

JUDGMENT OF THE COURT (Fourth Chamber)
10 December 1985*

In Case 31/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de commerce [Commercial Court], Brussels, for a preliminary ruling in the proceedings pending before that court between

ETA Fabriques d'Ébauches SA, a company incorporated under Swiss law, whose registered office is in Grenchen (Switzerland),

and

DK Investment SA, a company incorporated under Belgian law, whose registered office is in Ixelles (Belgium),

Horelec SA, a company incorporated under Belgian law, whose registered office is in Ixelles,

Scor SA, a company incorporated under Belgian law, whose registered office is in Ixelles,

Bureau d'achats Maxitec SA, a company incorporated under Belgian law, whose registered office is in Edegem (Belgium),

GB-Inno-BM SA, a company incorporated under Belgian law, whose registered office is in Brussels,

on the interpretation of Article 85 of the EEC Treaty,

THE COURT (Fourth Chamber)

composed of: K. Bahlmann, President of Chamber, G. Bosco, T. Koopmans, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: M. Darmon

Registrar: P. Heim

* Language of the Case: French.

after considering the observations submitted on behalf of:

ETA Fabriques d'Ébauches SA, the plaintiff in the main proceedings, by Xavier Magnee, of the Brussels Bar,

DK Investment SA and Horelec SA, the defendants in the main proceedings, by J. C. Fenaux, of the Brussels Bar, in the oral procedure, and

the Commission of the European Communities, by its Legal Adviser, Anthony McClellan and by Philippe Mihail, of the Brussels Bar,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 November 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

- 1 By a judgment of 4 February 1985, which was received at the Court Registry on 6 February 1985, the Tribunal de commerce [Commercial Court], Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 85 of the EEC Treaty, in order to ascertain whether a manufacturer may restrict a guarantee on his products to the customers of authorized dealers only.
- 2 It appears from the judgment of the national court that ETA Fabriques d'Ébauches SA (hereinafter referred to as 'ETA'), a limited company incorporated under Swiss law, mass-produces inexpensive 'Swatch' quartz watches and markets them in the Common Market through a network of exclusive distributors. ETA assigned the exclusive distribution of 'Swatch' watches in the territory of Belgium and the Grand Duchy of Luxembourg to Sedos SA, of which Gedève Diffusion SA is the

successor in title. Under clause 2 of the distribution agreement ETA undertakes not to offer or sell its products in the territory allotted, except to the dealer, and to pass on to him any order relating to that territory. For his part, the dealer undertakes not to buy the products otherwise than from ETA, not to sell or distribute them, either directly or indirectly, outside the territory allotted and to pass on to ETA direct any order relating to the distribution of the products outside that territory.

- 3 Clause 7 of the agreement stipulates that the products sold by ETA to the dealer are covered by a guarantee against technical defects for a period of 12 months after sale to the consumer, subject to a maximum of 18 months following delivery to the dealer. The latter is required to keep his stock up to a certain level, which ETA is entitled to verify, and he must regularly pass on to ETA full information concerning his turnover, stock levels and sales. It appears from the documents before the Court that the packaging of every watch contains a guarantee certificate which states: 'Your "Swatch" watch is guaranteed by ETA SA for 12 months from the date of purchase against all defects in material or workmanship. This guarantee does not cover the battery, the watch glass, or wear and tear to the case, strap or buckle'. Some guarantee certificates stipulate that the dispatch coupon supplied must be sent to the 'Swatch' repair service in Switzerland, whereas others require it to be sent to the exclusive distributor for Belgium. It also appears from the documents before the Court that a defective watch is normally replaced, since repairs are impossible on account of the method of manufacture.
- 4 The defendants in the main proceedings sell 'Swatch' watches which they obtain by way of parallel imports, together with the guarantee certificate which refers to the 'Swatch' repair service in Switzerland. The plaintiff applied to the Tribunal de Commerce, Brussels, for an interlocutory injunction restraining the defendants from selling 'Swatch' watches with the guarantee granted by ETA to its authorized dealers by virtue of its contractual relationship with them.
- 5 In order to determine whether or not to grant ETA's application, the national court submitted the following question to the Court of Justice for a preliminary ruling:

'Should Article 85 be construed as meaning that an undertaking distributing its products in the Common Market through appointed dealers in each of the Member States — whilst tolerating the distribution of its products through a network of parallel importers — may be permitted to restrict to the customers of its recognized dealers alone the benefits of a guarantee which it gives on those products?'

- 6 According to ETA, the guarantee provided is contractual in nature and is binding upon it only as against the recognized distributors. The guarantee is the corollary of the quality checks carried out on the distributors and should be viewed in the general context of the conditions contained in the exclusive distribution agreement. The quality checks basically consist in ensuring that distributors do not stock 'Swatch' watches for longer than six months. That limit must, in ETA's view, be observed in order to prevent any impairment of the watches which might damage the 'Swatch' brand image. Since those checks cannot be carried out on parallel importers, whose source of supply is unknown to it, ETA considers that the difference in treatment between, on the one hand, authorized distributors and, on the other, retailers unable to show evidence of an unbroken chain of assignments of the contractual guarantee does not amount to discrimination and that its attitude is not contrary to Article 85 of the EEC Treaty.

- 7 In their observations at the hearing, two of the defendants in the main proceedings, DK Investment SA and Horelec SA, pointed out that the advertising leaflets distributed by ETA to all its dealers showed that the 'Swatch' watch was a mass-produced article offered at a very reasonable price, the marketing of which did not require a special network of dealers providing an after-sales service. In their view, the Commission had already had occasion to establish, in individual decisions, that the practice of not extending the guarantee to parallel imports and exports might constitute a major obstacle to the development of trade within the Community and must consequently be prohibited.

- 8 The Commission considers that, where an undertaking which markets its products in the Common Market through exclusive distributors established in each of the Member States and which also tolerates parallel distribution, restricts its guarantee on those products to customers of the exclusive distributors, that restriction constitutes a clause of the exclusive distribution agreement, even if the guarantee is provided by the manufacturer direct. In its view, the limitation of the guarantee to

consumers who have purchased the product from an exclusive distributor places the latter and the retailers within his network in an artificially advantageous competitive position by comparison with that of parallel importers or distributors. Since the guarantee constitutes a major incentive to buy the product, such a scheme hinders parallel imports and distorts competition and trade between Member States. If an exclusive distribution agreement is to qualify for exemption under Article 85 (3), the guarantee must, according to the Commission, be granted to every user holding a guarantee certificate, irrespective of which retailer supplied the product. The Commission observes that those principles have been embodied in Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (Official Journal 1985, L 15, p. 16).

- 9 In essence, the question submitted by the Tribunal de Commerce seeks to ascertain whether a clause contained in an exclusive distribution agreement, whereby the manufacturer undertakes with his exclusive distributor to grant a guarantee on his products after sale to the consumer, and by virtue of which he withholds the guarantee from the customers of parallel distributors, is compatible with Article 85 (1) of the EEC Treaty.
- 10 In order to answer that question, it is necessary to examine the guarantee clause in conjunction with the other clauses of the exclusive distribution agreement. The documents before the Court show that ETA has established in the Common Market a distribution network which confers on every dealer an exclusive right to distribute 'Swatch' watches within the territory allotted to him, whilst prohibiting him from supplying them outside that territory. The partitioning of the markets thus brought about constitutes a restriction of competition within the meaning of Article 85 (1) of the EEC Treaty.
- 11 The restriction of the guarantee to products sold through authorized dealers must be viewed in that context and must be appraised by reference to the distortion of competition which is its object or effect. As the Court stated in its judgment of 10 July 1980 (Case 99/79 *Lancôme v Etos* [1980] ECR 2511) and 11 December 1980 (Case 31/80 *L'Oréal v De Nieuwe AMCK* [1980] ECR 3775), it is necessary to consider competition within the actual context in which it would occur in the absence of the agreement or clause in dispute.

- 12 The crucial element to be taken into consideration in that respect is the actual or potential effect of withholding the guarantee on the competitive position of parallel distributors. In that connection it is necessary to consider whether parallel imports may be hindered, or whether opportunities for marketing such products may be restricted, regard being had in particular to the reaction of consumers and to the importance of the guarantee as an incentive to buy the products.
- 13 In its judgment of 21 February 1984 in Case 86/82 (*Hasselblad v Commission* [1984] ECR 883) the Court considered it important that the possibility of obtaining products by means of parallel imports should not be restricted. As far as the guarantee scheme was concerned, the Court accepted that it was essential for parallel imports to be fully covered by the manufacturer's normal guarantee.
- 14 A guarantee scheme under which a supplier of goods restricts the guarantee to customers of his exclusive distributor places the latter and the retailers to whom he sells in a privileged position as against parallel importers and distributors and must therefore be regarded as having the object or effect of restricting competition within the meaning of Article 85 (1) of the Treaty.
- 15 The fact, indicated in the decision requesting a preliminary ruling, that the manufacturer tolerates the distribution of his products through a network of parallel importers must be considered irrelevant, since the guarantee scheme may have the object or effect of bringing about, to some extent, a partitioning of national markets.
- 16 The refusal to grant the guarantee cannot be justified by the need to ensure observance of the maximum storage period. The watches in question do not belong to a category of products in respect of which it is necessary to accept certain restrictions which are an inherent feature of a selective distribution system and are motivated by the desire to maintain a network of specialized dealers able to provide specific services for technically sophisticated, high-quality products. The battery is expressly excluded from the guarantee, its replacement does not pose any particular technical difficulties and, by its own admission, ETA honours the guarantee within the official distribution network beyond the six-month storage period, should the battery need to be replaced. The fact that, according to the parties, a defective watch cannot be repaired but can only be replaced is not without relevance in this regard.

- 17 Following consideration of those factors, it will be for the national court to decide whether the guarantee clause in the distribution agreement may affect trade between Member States. As the Court held in the *Lancôme* and *L'Oréal* judgments cited above, it will for that purpose be necessary to decide, on the basis of a set of objective criteria of law or of fact, having regard in particular to the consequences of the guarantee scheme on the possibilities of parallel importation, whether it is possible to foresee with a sufficient degree of probability that the agreement may have an influence, direct or indirect, actual or potential, on trade between Member States.
- 18 Accordingly, the answer to the question submitted must be that a clause contained in an exclusive distribution agreement, whereby the manufacturer undertakes with his exclusive distributor to grant a guarantee on his products after sale to the consumer, and by virtue of which he withholds the guarantee from the customers of parallel distributors, is incompatible with Article 85 (1) of the EEC Treaty, in so far as the restriction on competition which is likely to result therefrom affects trade between Member States.

Costs

- 19 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question submitted to it by the Tribunal de commerce, Brussels, by judgment of 4 February 1985, hereby rules as follows:

A clause contained in an exclusive distribution agreement, whereby the manufacturer undertakes with his exclusive distributor to grant a guarantee on his products after sale to the consumer, and by virtue of which he withholds the

guarantee from the customers of parallel distributors, is incompatible with Article 85 (1) of the EEC Treaty, in so far as the restriction on competition which is likely to result therefrom affects trade between Member States.

Bahlmann

Bosco

Koopmans

O'Higgins

Schockweiler

Delivered in open court in Luxembourg on 10 December 1985.

P. Heim

K. Bahlmann

Registrar

President of the Fourth Chamber