DISTRIBUTION (CONSTRUCTION EQUIPMENT): THE JCB CASE

Subject: Distribution arrangements
Fines
Sales restrictions
Pricing policy

Industry: Construction, farm and industrial handling equipment
(Implications for other industries)

Parties: J C Bamford Group
JCB Service
Central Parts SA (complainant)

Source: Commission Statement IP/00/1526, dated 21 December 2000

(Note. In earlier days, this type of case would have merited a full and detailed report; but the law on distribution agreements is now well settled. Consequently, the case is mainly interesting both for the fact that circumstances of this kind still recur and for the size of the fine imposed by the Commission. In its Statement, the Commission refers to the fines in the Volkswagen and Opel cases imposed last year, the latter being of a similar size, the former considerably higher. The main reasons for the severity of the fines were the duration of the infringements and other circumstances aggravating the seriousness of the infringement: in the present case, the imposition of sanctions by the infringer on other traders.)

The Commission has adopted a decision finding that J C Bamford Group (JCB) of Britain, a leading manufacturer of construction, farm and industrial handling equipment, has violated the European Communities' rules on competition. Since the late 80s, JCB has put in place distribution agreements and other practices which have had the effect of severely restricting out-of-territory sales of JCB's products both within certain national territories and across national borders, as well as interfering with the freedom to set resale prices. For these very serious violations of article 81 of the EC treaty, JCB has been fined a total €39.6m. The decision is addressed to JCB Service, the parent company of the UK-based JC Bamford Group, the world's fifth largest manufacturer of construction and earth-moving machines.

The antitrust procedure concerns the restrictive agreements and concerted practices implemented by JCB and its network of independent authorised distributors. The proceedings were prompted by a complaint from a French distributor, Central Parts SA, in February 1996. The infringements affect the market for construction and earth-moving machines, which is worth approximately €7.8 billion a year in Europe. JCB's sales account for 13% of Europe's total. This figure does not, however, reflect JCB's important position in relation to its flagship product, the backhoe loader, which was developed in the

late forties by Mr J C Bamford, and for which its European market share has remained stable at around 45% for the last 25 years.

During surprise inspections in November 1996, the Commission found evidence of the illegal agreements implemented by various companies of the JCB Group and, in particular, the JCB Sales organisation in the UK, JCB SA (France) and JCB Spa (Italy), all controlled by JCB Service. These illegal agreements or practices have been implemented in isolation or in combination between 1988 and 1998, according to evidence.

The restrictive agreements or practices between JCB and its distributors consist of:

- restrictions on sales outside allotted territories;
- restrictions on purchases of machines between authorised distributors in different EU states;
- bonuses and fees systems which disadvantaged out of territory sales;
- occasional joint fixing of resale prices and discounts across different territories.

There is evidence that the restrictions have been put in place in at least the United Kingdom, France, Italy and Ireland.

Each of these measures and, *a fortiori*, their combination, are contrary to the ban on restrictive agreements under article 81(1) of the EC Treaty. As a result, import and export purchases and sales of JCB's products have been severely restricted in the Member States more directly concerned and, consequently, within the European Community as a whole. Through such restrictions purchasers of JCB machines are illegally deprived of the opportunity to take advantage of substantial price differences for the same equipment in different Member States. The Commission has ordered JCB to stop these practices and to bring its agreements and arrangements into line with the competition rules applicable to distribution.

JCB's infringements are comparable to those verified in the Volkswagen case, where a fine of €102m was imposed in 1998, subsequently reduced to €90m by the Court of First Instance. The case is also similar to a recent case involving Opel Netherlands, for which a fine of €43 millions was imposed. Pursuant to the Commission guidelines on antitrust fines, JCB's infringements were considered very serious. Given their long duration and the fact that JCB imposed financial penalties on one distributor who did not conform to the restrictive agreements an aggravating circumstance, the fine was set at €39.6m. Commenting on the decision, Competition Commissioner Mario Monti said: "It is shocking that important companies present in all Member States still jeopardise the most fundamental principles of the internal market to the detriment of distributors and, ultimately, consumers". ■

The text of the report on page 44 of this issue (the *Neste* case) is subject to correction: it is taken from the Court's website, which is freely available.

The SAS / Maersk Case

In a statement of objections sent to SAS and Maersk Air, the Commission has taken a preliminary view that the two airlines, by agreeing to share markets, have infringed Article 81 of the EC Treaty, which prohibits concerted behaviour or agreements between companies having an anti-competitive object or effect. As the situation currently stands, Maersk Air has stopped operations between Copenhagen and Stokholm, leaving SAS to dominate overwhelmingly that major Scandinavian route with the risk of higher prices for the one million passengers who fly between the two capitals every year. The Statement of Objections marks the opening of infringement proceedings and the parties are now entitled to present their defence in writing, as well as at an oral hearing.

SAS and Maersk asked the Commission in March 1999 to grant regulatory clearance to a co-operation agreement in place since 28 March 1999. However, it appeared from the fact-finding that followed the notification and from the on-site inspections carried out by the Commission in June 2000 at the headquarters of SAS, Maersk Air and A.P. Møller (Maersk Air's parent) that the scope of co-operation was broader than the parties had notified to the Commission.

In the Commission's view, the evidence obtained shows that SAS and Maersk Air had concluded an overall market-sharing agreement, the basis of which is that Maersk Air will not operate new international routes from Copenhagen without a specific request or approval by SAS and, conversely, that SAS will not operate on Maersk Air's routes out of Jutland, or on the routes from Copenhagen that are operated by Maersk Air. The two companies also agreed to respect a share-out of domestic routes. In addition, the Commission found that SAS and Maersk concluded specific market-sharing agreements regarding individual international routes, as a result of which Maersk Air ceased flying between Copenhagen and Stockholm as from 28 March 1999 and was compensated for this withdrawal. Until that moment, SAS and Maersk Air had been competing on the Copenhagen - Stockholm route. The Copenhagen - Stockholm route is an important route, with approximately one million passengers per year and some 20 daily flights in each direction.

As compensation for Maersk Air's withdrawal from the Copenhagen - Stockholm route, SAS stopped operating between Copenhagen and Venice at the end of March 1999 and Maersk Air started operations on the route at the same moment; SAS stopped flying on the Billund-Frankfurt route in January 1999, leaving Maersk Air as the only airline on the route. Until then, SAS and Maersk had been competing on this route. In the statement of objections, the Commission takes the preliminary view that the behaviour of SAS and Maersk Air violates Article 81 of the Treaty and that, taking into account the seriousness of the infringements, the Commission intends to impose fines. The infringements are particularly significant for consumers, who on some major routes no longer have a choice between the two airlines as a result of these arrangements. The companies have been given two months to respond in writing to the Commission, and they also have the right to request an oral hearing.

(Source: Commission Statement IP/01/156, dated 2 February 2001.)