriction of such sales to authorised resellers and users pursues an anti-competitive goal. The prohibition of sales of new machines to unauthorised resellers in other Member States, unless, from 1995 onwards, authorised in writing by JCB, is also restrictive of competition, having regard to other provisions allegedly intended to improve after-sales service within JCB's distribution network in the EC.

(187) Indeed, those United Kingdom official distributors who are prevented from selling new machines to unauthorised resellers are also requested to pay a service fee on sales made outside their territory. As stated in the United Kingdom distributor agreement, that fee is intended to maintain JCB's service standards, whilst compensating for the cost to the local distributor of providing services for a machine which it did not sell. JCB's official distribution network covers the whole of the EC.

(188) In these circumstances, the prohibition on directly or indirectly selling machines to unauthorised resellers in other Member States goes beyond the goal of assuring high service standards. There are official distributors throughout the EC, who provide product maintenance according to JCB standards, remunerated either on a normal commercial basis or by both the service fee and JCB itself under its warranty, whether the machine was sold directly by an official distributor or indirectly through an unauthorised reseller. In this context, the prohibition has, instead, the object or the effect of restricting competition.

(189) The market partitioning effects of the combination of territorial exclusivity restricting cross-border sales and selective clauses are further increased by three other restrictions:

— firstly, a de facto prohibition on or restriction of cross-supplies within the official network, which isolates the French and the Italian markets from the rest of the common market. In fact, this obligation supplements the restrictions on official distributors, for instance in the United Kingdom, that prevent them from effecting sales outside their territory, including sales to official JCB distributors ([176]);

— secondly, a service support fee levied on sales made outside the allotted territory, which, in so far as it is charged irrespective of the real costs actually involved, penalises exports;

— thirdly, the Multiple Deal Trading Support in the United Kingdom, which, as actually implemented, has similar export deterrent effects to those of the service support fee.

(190) By imposing additional price elements on sales outside the territory (non-cost-related elements in the service support fee, withdrawal of the allowance under the Multiple Deal Trading Support, compensation in cases of sales to unauthorised distributors) compared to sales within it, resale prices are made artificially closer in different territories. Assuming a 10 % gross margin, the

([176]) Recital 110. Recitals 84 and 120 show indications of restrictions on such intra-network sales from the United Kingdom to France and Germany.

Multiple Deal Trading Support makes more than one third of the official distributors' total remuneration dependent upon the geographic destination of sales, which is already appreciable. If a service fee is additionally charged for a transaction outside the territory, an official distributor may lose more than three quarters of its gross margin compared to a transaction within its territory. Other examples exist of collusion on prices with JCB's involvement which further harmonise them across different Member States. These additional price elements support the effectiveness of the market partitioning, since purchasers have fewer incentives to shop around within the common market.

(191) The restrictive objects and effects of the various elements of the agreement are, therefore, mutually supportive in preventing or restricting imports or exports within and outside JCB's distribution network in order to grant absolute territorial protection. The combination of selective distribution (i.e. the ban on sales to unauthorised resellers) in JCB's distribution agreements with (i) these three categories of restrictions, (ii) other restrictions that artificially harmonise prices and discounts across different territories and (iii) territorial protection restricting passive sales, in particular to other Member States, clearly has the anti-competitive object of partitioning national markets in the EC and is therefore caught by Article 81(1).

3. APPRECIABLE RESTRICTIONS OF COMPETITION AND EFFECT ON TRADE BETWEEN MEMBER STATES

(192) JCB holds nearly 40 % of the United Kingdom market for all groups of construction and earthmoving machinery and 60 % for backhoe loaders. Its market share across the EU is about 14 % for all construction and earthmoving machinery and higher than 40 % for backhoe loaders. JCB's market share for specific spare parts is higher than its market share on each product market for machines and its market power is considerable for those parts. In analysing the specific market for backhoe loaders, the Commission stated in 1999 that JCB's position and market power would not be easily challenged by competitors. This finding is confirmed by the fact that JCB's market share and leadership in 1995 were similar to that in 1975 ([177]).

(193) JCB's agreement and practices relate specifically to the distribution of JCB's machines and spare parts produced or sold in some Member States for resale in other Member States. When effected elsewhere than in the United Kingdom, the agreements have concerned products manufactured in other Member States. Pricing-related agreements in the United Kingdom concern products likely to be resold in other Member States.

(194) JCB's official distributor network in the United Kingdom is restricted from supplying resellers, purchasing machines and spare parts for resale outside allotted territories. Pricing-related restrictions and other financial disadvantages inhibiting passive cross-border sales may render such sales almost unprofitable. Trade flows between the United Kingdom and other Member States would have been different if sales outside the allotted territories had not been penalised with the service support fee as effectively implemented and had unconditionally received allowances under the Multiple Deal Trading Support. To the extent that those elements may diminish or even cancel out the profitability of sales made to other Member States, official distributors may have given up carrying them out. It is also apparent that the agreements with JCB's official distributors in Italy and France prevent such distributors from purchasing JCB machines and spare parts in other Member States.

(195) When the restrictions concern resale or purchases in the same Member State (home market), they have limited, although noticeable, effects in the common market. The same restrictions on sales to or purchases from other Member States necessarily affect competition and trade between Member States. Competition and trade between Member States would have been much stronger if efficiencies and attractive pricing conditions present, mainly but not only in the United Kingdom, had not been artificially isolated therein by the agreements.

(196) On account of those factors, having regard to JCB's position in the relevant markets and the very nature of the above restrictions involving market partitioning between several Member States, through absolute territorial protection and price fixing, the restriction of competition and the likely effects on trade between Member States are appreciable within the meaning of Article 81(1).

B. *ARTICLE 81(3) OF THE EC TREATY*

1. COMMISSION REGULATIONS (EEC) NO 1983/83 AND (EC) NO 2790/99

(197) The block exemption under Commission Regulation (EEC) No 1983/83, in force when the agreements or concerted practices were concluded or implemented, does not apply. The agreements or concerted practices involve taking measures to prevent distributors or users from obtaining contract goods from Member States outside the contract territory and restrictions on resale

([177]) Recitals 15, 17 and 27 to 33.

prices. That circumstance, by virtue of Article 3(c) and (d), renders inapplicable the block exemption provided for in Article 1 of Regulation (EEC) No 1983/83. Paragraph 8 of its preamble further recalls that restrictions on a distributor's freedom to set its resale prices or to choose its customers are not exempted.

(198) The block exemption under Commission Regulation (EC) No 2790/99 does not apply either, having regard to JCB's market share in the EC market for backhoe loaders (40 % in value and 45 % in volume), which is higher than the threshold of 30 % provided for in Article 3. JCB's agreements also include hardcore restrictions listed in Article 4, which exclude the benefit of the block-exemption provided for in Article 2 thereof.

(199) Even if construction and earthmoving machines in the EC, where JCB's share of total sales is below 30 %, were taken as the relevant market, Regulation (EC) No 2790/99 would not apply to JCB's agreements either, having regard to Article 4(a), (b), (c) and (d) thereof. JCB's agreements with its authorised distributors, which are buyers of its machines and spare parts for the purposes of resale, include:

— restrictions on the buyer's ability to determine its resale prices;

— restrictions on the territory into which passive sales are effected by the buyer;

— restrictions on active or passive sales to end-users or duly appointed agents in a selective distribution system;

— restrictions of cross-supplies between distributors.

2. REGULATION (EC) NO 1475/95

According to JCB, for highly complex technical equipment of the kind at issue, the interests of consumers and of distributive efficiency are best served with an exclusive and selective system of the kind allowed under Regulation (EC) No 1475/95, the rationale of which should be applied to the distribution of its equipment. In essence, JCB states that the technical complexity of its machines means that distributors must be trained professionals capable of providing high-quality after-sales service and accurate information on machine improvements, modifications and problems, which requires considerable investment (RSO II, pp. 46-47).

(200) The block exemption under Commission Regulation (EC) No 1475/95 does not apply on account of Article 1 of that Regulation. Article 1 declares that the Regulation applies to new motor vehicles intended for use on public roads. JCB knew this and wrote to its distributors that its distribution arrangements regarding construction and earthmoving machines, which are not intended for use on public roads, needed to be viewed under Regulation (EEC) No 1983/83. JCB executives were also aware that the Commission had refused to extend to tractors the benefit of block-exemption Regulation (EEC) No 123/85, which was applicable to motor vehicles prior to Regulation (EC) No 1475/95. JCB even claimed in its letter dated 11 March 1976 to the Commission that construction and earthmoving machines should be treated differently from motor vehicles, despite its current allegations that the rationale of Regulation (EC) No 1475/95 should be applied to its distribution system ([178]).

Nonetheless, had Regulation (EC) No 1475/95 been applicable, quod non, the agreement between JCB and its official distributors would also render that Regulation inapplicable. The agreement includes several provisions listed in Article 6(1) of the Regulation, which rule out the benefit of the exemption, namely:

— restrictions on official distributors purchasing machines and parts from other official distributors in other Member States (Article 6(1)(3));

— restrictions on official distributors' freedom to determine prices and discounts on contract goods (Article 6(1)(6));

— the fact that official distributors' remuneration, by virtue of both the service fee, insofar as it bears no relation to actual costs whilst being determined by JCB, and the multiple deal support, is made dependent on the destination of sales and/or the place of residence of the purchaser (Article 6(1)(8));

— the restriction on official distributors' freedom to obtain from a third undertaking of their choice spare parts which compete with contract goods and which match their quality (Article 6(1)(9)).

3. INDIVIDUAL EXEMPTION UNDER ARTICLE 81(3)

(201) Pursuant to Article 4(1) of Regulation No 17, the Commission may grant an individual exemption under

([178]) Recitals 65, 111, 135 and 136.

Article 81(3), only to the agreement that JCB notified. As shown above in recitals 61 to 72, some provisions agreed between or implemented by JCB and its official distributors identified as restrictive of competition have been notified or submitted to the Commission.

(202) No decision pursuant to Article 81(3) may be taken on restrictive agreements or concerted practices that have not been validly notified ([179]).

(203) The part of the agreement notified or furnished to the Commission since 1975, on which the Commission has not yet taken any definitive position, covers the following restrictions of competition further analysed above:

— the prohibition, within allotted territories of the United Kingdom, on supply wholesale to unauthorised resellers for resale (i.e. selective intra-network sales) ([180]);

— the payment of a service fee for sales made outside allotted territories in the United Kingdom and other EEC Member States 1975, excluding France, the amount of the fee being primarily negotiated by the selling distributor and the distributor in whose territory the machine is operated ([181]);

— the obligation, valid in the United Kingdom and other EEC Member States in 1976 except France, to purchase parts, equipment and ancillary products for use with or repair of JCB products only from JCB, unless stated otherwise by JCB, and to use or to supply only JCB products in connection with warranty or modification work on JCB machines ([182]).

(204) The provisions in the notified agreement are not actually applied as notified or are applied in parallel with unnotified agreements. They are also applied in Member States for which the contracts notified do not contain such provisions. The unnotified elements of the agreement ([183]) include the following restrictions of competition, further analysed above:

— the implementation, at least in the United Kingdom, of the remuneration system referred to as the 'Multiple Deal Trading Support';

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

— the obligation for French and Italian official distributors to purchase exclusively from JCB's subsidiaries in France or in Italy respectively all their JCB products (machines and spare parts), excluding other official distributors, subsidiaries or sources in other Member States;

— the restriction on official distributors, within their allotted territories, supplying purchasers in other Member States; this restriction includes, in the United Kingdom, an abusive extension in the implementation of the notified prohibition on supplying wholesale to unauthorised resellers for resale to cover, in general, export sales to authorised resellers and end-users;

— the imposition of a service fee on sales made outside the allotted territories based on a fixed scale, the amount of which is actually determined by JCB, which constitutes an abusive implementation of the notified clauses in this respect.

(205) In principle, the only possible course open to the Commission is to appraise JCB's agreements in accordance with the terms notified to it ([184]). However, the examination of the notification in this case cannot be made in isolation from unnotified agreements. Such unnotified agreements are part of the economic and legal context of the former. Having regard to the fact that unnotified restrictions reinforce the effects of notified restrictions, notified and unnotified restrictions, taken as a whole, infringe Article 81(1). Had JCB fully notified its actual agreements, the Commission could have assessed the effects in the common market of the combination of restrictive provisions and those of some individual provisions in various Member States. Notified and unnotified provisions are applied simultaneously within JCB's distribution network and should be appraised as a whole.

(206) In any event, the actual agreements or concerted practices do not fulfil the cumulative conditions of Article 81(3), as further analysed below.

([179]) Judgment of the Court of Justice in joined Cases 209 to 215/78 and 218/78, Van Landewyck v Commission, 29 October 1980, ECR 1980 p. 3125, 3243, points 61 and 62.
([180]) Recital 63.
([181]) Recitals 52, 64 and 69.
([182]) Recitals 65 and 70.
([183]) Recitals 61 to 65 (United Kingdom) and 67 to 72 (other Member States) indicate the most relevant provisions of the latest agreements notified or made known to the Commission for each Member State.

([184]) Judgment of the Court in Joined Cases 43 and 63/82 VBVB and VBBB v. Commission, 17 January 1984, [1984] ECR 19, summary, No 1.

4. CUMULATIVE CONDITIONS OF ARTICLE 81(3)

(a) ***Improving the production or distribution of goods***

(207) Some of the benefits common to certain categories of distribution agreements, like the exclusive distribution, exclusive purchase and distribution of motor vehicles, may be derived from JCB's distribution arrangements, which in fact combine provisions present in those categories. Those benefits are:

— improved planning of production for JCB and regular supply for its official distributors, which facilitate or enhance sales, market penetration and more rational output. An exclusive and dedicated distribution network may have allowed JCB to appropriately adjust production to each territory's situation;

— improved and regular supply throughout the common market, given the density of JCB's distribution network. Such a dedicated network may have also allowed for concentration of sales efforts for new machines within allotted territories and rapid on-site supply of spare parts imported from other Member States;

— such cooperation has also allowed the provision of efficient after-sales service within allotted territories on machines that need repair services at unpredictable intervals, to be operated under demanding service conditions. Since construction and earthmoving machines are technically complex, servicing needs to be assured by personnel capable of meeting stringent service standards, thereby guaranteeing optimal service conditions.

(b) ***Allowing consumers a fair share of the resulting benefit***

(208) Consumers can be deemed to obtain a fair share of the objective benefits outlined above. It is therefore a legitimate concern to select distributors on the basis of their ability to provide high service standards to purchasers of JCB products. Obligations on distributors to employ staff having specialised training and to provide customer services did not exclude the benefit of the block exemption under Regulation (EEC) No 1983/83 on exclusive distribution. JCB's negotiations to appoint Central Parts as an official distributor show that, subject to appropriate support and a territory provided by the manufacturer, the suitability to become official JCB distributors cannot be ruled out for parallel traders of JCB machines ([185]).

(209) The combination of territorial exclusivity with the prohibition on selling to unauthorised distributors, which may compete with official distributors, and exclusive purchase of parts for official distributors prevents or restricts the development of the market for maintenance, repair and provision of spare parts under optimum safety conditions, which is separate from the market for sales of new machines. Regarding the local market power that an official distributor enjoys in respect of supplies under tight time constraints, this combination outweighs the expected benefits for the consumer, taking into account, in particular, JCB's important market share in backhoe loaders.

(210) Meanwhile, the consumer obtains no apparent benefit from the obligation for official distributors in France and Italy, which meet JCB service standards, to purchase machines or spare parts exclusively from their national JCB subsidiary, thereby excluding suppliers of genuine JCB products like other official distributors in other Member States ([186]). Such distributors are able to supply at a lower cost than JCB's subsidiary. Lower purchasing costs cannot therefore be passed on to the consumer.

(211) The application of unfavourable financial conditions depending on the geographic destination of sales (e.g. non-cost-related elements of the service support fee, Multiple Deal Trading Support dependent on the destination of sales, compensations for passive sales) is not beneficial to consumers either. Where the differences in prices are not dependent on costs or objective economic differences, they face artificially homogeneous prices throughout territories for the same range of JCB products. Similarly, agreements or concerted practices fixing resale prices or discounts are not beneficial to the consumer, who can no longer take advantage of price differentials for identical products in the EC.

(212) However, a service support fee which covered the actual costs incurred by a servicing distributor in whose territory the machine is operated would favour the distribution of JCB machines in the common market, whilst being beneficial to consumers, only if the service cannot be carried out and charged on a normal commercial basis by the official distributor in whose territory the machine is operated. The Commission has

([185]) Recital 95.
([186]) Recital 111.

no evidence that the service which is allegedly remunerated with the service support fee could not be provided on such a basis.

(c) ***Imposition of restrictions which are not indispensable to the attainment of the objectives***

(213) The application of unfavourable financial conditions depending on the goegraphic destination of sales is not indispensable for improving the distribution of JCB products in the common market either. Whilst artificially harmonising prices, the price elements which are charged on passive sales actually discourage the transfer of efficiencies in distribution from one territory to another. For the same reason, agreements and concerted practices fixing resale prices or discounts are not indispensable to the improvement of the distribution of JCB products, were they to allow consumers any benefit.

(214) Passive sales must be allowed in an exclusive distribution system to avoid the disadvantages for competition outweighing the benefits. Restrictions of such sales of new machines and spare parts to authorised distributors or final users based on the mere geographic destination or origin of the purchaser are clearly not indispensable to the attainment of the above economic benefits, it having been shown that they do not accrue to consumers. The same is true as regards sales of new machines to unauthorised resellers, provided they have access to the relevant manufacturer's information on technical and safety requirements.

(215) Within the common market, the combination of territorial exclusivity, restriction of active and passive sales and selective distribution in JCB network cannot be regarded as indispensable to the improvement of distribution of construction and earthmoving machines, among which JCB holds an EC market share of 45 % for backhoe loaders. Such machines are, for the most part, operated in limited geographic areas and do not travel over long distances and variable locations, unlike motor vehicles. The Commission does not have evidence that a predominant number of end-users in every Member State is likely to effect arbitrage amongst different Member States. Consequently, in this sector, failing intermediaries mandated by the purchasers, parallel trade ensures that the common market is not fragmented by official distributors who enjoy local power in their territory to the detriment of competition and purchasers.

(216) By limiting support in terms of integrated software, product references, microfiches and safety instructions to the official distributor in each territory, JCB confers a considerable commercial and competitive advantage to its distributor network. It could be argued that unauthorised resellers might not be qualified to assure safety standards and requirements, thereby making it indispensable to restrict passive sales of JCB spare parts. This view cannot be upheld for a number of reasons:

— territorial exclusivity is a quantitative selection criterion unrelated and not indispensable to providing high service standards. Authorised or not, resellers are liable for the products and services that they provide;

— users of earthmoving machines are professional purchasers, who take into account safety constraints in order to define their purchase and maintenance policy. Furthermore, service support by official JCB distributors may be subject to artificially uniform prices. JCB may prevent supply of spare parts outside the official network in order to avoid such uniformity being jeopardised by competition;

— finally, safety constraints for JCB products are the same for all manufacturers of earthmoving machines. The Commission has no indication that either JCB machines, though being undoubtedly specific, have safety requirements substantially distinct to those of its competitors that would require selective supply of parts or that such selectivity has been indispensable in allowing JCB to assure to customers higher safety in the operation of its machines than its competitors.

(217) The restriction of passive sales of spare parts to unauthorised resellers prevents repairers from assuring optimal safety conditions and maintenance services, in so far as it leaves potentially suitable distributors or repairers outside the official network. Such restriction prevents a competitive market for repair services from emerging and is disproportionate in order to attain the benefits stemming from exclusive distribution of JCB specific spare parts. It is a paradox for a manufacturer to claim that independent resellers and repairers cannot assure high safety standards when such a situation is attributable to agreements entered into by this manufacturer which restrict logistic and technical support exclusively to the official distributor.

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

(219) Finally, it is certainly not indispensable for the beneficial effects of a service support fee to accrue to consumers that such a fee should be charged by JCB to official distributors based on a fixed scale or amount. It is sufficient for that purpose that the official distributors involved determine their actual costs and negotiate a fee accordingly on a case-by-case basis. The service allegedly supported with the fee, which, however necessary, is not included under JCB's warranty, could be either provided and charged by the servicing distributor on a normal commercial basis taking its individual costs into account or reimbursed directly by JCB. Both alternatives are less restrictive than a fee which operates as a disincentive to out-of-territory sales.

(220) Furthermore, the Commission needs not to carry out a detailed examination of all the advantages and disadvantages likely to flow from an exclusive and selective distribution system which, like JCB's, also includes other indirect restrictions on out-of-territory sales where there is evidence that such a system has been used, if not designed, to prevent exports and imports and, thus, artificially partition the common market and abusively protect distributors' territories.

(221) Some of the cumulative conditions of Article 81(3) not being fulfilled, it is not necessary therefore to examine whether the agreements eliminate competition in respect of a substantial part of the products in question. Nor is it necessary to assess whether some combinations of the above restrictive elements in the agreement would meet the conditions of Article 81(3).

(222) Accordingly, no individual exemption may be granted, even if JCB had notified its actual agreements as implemented.

C. *ARTICLE 3 OF REGULATION NO 17*

(223) Under Article 3(1) of Regulation No 17, where the Commission finds that there is an infringement of Article 81, it may by decision require the undertakings concerned to bring such infringements to an end. The Commission has no evidence that the infringement has been brought to an end and JCB denies that any such infringement exists or has ever existed.

(224) It is therefore necessary to require JCB to bring to an end the infringements described above.

D. *ARTICLE 15 OF REGULATION NO 17*

1. ARTICLE 15(2)

(225) Article 15(2) of Regulation No 17 provides that the Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceeding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty.

(226) JCB could not reasonably be unaware that its actions and agreements were conducive to restricting competition among its official distributors by partitioning territories in the common market. The Commission furthermore had clearly warned JCB already in 1975 that direct and indirect export prohibitions such as those which are assessed as restrictive of competition above were likely to infringe Article 81 (Article 85 at that time) ([187]). Furthermore, the continued implementation of the restrictive agreements or concerted practices results from the intention to restrict intrabrand competition, as evidenced by JCB's own declarations and instructions to its official distributors or in internal documents in the conduct of its business ([188]). The infringement is therefore intentionally committed.

2. ARTICLE 15(5)

(227) Article 15(5)(a) further specifies that no fine shall be imposed in respect of acts which have been duly notified to the Commission, provided they fall within the limits of the activity described in the notification.

(228) The only texts of agreements duly notified to the Commission are the following:

— Greece, Portugal, Spain, Austria, Sweden and Finland: agreements notified with form A/B on 30 June 1973,

— Germany, Italy, Belgium, the Netherlands, Luxembourg, Ireland, Denmark: agreements furnished on 18 December 1975 (modifying those notified on 30 June 1973), form A/B dated 30 June 1973,

— UK: agreement ultimately furnished on 29 December 1995, form A/B dated 30 June 1973.

In particular, the agreements submitted in 1980 and 1995 for application solely in the United Kingdom and

([187]) Recitals 44 to 46.
([188]) Recitals 93, 102, 103, 104, 108, 110, 112, 116, 118, 121, 124, 129 and 130.

the intragroup agreement with JCB France furnished on 18 March 1976 in reply to a request for information pursuant to Article 11 of Regulation No 17 were not notified in accordance with the relevant Commission regulations ([189]).

(229) The Commission has not taken a definitive position on any agreements brought to its attention by JCB, whether duly notified or not. These agreements include the following restrictions of competition:

— the prohibition, within allotted territories of the United Kingdom, on supply wholesale to unauthorised resellers for resale (i.e. selective intranetwork sales) ([190]). The application of this clause, exclusively in the United Kingdom, has been made known to the Commission since 1975,

— the payment of a service fee for sales made outside allotted territories, the amount of the fee being primarily negotiated by the selling distributor and the distributor in whose territory the machine is operated ([191]). This clause has been made known to the Commission since 1975 for the United Kingdom and other EEC Member States in 1975, excluding France,

— the obligations to purchase only from JCB parts, equipment and ancillary products for use with or repair of JCB products, and to use or to supply only JCB products in connection with warranty or modification work on JCB machines, unless stated otherwise by JCB ([192]). This clause has been made known to the Commission for the United Kingdom and other EEC Member States in 1976 since 1975.

(230) Among these three restrictions, the following two were either abusively implemented, applied in Member States other than those for which they were notified, enforced out of the scope of the activities notified, reinforced with unnotified restrictions or implemented differently than notified:

— the prohibition to supply wholesale for resale, and

— the service support fee.

([189]) Commission Regulation No 27 of 3 May 1962, First Regulation implementing Council Regulation No 17 (OJ 35, 10.5.1962, p. 1118/62. See recitals 58, 61, 67).
([190]) Recital 63.
([191]) Recitals 52, 64 and 69.
([192]) Recitals 65, 68 and 70.

(a) ***Prohibition to supply wholesale for resale in the United Kingdom***

Abusive implementation

(231) In JCB's distribution agreements notified in 1973, clause 5 stated that official distributors would not sell new JCB machines (less than 12 months old) and spare parts, directly or indirectly, outside the United Kingdom. They would furthermore take all reasonable steps to avoid selling JCB products to a purchaser in the United Kingdom for resale outside the United Kingdom. Pursuant to clause 4, official distributors agreed to sell JCB products wholesale for resale only to approved subdealers in their territory and to sell retail in the United Kingdom ([193]).

(232) The Commission clearly objected to clauses 4 and 5 as constituting, inter alia, an export prohibition ([194]). The Commission made no distinction whether purchasers from other Member States were purchasing for their own use or for resale, whether authorised by JCB or not. The United Kingdom, which was the national market where JCB had the highest market share (56 %), was of particular concern to avoid JCB agreements isolating it from the rest of the common market.

(233) Therefore, clause 4 as communicated in 1975, 1980 and 1995, whereby official distributors agree not to sell JCB products wholesale for resale except to an approved subdealer, is being implemented in spite of the Commission warning in its letter dated 27 October 1975 when it prevents official distributors from both selling JCB new machines (less than 12 months old) and spare parts, directly or indirectly, outside the United Kingdom and selling JCB products to a purchaser in the United Kingdom for resale outside the United Kingdom (i.e. wording of clause 5 in the version notified on 30 June 1973). If clause 4 as communicated in 1975 and afterwards were to prevent such transactions, this would be tantamount to replacing the clauses objected to on 27 October 1975 with others having the same effect.

(234) However, on the other hand, JCB was also encouraged to amend its 1973 UK agreements in the light of the decision regarding BMW's distribution agreements adopted by the Commission in 1974, which exempted obligations not to supply unauthorised distributors for resale. Neither this decision nor JCB's agreement for the

([193]) Version of 30 June 1973, recitals 38 and 39.
([194]) Recitals 44 to 46.

United Kingdom made any distinction as to where these unauthorised resellers may come from or sell the products.

(235) Although the implementation of clause 4 in respect of resellers from other Member States is contrary to Commission's initial warnings in 1975, the absence of any reaction from the Commission from 1976 until now justifies imposing no fine on the enforcement of that provision when such enforcement clearly concerns sales from United Kingdom official distributors to unauthorised resellers, even those from other Member States.

Implementation in other Member States for which it has not been notified

(236) It is apparent that, at least in Ireland, official distributors make supplies wholesale for resale to unauthorised distributors from other Member States dependent on JCB's approval, as in the United Kingdom. This restriction is not included in the agreement notified for Ireland and other Member States ([195]). JCB is enforcing an agreement which it has not notified to the Commission.

(237) A fine can be imposed on JCB when, beyond the scope of the notification and having regard to other restrictions present in the notified agreements ([196]) distributors from Member States other than the United Kingdom are prevented from or restricted in selling to unauthorised distributors in other Member States.

Enforcement out of the scope of the activities being notified

(238) JCB has imposed compensations for breach of clause 4 in the United Kingdom regarding sales of spare parts, which do not receive support under the 'multiple deal trading support', to unauthorised resellers from other Member States. The imposition of financial sanctions on official distributors for out-of-territory sales to such unauthorised resellers is in itself a restriction of competition, in the context of other restrictions present in the agreements, such as the service support fee. Yet in form A/B describing the activities being notified, JCB expressly declared to the Commission that no sanction was applicable to undertakings which were a party to the United Kingdom distributor agreement ([197]).

(239) The activities notified to the Commission in form A/B in the United Kingdom are therefore distinct from those actually implemented by JCB and a fine can be imposed on JCB for the imposition of such sanctions.

Reinforcement with unnotified restrictions

(240) Official distributors in the United Kingdom have extended the application of clause 4 to restrict also sales made to authorised distributors and end-users in other Member States, following JCB's instructions, beyond the terms of the agreements made known to the Commission. The abusive extension of the notified clause in the United Kingdom is apparent as regards Gunn JCB and Watling JCB at least.

(241) The restriction is reinforced also by the way in which the unnotified multiple deal trading support is implemented in the United Kingdom, which limits allowances to sales made to end-users and which disadvantages sales made outside the allotted territory, compared to sales within. The service support fee as actually implemented, i.e. not as notified, also restricts such sales and, like the multiple deal trading support, reinforces the notified restrictions.

(242) A fine can therefore be imposed on JCB where, in accordance with JCB's agreements or instructions, official distributors in the United Kingdom have restricted their sales to authorised distributors or end-users from other Member States. A fine can also be imposed regarding the multiple deal trading support in the United Kingdom.

(b) ***Service support fee: implementation different from text notified***

(243) The notified provisions regarding the service support fee in the United Kingdom and other Member States of the European Union in 1975 provide for a service support fee. Following the Commission warning on 27 October 1975 in respect of the provisions notified in 1973, the amount of the fee is to be agreed between the official distributors involved. Only in the event of disagreement should JCB determine the amount, with reference, *inter alia*, to all the circumstances of the case and to the cost of the service (actually) carried out, i.e. not for an estimate of a future cost.

(244) Beyond the notified provisions, other internal instructions within JCB state the amount applicable by official distributors throughout Germany and Spain as respectively 4 % of the local customer achieved price and 5 % of the distributor's purchase price. Similarly, JCB, through its subsidiaries in France and Germany, negotiates with United Kingdom official distributors the payment and the amount of the fee for sales made in

([195]) Recitals 71 and 122.
([196]) Recitals 67 to 72.
([197]) Recitals 40 and 96.

those Member States. In France, evidence shows that the fee for backhoe loaders sold from the United Kingdom is recurrently set by JCB at of [between FRF 5 000 and FRF 15 000] ([198]). In none of these instances is the fee negotiated first between the official distributors involved on the basis of actual costs and circumstances of the case, nor is there any evidence of prior disagreement between the distributors involved. In fact, for the purposes of setting the amount and charging the fee, JCB's national subsidiaries act as if they were independent distributors in their Member States. They are part of the JCB Group, however.

(245) The actual implementation of the service support fee is in fact closer to the provisions notified in 1973 objected to by the Commission in 1975 than to the provisions communicated thereafter. Under the initially notified provisions an amount of 15 % of the retail price, determined in the agreement with JCB, was charged by JCB to the exporting distributor ([199]). JCB has simply hidden the way in which the provision is actually implemented and submitted an agreement which is not actually followed, since 1975. The fact that official distributors do not freely negotiate and set the amount of the service support fee between themselves is liable to attract a fine, having regard to the restrictive effect of the fee as implemented.

JCB states that it has been concerned only with sales to unauthorised resellers, with active selling outside allotted territories and with the enforcement of the service support fees provided for in its agreements (RSO II, pp. 9-11). JCB claims that it has implemented its distribution agreements in accordance with the terms notified to and accepted by the Commission:

— what the Commission claims to be examples of JCB preventing parallel exports constitute in fact either the enforcement of the notified restrictions or enforcement of the legitimate notified obligation not actively to sell outside territory,

— the service support fee is intended to reflect the cost of servicing and a reasonable profit element, so that the same amount may be applied to the same machine.

As regards whether the obligation not actively to sell outside the territory is legitimate or has been notified, the agreements made known by JCB to the Commission provide no apparent basis on which JCB is entitled to prevent such sales to end-users, provided such sales are made from premises inside the allotted territory (see recitals 48, 54, 62, 64 and 69).

(246) In conclusion, the argument regarding the notification concerns whether the Commission can impose a fine on the infringements. Article 15(5) of Regulation No 17 does not bar the Commission from imposing a fine on JCB regarding:

— the unnotified agreements or concerted practices preventing or restricting out of territory sales in all Member States for which there is evidence ([200]), including sales to unauthorised distributors, except for the United Kingdom, for which the restriction of sales to unauthorised distributors has been notified or made known to the Commission,

— the unnotified imposition of sanctions in the United Kingdom regarding sales to unauthorised resellers, the unnotified restrictions of intranetwork purchases from (i.e. cross-supplies between) authorised distributors through exclusive purchase obligations in France and Italy; the extension of the agreements to restrict sales to authorised resellers and end-users, the implementation of the service support fee differently from what has been notified, the reinforcement of the restrictions with the multiple deal trading support and the occasional fixing of levels of resale prices or discounts in France and the United Kingdom. Moreover, the restrictions implemented by JCB concerning intranetwork purchases, out of territory sales to authorised distributors or end-users, resale price maintenance and service fees fixed by JCB were clearly objected to by the Commission in October 1975 and accordingly removed from the written contracts submitted by JCB in December 1975 ([201]). They have been implemented therefore expressly against Commission warnings.

3. AMOUNT OF THE FINE

(247) Pursuant to Article 15(2) of Regulation No 17, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement. The Commission also takes into account aggravating and mitigating circumstances.

(a) ***Gravity***

(248) In assessing the gravity of the infringements, the Commission takes into account their nature, their actual impact on the market, where this can be measured, and

([198]) Recitals 123 to 127.
([199]) Recitals 42 and 44 to 46.
([200]) Recitals 83 to 91, 107, 108 and 111 to 122.
([201]) Recitals 41 to 46.

the size of the relevant geographic market. Distribution agreements which, like JCB's, have as their object the partitioning of national markets within the common market through a variety of reinforcing restrictions of competition, jeopardise the proper functioning of the single market, frustrate one of the principal aims of the Community and have been held for decades as infringements of Article 81 of the Treaty in decision-making practice and case-law.

(249) The implementation of those restrictions is apparent with certainty in respect of distributors in at least several Member States, which constitute a substantial part of the common market. Sales of earthmoving machines in the Community amounted to EUR 7 760 million in 1997. The size of the market served by JCB is therefore, considerable. The combination of the restrictions implemented by JCB concerns a large number of distributors in the Community, which have been inhibited from exporting or importing JCB's products within the Community. The restrictions are the following:

— restrictions on distributors' ability to determine resale prices: United Kingdom and France,

— restrictions on the territory into which passive sales can be made by distributors: United Kingdom, France, Italy, Ireland, including restrictions on passive sales to end-users or duly appointed agents in the United Kingdom,

— distributors' remuneration dependent on the territory into which they sell (multiple deal trading support and service fee as implemented): United Kingdom and France,

— restrictions of cross-supplies between distributors through exclusive purchase: France and Italy.

(250) Although JCB is not a diversified multiproduct group, JCB is a large undertaking with considerable strength in some of the product and geographic markets affected, has an effective capacity to cause significant damage to other downstream operators through its behaviour and has the infrastructures which should have enabled it to realise that its conduct infringes Article 81.

(251) In view of those factors, JCB's infringements are therefore, very serious and should attract a fine of EUR 25 000 000 on account of their gravity.

(b) ***Duration***

(252) Overall, evidence shows that the different elements of the infringements have been in force between 1988 to 1998, as follows:

— restrictions on distributors' ability to determine resale prices: 1991 to 1996 (recital 171),

— restrictions on the territory into which passive sales can be made by distributors, including restrictions on passive sales to end-users or duly appointed agents: 1989 to 1998 (recital 149),

— distributors' remuneration dependent on the territory into which they sell by virtue of the service support fee and the multiple deal trading support, both as implemented: 1988 to 1996 (recitals 158 and 163),

— restrictions of cross-supplies between distributors: 1992 to 1996 (recital 175).

(253) The 11-year period in which at least one element of these agreements or practices has been in force is therefore, of long duration. However, all the elements have been simultaneously implemented only from 1992 to 1996; in 1991, three elements are apparent; two elements are apparent from 1989 to 1990; in 1988, 1997 and 1998, only one element is apparent. In the light of the above, the increase for the duration is 55 % (EUR 13 750 000 in total).

(254) The basic amount resulting from the gravity and the duration of the infringement is therefore EUR 38 750 000.

(c) ***Aggravating or mitigating circumstances***

(255) JCB has taken retaliatory measures against Gunn JCB, a distributor participating in the infringement which did not conform to the agreement, by imposing sanctions worth GBP 288 271 (EUR 432 000) on it. JCB notified, moreover, that no such sanction would be taken in enforcing the agreements (see recitals 40, 61, 91). However, the Commission does not have evidence of other instances where JCB has imposed similar retaliatory measures.

(256) Having regard to this aggravating circumstance, the basic amount should be increased by EUR 864 000.

(257) The Commission does not consider that there are mitigating circumstances that need to be taken into account.

(258) The total amount of the fine pursuant to Article 15(2) is therefore EUR 39 614 000.

E. *ADDRESSEE OF THE DECISION*

(259) The agreement or concerted practices have been entered into between various subsidiaries of the JCB group and its official distributors.

(260) Geographic market partitioning may be beneficial to some distributors, particularly where territorial protection shelters their territory from sales initially made by other, more efficient, distributors. However, in applying the various elements of the agreement, some of these distributors have acted under duress and contrary to their economic interest. Moreover, the Commission has no more than anecdotal or indirect evidence of distributors requesting the restrictive agreement to be enforced. Similarly, there is no evidence of collusive links between official distributors in different Member States, whilst some provisions might also be different according to the Member State or present in some Member States only.

(261) Conversely, JCB appears as a single player defining, setting and enforcing each provision of the agreement or concerted practice, in every Member State involved, throughout the whole period for which there is evidence. A decision finding the infringement and requesting its termination should therefore be addressed to JCB Service, which, according to JCB, owns and controls the subsidiaries of the JCB Group (commercially known as JC Bamford Excavators), that are involved in the agreement. The fine should be imposed on JCB Service,

HAS ADOPTED THIS DECISION:

Article 1

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

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

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

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

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

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

Article 2

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

Article 3

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

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

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

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

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

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

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

Article 4

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

Article 5

The fine determined in Article 4 shall be paid in euro within three months of the date of notification of this Decision, to the following account: Account No 642-0029000-95, of the European Commission with Banco Bilbao Vizcaya Argentaria BBVA, Avenue des Arts Kunstlaan 4, B-1040 Brussels.

After three months, interest shall automatically be payable at the interest rate charged by the European Central Bank on its main refinancing operations on the first working day of the month in which this Decision was adopted, plus 1,5 percentage points, namely 8,32 %.

Article 6

With regard to the obligations mentioned in Article 3, a penalty payment of EUR 1 000 shall be imposed on JCB Service for each day of delay in implementing this Decision. Such delay shall start from the expiry of the two-month period specified for implementation.

Article 7

This Decision is addressed to JCB Service, Rocester, Staffordshire ST14 5JP, United Kingdom.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 21 December 2000.

For the Commission

Mario MONTI

Member of the Commission