

the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order.

4. If the restrictive sales policy of a producer prevents a potential client, established in the same Member State, from satisfying its spare parts requirements through normal commercial channels, that is to say on the national market, and it is thus induced to attempt to obtain the product in question in the other Member States, those attempts cannot be regarded as an indication of the existence, whether actual or potential, of a normal pattern of trade between the Member States in the product. In those circumstances the producer's conduct is not capable of affecting trade between Member States within the meaning of Article 86 of the Treaty.

In Case 22/78

1. HUGIN KASSAREGISTER AB, Stockholm,
2. HUGIN CASH REGISTERS LTD, London,

represented by Walter van Gerven and (for the written procedure) Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 84 Grand-Rue,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision No 78/68/EEC of 8 December 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.132 Hugin/Liptons) (Official Journal, L 22 of 27 January 1978, p. 23),

THE COURT

composed of: J. Mertens de Wilmars, President of Chamber Acting President, and Lord Mackenzie Stuart, President of Chamber, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: G. Reischl

Registrar: J. A. Pompe, Assistant Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the observations and the submissions and arguments of the parties may be summarized as follows:

I — Facts and Procedure

A — By a decision of 8 December 1977 (Official Journal, L 22 of 27 January 1978, p. 23) the Commission, the defendant in these proceedings, declared (Article 1) that Hugin Kassaregister AB (hereinafter referred to as "Hugin AB") and Hugin Cash Registers Ltd (hereinafter referred to as "Hugin UK")

"... have infringed Article 86 of the Treaty establishing the European Economic Community by refusing to supply spare parts for Hugin cash registers to Liptons Cash Registers and Business Equipment Ltd from 1 January

1973 and that Hugin Kassaregister AB has also infringed Article 86 of the said Treaty by prohibiting its subsidiaries and distributors within the Common Market from selling such spare parts outside its distribution network."

By Article 2 of that decision a fine of 50 000 units of account, that is £20 833, was imposed on Hugin AB and Hugin UK.

Article 3 of the decision provides that Hugin AB and Hugin UK

"... shall bring to an end without delay the infringements referred to in Article 1 hereof, unless they have already done so of their own accord. Hugin Cash Registers Ltd shall submit for the approval of the Commission, within one month of the notification of this Decision, proposals relating to the resumption of supplies of spare parts for Hugin cash registers to Liptons Cash Registers and Business Equipment Ltd."

In respect of the obligations set out in Article 3, a periodic penalty payment of 1 000 units of account per day is to be payable by Hugin UK in respect of each day of delay (Article 4).

The application seeks primarily the annulment of the decision in its entirety or, alternatively, a reduction in the fine.

B — Factual and legal considerations in the decision

1. Facts

(a) The undertakings

(1) The Hugin group

Hugin AB is a major manufacturer of cash registers which is wholly owned by the Federation of Swedish Consumers, Köoperativa Forbundet.

In the countries of the Community Hugin has either established subsidiaries or appointed distributors.

In 1975 the turnover for the sale of cash registers by Hugin companies in the Community was SKr 47 200 000, and the value of spare parts supplied is estimated at SKr 2 300 000. In the United Kingdom turnover was SKr 13 800 000, of which SKr 7 500 000 is accounted for by maintenance and repair services other than the supply of spare parts. The value of spare parts supplied is assessed at SKr 700 000. That figure is only an estimate, however, as spare parts are not normally available for sale, being supplied either free under guarantee or as part of a service contract provided to customers.

(2) Liptons

Liptons services, repairs, reconditions, sells and rents out cash registers of numerous makes both new and reconditioned. To this end it employs technical staff.

Liptons' total turnover in 1968/1969 was £65 523, in 1970/1971 £285 000 and in 1974/1975 £48 207; since then Liptons has, according to the Commission, recovered from this downward trend due to the expansion of its business outside the field of Hugin products.

(3) Other producers

The approximate market shares expressed as a percentage held by the major suppliers of cash registers in the Community market are as follows: the National Cash Register Company of the United States 36%; the German undertaking Anka 15%; the American company Sweda 13%; Hugin 12%; Japanese producers 13%, and all other producers 11%. In the United Kingdom National Cash Register has approximately 40% of the market, Sweda 18%, Gross 16%, and Hugin 13%. Anka has about 4% of that market and all other producers together have about 9%.

(b) The product

Cash registers are still largely mechanical or electro-mechanical. However, the sale of electronic cash registers is rapidly increasing. The price of cash registers usually lies between SKr 4 000 to 5 000.

A cash register can have up to 2 000 different parts, although for the purposes of meeting different customer requirements, up to 5 000 parts may be manufactured to cover the variations possible in any one model.

(c) After-sales service and repair

It is essential that cash registers are reliable and that, if there is a breakdown, rapid and effective repair or replacement is available. Each producer, therefore, lays great stress on the after-sales service available in respect of its cash registers and regards it as a significant factor in the competitiveness of the machine itself.

Hugin provides for all its products a full guarantee for 12 months which includes free maintenance, repair and replacement of faulty parts. All other producers offer virtually the same form of guarantee. In addition, Hugin companies offer a maintenance service contract, which is available after the period of guarantee expires, under which Hugin provides all necessary inspection, service and repair for a fixed sum per year (according to Hugin approximately £25). Hugin claims that in order to remain competitive it runs this service at a loss. For users who do not enter into such contracts, Hugin offers to maintain and repair all Hugin machines on a day-work basis. It refuses however to supply spare parts outside its organization.

(d) The collaboration between Liptons and Hugin

Towards the end of the fifties Liptons began to purchase Hugin spare parts from the importer of Hugin cash registers, Cash Machines Ltd. When in 1969 the latter company changed its trading name to Hugin (Great Britain) Ltd (hereinafter referred to as "Hugin GB"), Liptons was appointed, in the same year, as "main agent" to sell Hugin cash registers in Great Britain, with the right, during the initial period of such

agency, to service and repair the new machines delivered under that agreement. Like Hugin GB, Cash Machines Ltd was a wholly owned subsidiary of the Co-operative Wholesale Society.

One of the main reasons for that appointment was the necessity to convert all the cash registers in the United Kingdom to the decimal system before 15 February 1971, which led to a boom on that market in 1969, 1970 and 1971. During the period covered by the agency agreement Liptons maintained its previous activities, albeit to a lesser extent, and it continued to purchase Hugin cash registers and spare parts for its separate business from Hugin GB.

In 1970 Liptons entered the business of renting out cash registers. Since the termination of the distribution agreement, the rental business has become the major part of Liptons' business, accounting for nearly 80% of its turnover.

In January 1972 Hugin AB founded a subsidiary in the United Kingdom called Hugin Cash Registers Ltd (Hugin UK), which took over some of the assets and liabilities of Hugin GB, but not the rights and obligations of Hugin GB relating to the agreement with Liptons. In April 1972, when Hugin UK offered Liptons a new distributorship agreement, the latter company refused the offer in view of the fact that the terms of the new agreement were less wide in scope than those of the previous agreement. In May 1972 Hugin GB repudiated its agreement with Liptons. Hugin GB thereafter changed its name to Century Cash Registers Ltd and has become a non-trading company.

Hugin UK, however, continued to supply Liptons with the cash registers

and spare parts it required for its separate business.

From 23 October 1972 Hugin UK refused to supply Liptons with cash registers at wholesale price or any spare parts other than minor parts not related to maintenance or repair, such as keys, handles and pins, which the operator of the machine can install himself and which were sold at the retail price.

Following the refusal by Hugin UK to supply Liptons with spare parts, Liptons endeavoured between February 1973 and July 1975 to obtain these parts in other countries. Not only did Hugin AB itself refuse to supply the parts but so also did its subsidiaries and a distributor to which Liptons applied.

The distribution agreements concluded by Hugin prohibit distributors from selling the products outside their territory or to anybody within their territory, if they have reason to believe that the purchaser intends to bring the products outside that territory. Similar prohibitions are imposed on subsidiaries.

In this respect Hugin AB has declared that it is prepared to inform its subsidiaries and distributors that it has never been its intention to prohibit exports of cash registers from one Member State to another. It still, however, does not wish spare parts to be sold outside its organization.

(e) The effect of the refusal to supply spare parts

In the terms of the Commission's decision, the result of Hugin's withdrawal of the supply of spare parts

was to bring to an end the business of servicing and maintaining new Hugin machines, as Liptons had no continued access to new spare parts. The buying, selling, reconditioning and renting out of Hugin machines was severely restricted and, when existing stocks of spare parts were exhausted, Liptons was reduced to dismantling its own Hugin cash registers to provide spare parts. This is an unprofitable practice and Liptons has stated that it will shortly be unable even to deal in second-hand Hugin machines.

Liptons' rental income for all makes increased from £3 500 in 1970 to £43 776 in 1975, but the percentage of this income attributable to the renting out of Hugin machines fell from 62% at the outset to under 6% in 1975 due to the refusal to supply spare parts. This business exists only because Liptons dismantled Hugin cash registers to the value of £9 000 in order to use parts of those cash registers as spare parts for other machines.

2. Legal assessment

(a) The alleged dominant position

As the parts for Hugin cash registers are not interchangeable with the parts of other makes and cannot otherwise be economically reproduced, and as Hugin AB controls the supply of them, Hugin AB enjoys a monopoly throughout the world and holds a dominant position in the common market for the supply of spare parts and for the maintenance and repair of its machines in relation to maintenance and repair companies which need a supply of those spare parts. Such dominant position extends to the business of reconditioning and repairing used Hugin cash registers and the

business of renting out those cash registers, as the owner must also be in a position to carry out his own maintenance and repair.

(b) The alleged abuse

Hugin AB and its subsidiaries abused that dominant position.

The result of the refusal to supply persons outside the Hugin organization is to make the users of Hugin cash registers totally dependent on Hugin AB for the supply of spare parts and, in effect, for the maintenance and repair of those machines.

Liptons alleges that the maintenance and repair of those cash registers is within the competence of anyone having the skill to maintain and repair competing cash registers and provided that they have experience and training in the repair of such machines. No other justification has been offered for the refusal to supply spare parts. There is therefore no valid objective reason for the conduct of the Hugin companies with regard to maintenance and repair undertakings which have the requisite skills and training. Such refusal therefore constitutes an abuse of Hugin AB's dominant position in that it restricts all effective competition and trade in reconditioned Hugin cash registers.

With regard to Liptons, the conduct of Hugin AB and Hugin UK is an abuse in that Liptons was until 1972 a principal customer for spare parts and had been a customer for spare parts for over 12 years and that the refusal to supply had the result of removing a major

competitor in the matter of service, maintenance, repair and the supply of reconditioned machines from a substantial part of the Common Market, as Liptons was thus obliged to cease its business of renting out new Hugin cash registers.

The fact that Liptons has ceased to be a distributor of Hugin cash registers does not in the circumstances amount to a valid objective reason for refusing to supply spare parts as the business created by the "main agency" agreement is separate from the other business which Liptons undertook on its own initiative.

Similarly, Hugin AB abused its dominant position by prohibiting its subsidiaries and distributors from supplying outside the Hugin organization. Such conduct shelters Hugin AB from all effective competition in the matter of service, maintenance and repair of Hugin cash registers and from competition from reconditioned and rented Hugin cash registers throughout the common market.

(c) The alleged effects on trade between Member States

The prohibition on the export of spare parts from all Member States to any firm outside the Hugin organization directly affects trade between Member States; the refusal to supply Liptons in particular affected trade between the United Kingdom and the Member States involved, and even if the prohibition is removed in the manner proposed by Hugin AB it will still affect trade between Member States. Hugin AB is thereby preventing Liptons from carrying on its business with regard to Hugin cash

registers in a substantial part of the common market and Liptons is unable to purchase spare parts from other Member States. Due to the size of Hugin AB's share of the overall market for cash registers, the distribution system practised by Hugin AB prevents the operation of independent servicing companies anywhere in the common market and has an appreciable effect on the structure of competition within the common market.

(d) The order to supply spare parts

According to the Commission, the price for the spare parts to be supplied by Hugin UK should be an appropriate market price between that which is currently charged by Hugin AB to Hugin UK and that which is currently charged by Hugin UK to end users in the United Kingdom and which allows to Hugin UK an adequate margin of profit and to Liptons a reasonable trade discount.

(e) The fine

As regards the refusal to supply, the Commission takes the view that Hugin AB and Hugin UK were aware of the consequences of their conduct for Liptons. As regards the prohibitions imposed on Hugin's subsidiaries and distributors, the Commission considers that Hugin AB knew or must be taken to have known that the restrictions on the supply of its spare parts would severely restrict competition in Hugin products within the common market. The undertakings concerned have, therefore, at the very least infringed Article 86 of the EEC Treaty through negligence.

With regard to the duration of the infringements, the Commission took account of the fact that, although the withdrawal of supplies of spare parts has

continued since October 1972, the obligation on Hugin UK to ensure that it complied with the EEC rules on competition in so far as Liptons was concerned did not commence until 1 January 1973. Such a consideration does not, however, apply to the export prohibition which has been in force within the common market since at least February 1972.

With regard to the gravity of the infringement, the Commission took account of the effect of the refusal on Liptons' various activities.

It further took into account the sudden and unforeseen nature of the withdrawal of supplies, particularly in view of the fact that supplies of such spare parts continued after the termination of the agency agreement.

With regard to the prohibitions imposed by Hugin on its subsidiaries and distributors the Commission took account of the fact that the prohibitions were imposed by means of a general export prohibition. In addition, Hugin AB has so far failed to inform the Commission that such prohibition has been removed but even when the export prohibition is removed the prohibition on the supply of spare parts outside the distribution network will remain.

C — Written procedure

By application lodged on 24 February 1978 Hugin sought the annulment of the decision of 8 December 1977.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the procedure without any preparatory inquiry. However, it invited the parties to reply to certain questions.

II — Conclusions of the parties

A — *Hugin* claims that the Court should:

- Annul the decision under review; or
- Alternatively, cancel or reduce the fine imposed by the Commission; and
- Order the Commission to pay the costs of the proceedings.

B — The *Commission* contends that the Court should:

- Reject the application;
- Order *Hugin* to pay the costs.

III — Submissions and arguments of the parties

A — *The alleged dominant position*

1. *Hugin's application*

Hugin argues that the supply of spare parts for *Hugin* cash registers and the supply of maintenance and repair services for those machines cannot properly be described as a separate market. In its view they are but one of the parameters of competition in the market for cash registers as a whole and form part of the criteria taken into account by the customer in making his purchases in the same way as the price and quality of the cash register itself. *Hugin* alleges that manufacturers of cash registers compete not only in terms of price and quality of the products sold, but as much in terms of quality and price of after-sales service, including the supply of spare parts. Cost and quality of maintenance, repairs and spare parts are therefore in its view an essential element in determining the buyer's choice, which is stressed by the manufacturers of cash registers in their marketing policy. This is particularly true with regard to *Hugin* whose commercial policy is based on top-quality service at low prices. *Hugin*

emphasizes in particular in this connexion that it undertakes, by virtue of a provision in the sale contract for cash registers, to supply spare parts and maintenance and repair service free of charge during the guarantee period, that spare parts are delivered within the framework of the maintenance contract without extra charge and that several customers sign such contracts at the time of purchase.

Hugin further states that since the supply of spare parts and of maintenance service is one of the essential parameters of competition in the market for cash registers as a whole and since such market is intensely competitive, *Hugin* is subject to the pressure of competition with respect to the supply of such parts and services. It adds that if *Hugin's* performance with respect to supply of spare parts and maintenance service ever became uncompetitive customers would buy their cash registers from other manufacturers rather than from *Hugin*. The relationship between the purchase cost of a new cash register and the cost of maintenance is such that such conduct by customers would not be uneconomical. In addition, account must be taken of the fact that the prices offered by the manufacturers for trading-in cash registers are often relatively high.

Hugin further observes that it does not behave like a monopolist, exploiting its alleged dominant position to the detriment of consumers. In this respect it refers to the guarantee offered by it, to the maintenance contracts which it offers at competitive prices and to the fact that the hourly rates charged by it for repair carried out on machines which are not covered by a maintenance service contract are generally in line with those charged by its competitors. It concludes that the cost of the supply of maintenance services and spare parts compared with the revenue from such

operations shows that it provides maintenance service at a loss: in 1976, for instance, the loss sustained by Hugin UK with respect to the supply of such service amounted to £396 000.

In holding that Hugin has a dominant position the Commission is extending Article 86 far beyond its natural scope of application and ignoring the existence of effective competition in the relevant market as defined by it and is relying solely on the fact that Liptons is dependent upon Hugin for its supplies of spare parts for Hugin cash registers. The mere fact that an operator is dependent upon another for the supply of a given product or service does not automatically have the effect of bestowing on the latter a dominant position within the meaning of Article 86; the Court of Justice has clearly rejected that view in its judgment of 25 October 1977 in Case 26/76 *Metro v Commission* (hereinafter referred to as "the *Metro-Saba* case"), the sixth sub paragraph of the 17th paragraph of the decision ([1977] ECR 1875).

2. The Commission's defence

(a) *General comments*

The Commission recalls that the essential elements of a market are one or more sellers, one or more buyers, and a demand for a product or service which can be sold or supplied at a profit.

In the opinion of the Commission the existence of:

- a demand for Hugin spare parts, for which no other spare parts are substitutable,

- from Hugin cash registers users, who form a group distinct from the general body of cash register buyers and users; and

- the production and sale of Hugin spare parts by Hugin, and by no other cash register manufacturer,

constitute the essential elements of a market in Hugin spare parts distinct from the general market for cash registers. The fact that independent maintenance companies also need spare parts further differentiates the market for spare parts from the market for the machines themselves. In this connexion the Commission recalls that if a machine breaks down before the end of its useful life it is generally more economical for a user to maintain and repair it rather than to replace it.

The Commission further states that users of Hugin cash registers in the long term can replace their machines with other cash registers. Undertakings such as Liptons do not have this choice if they are to continue to service, lease out and maintain cash registers. In the view of the Commission this point is corroborated by the judgment of the Court of 26 November 1975 in Case 26/75 *General Motors v Commission* [1975] II ECR 1367, in particular by paragraphs 7 to 9 of the decision.

The Commission further refers to paragraph 65 of the decision in the judgment of the Court of 14 February 1978 in Case 27/76 *United Brands v Commission* [1978] ECR 207, and it observes that the conditions laid down by that judgment for the existence of a dominant position were satisfied in Case 26/75 (*General Motors*) and are also satisfied in the present case. No effective

remedy was available when Hugin cut off supplies to Liptons: it was not possible for Liptons to manufacture spare parts for Hugin machines, or for any other undertaking to do so and the only possibility open to a user who thought Hugin's maintenance unsatisfactory would be to sell its Hugin machines prematurely and buy other cash registers; but this solution would be much too expensive and unsatisfactory for most users, and would not be enough to discourage Hugin from cutting off supplies to Liptons. The fact that nobody could take advantage of Hugin's refusal to supply Liptons is conclusive proof, in the Commission's view, not only that Liptons was in a market separate from the cash register market, but also that Hugin had a dominant position on the market for its spare parts. In the Commission's view Hugin's argument that each time a user replaces its cash registers there is competition is not relevant; such competition could not have prevented Hugin from, for example, charging Liptons excessive prices for Hugin spare parts, and it did not in fact prevent Hugin from cutting off supplies to Liptons.

The Commission further argues that the effect of Hugin's behaviour is similar to that of "tying-in" clauses which are prohibited by Article 85 (1) (e) and Article 86 (d) of the Treaty, as Hugin is trying to "tie" a service and a product.

(b) Observations on Hugin's legal argument

The Commission emphasizes that the other major producers, in the United Kingdom in any event, are all prepared to supply qualified independent

operators with the spare parts they require and that there is therefore a market for spare parts for cash registers and a market for the services of independent companies which maintain and service cash registers.

According to the Commission the fact that spare parts and maintenance are provided free of charge during the period of the guarantee and within the framework of maintenance contracts does not affect the existence of a separate market for spare parts and maintenance: many industries give guarantees with durable products, which are later serviced and maintained, and for which spare parts are later provided, by independent companies; the policy of one supplier of cash registers with regard to service contracts cannot cause a market to vanish.

In the Commission's view the argument that it would not be uneconomical to switch to a different make should the quality of maintenance services deteriorate or the price increase unduly is not correct: the average minimum price of a cash register is approximately 18 times the annual charge made by Hugin for maintenance, while the cost of spare parts for cash registers is small in relation to the cost of maintenance, with the result that even if the manufacturer were limited in the extent to which he could raise the price of maintenance there is no limit in practice to his freedom to charge for spare parts.

The Commission stresses that it held in its decision that Hugin has a dominant position for the maintenance and repair of Hugin cash registers in relation to companies which need a supply of Hugin spare parts. It believes that it is not necessary to prove that Hugin also has a dominant position for maintenance and spare parts *vis-à-vis* users of Hugin cash

registers, although the Commission considers that it has provided such proof.

As to Hugin's argument that it cannot have a dominant position in the supply of spare parts because of the guarantee which it provides and the reasonable prices which it charges for its maintenance, the Commission comments that the fact that an undertaking has not taken advantage of its dominant position in any particular way does not prove that it does not occupy a dominant position. Nor, in the Commission's view, does the fact that an undertaking has not abused its market power in one way mean that it could not have abused it in another way. The question whether Hugin provides its maintenance services or its spare parts at a loss does not seem relevant to the Commission, in view of the problem arising in the present case; Liptons was in any event able to make a reasonable profit and, moreover, Hugin includes in its calculation of its losses on maintenance the entire cost of guarantees.

In answer to Hugin's argument that the Commission is improperly extending Article 86, the Commission replies that the fact that Liptons was dependent on Hugin for its supplies of cash registers for its rental business does not prove that Hugin has a dominant position on the cash register market. The Commission stresses that it has stated in this respect that Hugin used its monopoly on the narrow market for the supply of its own spare parts to eliminate Liptons as a competitor in the maintenance, renting out, repairing and reconditioning of Hugin machines.

3. Hugin's reply

Hugin replies that it is erroneous to state that firms selling or leasing

reconditioned cash registers are entirely dependent upon Hugin for the supply of Hugin spare parts: Hugin does not control the supply of spare parts contained in trade-in machines, and the dismantling of trade-in machines to secure a stock of spare parts is indeed a common practice among firms dealing in reconditioned machines.

Hugin recalls that the supply of spare parts and maintenance service generally is an essential parameter of competition in the market for cash registers. In its view that factor constitutes an essential difference between the present case and the *General Motors* case (Case 26/75), where the price and other terms of issuance of certificates of conformity for Opel cars imported into Belgium were not an element with respect to which Opel and other car manufacturers competed.

Hugin further observes that in computing the relative onerousness of purchasing a new cash register, the Commission has omitted to take account of the practice of trading-in. For a one year old machine, the trade-in value can be as high as 90% of the purchase price; as a rule, the trade-in price is close to the purchase value discounted by the value of depreciation; contrary to the Commission's assertion, replacement of a machine during its working life is thus not at all an "uneconomical" proposition.

Hugin then challenges the Commission's argument that Liptons is dependent to a substantial extent upon Hugin for its supplies of spare parts. In this context Hugin notes that the order for Hugin spare parts filed by Liptons after the issuance of the challenged decision only amounts to £68, which it finds all the

more surprising as some of the parts requested by Liptons are pins and handles which are normally supplied to customers as they can be installed without the assistance of a service technician.

Finally in this connexion, Hugin refers to the fact that trade-in machines are used by companies dealing in reconditioned machines, among others, as a source of spare parts. Contrary to what is stated in the Commission's decision it is more economical to obtain spare parts from dismantling second-hand machines than to buy new spare parts from the manufacturer. Indeed, trade-in machines are generally sold in bulk amounts of 40 to 50 machines at a time, of which only a few, say approximately 15, lend themselves to reconditioning, while the only use to which the remaining machines can be put is to serve as a reserve of spare parts. Leaving out of account the labour involved in dismantling the machines, the cost of the spare parts obtained from trade-in machines is zero and the spare parts found in trade-in Hugin machines are interchangeable with those supplied directly by Hugin.

In Hugin's view, therefore, the Commission has erred in applying Article 86 in the present case since Hugin does not have the power to act independently with respect to maintenance services, including the supply of spare parts. In fact, what this case raises is basically a problem of selective distribution which is normally dealt with under Article 85, as the Court of Justice recognized in Case 26/76 the *Metro-Saba* case.

4. The Commission's rejoinder

With regard to Hugin's argument that the market for cash registers influences

the market for spare parts, the Commission emphasizes that competition on the cash register market at the level of the users could never have any effect on Hugin's ability to monopolize the maintenance market for Hugin machines by refusing to supply spare parts to maintenance companies such as Liptons; for independent maintenance companies, no goods are substitutable for Hugin spare parts.

In the Commission's view the idea that an undertaking may have a dominant position in the supply of its own spare parts is not new; it refers to a judgment of the Bundesgerichtshof of 26 October 1972, KZR 54/71 ("Wirtschaft und Wettbewerb" No 2/1973, p. 119).

Although it is not necessary for the Court to decide whether Hugin is dominant at the level of cash register users, since the abuse was not committed at that level, the Commission would welcome a ruling from the Court on this point, and the Commission therefore turns to Hugin's arguments on that question.

To the Commission, Case 26/75 (the *General Motors* case) means that a monopoly supplier of spare parts effectively has a dominant position for those parts, at least if the price of the car is so much greater than any price which could be charged for spare parts that the monopoly supplier could not be effectively prevented from charging excessive prices or otherwise taking unfair advantage of its monopoly.

The Commission observes that in the case of Hugin cash registers the economic value of spare parts is very low in relation to the cost of a cash register.

Therefore, once a cash register user has bought all the Hugin cash registers he needs Hugin is not, during the working life of those cash registers, subject to any effective competition in relation to spare parts. The Commission has found that spare parts represent only 3 % of Hugin's total turnover and it concludes from that that the total cost of spare parts, even over the entire life of the cash register, seems to be on average only 3 % of the cost of the cash register, so that even when the time comes and the user decides to replace his cash register the prices charged for spare parts will be a relatively minor factor in influencing his choice. Hugin could, if it chose, charge excessive prices for its spare parts without significantly influencing the choice of users.

In the Commission's opinion the facts referred to by Hugin were not part of the Court's reasoning in the *General Motors* case (Case 26/75). According to the Commission, Hugin cannot deny that parallel imports into Belgium competed with cars of all makes sold through the normal Belgian channels. It recalls that whether the cost of issuing certificates was included in the price of the car (as it was in the case of sales through approved dealers) or separately, that cost was part of the terms on which all cars came on the Belgian market.

With regard to that case, the Commission states finally that although General Motors argued that issuing certificates was "merely ancillary" to the market in cars, the Court rejected that argument and ruled that a dominant position existed.

As regards Hugin's argument that maintenance companies could obtain spare parts by buying second-hand machines, the Commission points out *inter alia* that a workable machine is more valuable for use than for spare parts. If other second-hand machines could be bought for "zero", as Hugin claims, it would be because they had no value, even as spare parts. In any case, the labour costs of dismantling the machines and of checking every part to see if it could satisfactorily be used again would be substantial. Parts of used machines are likely to be worn or otherwise unsatisfactory; spare parts from used machines would come on the market only several years after machines of the type in question were first sold and would therefore be of no use for maintenance of the latest type of cash register; in order to obtain a particular spare part when it was needed it would be necessary to store a substantial stock of machines, at substantial cost; a policy of obtaining spare parts only from obsolete machines would force independent maintenance companies to provide only second-class service.

As regards Hugin's claim that trading-in makes switching from one brand of cash register to another not at all uneconomical, the Commission points out that that argument has no relevance to the question of Hugin's dominance at the level of maintenance companies. In addition, Hugin has produced no evidence for its statements, and trade-in values cannot be high in an industry which is tending towards more and more sophisticated cash registers. Hugin's statement that the cost of trade-in machines to anyone buying them from manufacturers is zero is quite inconsistent with the claim that used cash

registers have a high trade-in value; all the Commission's information suggests that the average trade-in value of all used cash registers after seven years' use is generally low, though it varies widely depending on the type of machine.

B — The alleged abuse

In its application Hugin submits that the Commission has erred as a matter of fact and law in holding that the refusal to supply spare parts to Liptons violates Article 86.

1. The refusal to supply spare parts to Liptons did not cause competition to be substantially restricted

(a) In *Hugin's* view Liptons cannot reasonably be described as a "major competitor" of Hugin in a "substantial part of the Common Market". Liptons' turnover in 1974 amounted to only £48 207; Liptons' share of any market has infinitesimal proportions and the disappearance of Liptons cannot perceptibly affect the competitive structure of any relevant market in the United Kingdom.

Hugin further points out that it is only one among several manufacturers supplying the United Kingdom cash register market and that therefore Liptons' continued existence has never been threatened. Hugin's refusal to supply spare parts to Liptons cannot be said to prevent it from continuing its business of hiring out and refurbishing Hugin cash registers, and Hugin is ready

to maintain and repair all its cash registers. Such an arrangement may well turn out to be in the users' interest, as Hugin employs specialized technicians and it charges low prices for maintenance and repair work. Hugin recalls that it annexed to its application invoices relating to repair service carried out in 1972 by Hugin UK at Liptons' request. With respect to spare parts needed to recondition Hugin cash registers, Hugin states that in a letter of 14 September 1972 it expressly offered to supply the parts to Liptons but that Liptons has never responded to that offer.

The point alleged by the Commission that "Liptons would appear to be the only competitor of Hugin UK with respect to repair or maintenance of Hugin cash registers in the United Kingdom" is, according to Hugin, only a confirmation of the fact that there exists no significant market for spare parts and maintenance services for cash registers due to the specific characteristics of the cash register market: only technicians who have been especially trained to carry out repair on a specific model can provide adequate service; the proper carrying out of a repair business requires large inventories of spare parts which are very costly to maintain; the prices charged by the manufacturers for maintenance services have always been very low; thus there has generally been no incentive for independent service companies to engage in the maintenance or repair of cash registers; in spite of the fact that spare parts for Hugin cash registers are not protected by any industrial right there has never been any attempt on the part of any company to engage in the manufacture of spare parts for Hugin machines, in contrast to the position for other makes from which it may be deduced that there is no significant demand for spare parts on the part of customers or independent repair firms.

The Commission has only been able to reach its conclusion that competition in the supply of Hugin cash registers for rent and in the reconditioning and repairing of Hugin registers will eventually disappear as a result of the refusal to supply Liptons, Hugin alleges, by limiting its focus to an environment in which there is competition only among Hugin-manufactured cash registers.

Hugin recalls that in its view such competition is an inseparable part of the competition for cash registers in general which is, by all accounts, particularly intense, and it goes on to observe that even if the ancillary market of maintenance service and spare parts could validly be regarded as a separate market and Hugin's practice were held to have restrictive effects on such separate market, such restriction of competition is permissible if, on balance, it allows an increase of competition on the market for the principal product, that is to say the market for cash registers.

Hugin finally contends that keeping the maintenance of services and the supply of spare parts within the network of Hugin subsidiaries and dealers has as its effect to increase competition on the cash register market as a whole.

(b) The *Commission* replies, first, that a policy which eliminates all enterprises independent of the Hugin group which were able to maintain and repair Hugin cash registers, and which eliminated the only such enterprise in the whole of the United Kingdom, affects the competitive structure on the markets for maintenance, repair and leasing.

Secondly, the Commission states that Liptons' turnover in 1974 is hardly relevant, as 1974 was a year in which

Liptons was particularly badly affected by Hugin's behaviour.

In the Commission's view the fact that a victim of a refusal to supply is able to survive by dealing in other brands does not prevent the refusal from being an abuse; the United Brands decision concerning Olesen proves this.

According to the Commission, it is not clear that Hugin would have been willing to maintain cash registers leased out by Liptons. In addition, Liptons would probably not have been willing to take the risk of making itself dependent upon Hugin in this way. Finally, it is unlikely that cash register users would have been prepared to accept the inconvenience of having to deal with both a lessor company and a maintenance company. In any event, the fact that Hugin now belatedly raises this possibility clearly cannot, in the Commission's view, alter the fact that Hugin's refusal was an abuse throughout the period during which it occurred or that if this possibility had materialized all independent competitors of Hugin in the sector of maintenance and repair activities in the United Kingdom would have been eliminated.

As to Hugin's letter of 14 September 1972 the Commission states that Liptons did reply through its legal representatives but that, by letter of 28 July 1975, Hugin replied that it would itself recondition the machines held by Liptons.

The Commission argues that an enterprise in a dominant position cannot deny its customers freedom of choice and defend itself merely by showing that it offers a satisfactory service; its competitors might offer a better one, or it might take advantage of the absence of competition to charge a higher price. Anyway the customers are entitled to choose.

To Hugin's argument that maintenance of cash registers is costly and unprofitable, and so cannot constitute a market, the Commission replies that Liptons has been able to carry on this business at a reasonable profit and that the figure for Hugin's losses includes the cost of carrying out guarantees, for which Hugin naturally does not charge.

In the Commission's contention the fact that no independent company has ever manufactured Hugin spare parts contributes to Hugin's dominant position and is due to the fact that the relatively small numbers of each component, and the large number of components, would make it economic to produce components only for the most popular brands of cash registers. The manufacture of spare parts for Hugin machines would also have been contrary to the United Kingdom Design Copyright Act 1968. Finally, the Commission points out that no serious argument has been suggested for saying that Hugin can give a better service to actual or potential users of Hugin machines if it does not sell spare parts to Liptons, or if Liptons is prevented from offering Hugin's machines on lease, or maintenance of Hugin machines, to the public.

(c) *Hugin* replies that, contrary to what the Commission is implying, the refusal to supply is not responsible for the fact that Liptons' turnover in 1974 was lower than during the period 1970 to 1972; all undertakings in the sector in question experienced a similar decline in turnover after the end of the decimalization period.

Hugin also disputes the assertion that Liptons can be regarded as a competitor of Hugin: Liptons, which deals primarily in reconditioned machines, sells to local retail shops, pubs and coffee shops while Hugin, on the other hand, concentrates

upon national chain stores and large accounts and does not sell any reconditioned machine to users; nor does it engage in renting out cash registers except as an extra service for customers in exceptional periods of sales.

Hugin subsequently states that the Commission's decision makes it clear that Liptons has continued selling, renting out and repairing Hugin machines, and as far as the renting out business is concerned it even appears from the figures mentioned that Liptons' income attributable to the renting out of Hugin machines increased from £2 170 in 1970 to £2 626 in 1975.

Finally, Hugin points out that it is incorrect to state that Liptons is the only firm outside Hugin's distribution network which deals in Hugin machines. In support of its contention Hugin annexed to its reply a list of 40 firms in the United Kingdom which, it alleges, are engaged in the sale, renting out and repair of reconditioned machines of various makes, including Hugin.

(d) In its rejoinder the *Commission* observes, first, that it is incorrect to say that there is no meaningful demand for spare parts from maintenance companies. It refers in this respect to declarations, annexed to the rejoinder, by the principal manufacturers of cash registers which show, in its view, that they regularly sell spare parts to maintenance companies, and the Commission recalls that Hugin itself lists 40 firms in the United Kingdom which repair cash registers. The Commission then refers to another annex to the rejoinder which contains a list of larger maintenance companies in the United Kingdom.

In circumstances such as those in this case, the extent of the effect on competition resulting from a policy of

refusal of supplies can, the Commission argues, be indicated in several ways:

- (1) The extent of the total demand for the goods and services which are being monopolized. In this respect the Commission refers to Hugin's sales of spare parts in the Community (£257 000), the sale of spare parts derived from used cash registers, Hugin's turnover in maintenance (United Kingdom: £838 000; Community: £2 740 000), and the maintenance in the common market of Hugin machines by companies other than Hugin; these figures do not include the effects of Hugin's policy on the business of renting Hugin machines;
- (2) The extent of the restriction on competition resulting from Hugin's refusal to supply independent maintenance companies with Hugin spare parts. That refusal forces such companies either to cease to maintain Hugin cash registers or to depend for their supplies of spare parts on buying second-hand machines;
- (3) The importance of the competition previously offered by the companies excluded. No other independent maintenance company anywhere in the Community which services Hugin machines is more important than Liptons, and Hugin refuses to supply to any maintenance company outside its network. Furthermore, the United Kingdom is one of Hugin's most important markets in the Community.

The Commission then observes that the fall in the proportion of Liptons' business involving Hugin machines referred to in the Commission's decision was entirely due to Hugin's refusal to supply spare parts.

If it is now true that Liptons' business consists in the sale of reconditioned machines to small buyers the situation seems to be largely the result, the Commission alleges, of Hugin's having forced Liptons out of the Hugin maintenance business. If Liptons' market were inherently quite separate from Hugin's, there would be no justification for Hugin's refusal to supply Liptons.

The Commission finally notes that total elimination from a market is not necessary for a refusal to supply to be an abuse; it refers in this connexion to the judgment of the Court in Case 27/76 (the *United Brands* case, paragraphs 163 to 203 of the decision).

2. The refusal to supply was objectively justified

(a) *Hugin* recalls that Hugin cash registers are built and adapted in order to meet the requirements of individual customers and that as a result there generally exist no more than five or six identical units of each model, other than one particular example. The specialized character of its cash registers and the significance of adequate and rapid maintenance constitute, in Hugin's view, objective justification for Hugin's insistence on having its cash registers serviced only by qualified technicians working in close co-operation with it. In its view consumers would attribute the deficient operation of a cash register resulting from inadequate maintenance to the quality of the cash register itself. Hugin would then find it difficult to face its competitors which are powerful and have a well-established position on the market.

Hugin further argues that the extreme diversification of Hugin cash register

components and the necessity to make these components readily and rapidly available to the customer make the keeping of an inventory very costly. It is therefore comprehensible that it is Hugin's policy, in order to reduce costs, to stock only such items as are necessary to satisfy the needs of subsidiaries and dealers within its network as calculated by them.

Hugin adds that correct service of cash registers as complex as the Hugin models further requires continuous training to which Liptons does not have access as it is no longer part of the Hugin organization.

Finally, Hugin points out that the refusal to deliver commenced on a date when Article 86 of the Treaty was not applicable to the United Kingdom.

(b) In answer to those arguments the *Commission* states that Liptons' technicians were adequately trained by Hugin to service and maintain all kinds of Hugin machines, that Hugin's refusal to supply was not based on any deficiency in the service provided by Liptons, that the complexity and diversification of Hugin's registers is at about the same level as those of its major competitors, that the importance of proper maintenance and servicing is shared by Hugin cash registers with other makes and that other cash register manufacturers do not object to their machines being maintained by independent companies.

In the Commission's opinion Hugin is entitled to try to ensure that its machines are serviced only by qualified technicians, but it is not entitled to insist that those technicians must be "working in close co-operation with it".

As all users of cash registers are in business, the Commission assumes that they are quite able to differentiate

between poor maintenance and a defective machine.

As regards stocks of spare parts, the Commission points out that there is no reason for supposing that Liptons would be unable to predict its needs or that it would not carry stocks of its own.

To Hugin's argument that its policy is justified by its wish to prevent maintenance being carried out by unqualified personnel, the Commission replies that Liptons does have qualified employees.

Furthermore, Hugin cannot take advantage of the fact that Liptons' technicians are not abreast of innovations or improvements made to Hugin machines, as Hugin has denied them that chance for five years.

Finally, with regard to the claim that the refusal to supply Liptons began just before the United Kingdom joined the EEC, the Commission states that the argument is hardly relevant as Hugin has refused to supply Liptons ever since in spite of repeated requests.

(c) *Hugin* replies that it stopped supplies of spare parts to Liptons because Liptons could not maintain the level of excellence which Hugin required from its service network, which employs specialist technicians who work full time on the servicing of Hugin cash registers and who receive continuous training with respect to servicing.

Hugin further states that Liptons' participation in the maintenance and servicing of Hugin machines during the period 1969 to 1971 was mainly in the field of conversion of old machines for decimalization and installation of new machines.

According to Hugin the fact that other manufacturers may follow another policy of distribution and maintenance does not

disentitle Hugin from devising its own commercial policy.

offer maintenance service outside the local area where it operates.

Moreover, the fact that Liptons could service a different make of cash register does not necessarily mean that it can properly service a Hugin cash register. Hugin service technicians themselves are unable properly to service the whole range of Hugin models.

The mere fact that Liptons is unable to purchase spare parts from other Member States cannot, in the opinion of Hugin, turn what is a purely local matter into one which affects trade between Member States. If that were the case any incident, no matter how small the firm involved might be, would fall under Articles 85 or 86 of the Treaty.

Hugin finally stresses that the termination of supplies to Liptons was not unfair as when Liptons was appointed as an agent in 1969 it was expressly notified that its participation in the maintenance and servicing of Hugin machines would only be temporary.

Hugin recalls that when Liptons had the opportunity to order spare parts from Hugin it filed an order to a value of only £68.

3. The refusal to supply could not affect trade between Member States

(a) In *Hugin's* view the refusal to supply cannot be considered to affect appreciably the structure of competition within the Common Market. There exists no significant market for spare parts or independent maintenance services for cash registers; in spite of the absence of independent servicing companies Hugin is not sheltered from competition with respect to maintenance of Hugin cash registers, which is one of the important parameters of competition in the cash registers market in which Hugin competes.

(b) The *Commission* is of the opinion that the elimination of Liptons from the market for maintenance of Hugin machines can affect the structure of competition in the common market. Liptons' share of the market for Hugin spare parts and the market for maintenance of Hugin machines is substantial and it was the only independent company maintaining Hugin machines in the United Kingdom. The Commission recalls that Liptons could export to Ireland, which has the same currency as the United Kingdom, all cash registers without any modification which would be sufficient to cause Article 86 to apply.

Hugin goes on to allege that Liptons operates only in one Member State where its share of the market is infinitesimal and that Liptons has never engaged in export activities and could not in fact export outside the United Kingdom because the cash registers in use in the United Kingdom are adapted to the specific characteristics of the United Kingdom market. Finally, it would not be economical for Liptons to

As regards Hugin's argument that its refusal to supply Liptons is "a purely local matter", the Commission observes that the abuse against Liptons is simply an example of the enforcement of Hugin's Community-wide policy. No trade between Member States occurs in Hugin spare parts except between Hugin companies. If Hugin's policy had been applied only in the United Kingdom, Liptons could have imported Hugin

spare parts bought elsewhere in the Community.

Furthermore, the effects of Hugin's conduct on the competitive structure necessarily implies, in the Commission's contention, an effect on trade between Member States because of the prejudice to consumers (and primarily to users of cash registers): judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents Corporation v Commission* (paragraphs 30 to 33 of the decision, [1974] I ECR 223).

The Commission concludes that if an abuse of a dominant position is a direct result of a Community-wide policy adopted by the dominant undertaking, and where it is clear that the same policy was applied whether or not exports between Member States were directly affected, Article 86 applies even if each specific incident complained of itself has no direct effect on imports and exports.

4. Article 86 has been misused by the Commission to attack selective distribution and maintenance permitted under Article 85

(a) *Hugin* maintains that its refusal to supply Liptons is the natural consequence of its sales policy to have its product distributed and maintained through a network of specialized subsidiaries, distributors and dealers.

As Hugin's cash registers are products of high quality and technicality, and are to a large extent individualized products, adapted to the specific needs of the customer, they require, according to Hugin, even better service and maintenance. Hugin's sales and maintenance organization can therefore be regarded

as a selective distribution, maintenance and repair system which is comparable to the Saba organization, which both the Commission (decision in Official Journal, L 28 of 3 February 1976, p. 19) and the Court (judgment in Case 26/76 *Metro-Saba*) have held to be permissible under Article 85 (1). Hugin submits that this attitude of the Commission amounts to unequal treatment, as it treats the same sales organization differently from the point of view of Article 85 and from the point of view of Article 86, and moreover to a misuse of Article 86, by using that article to cover a situation which the Commission itself has considered to be in conformity with Article 85.

(b) The Commission replies that in the BMW decision (Official Journal L 29 of 3 February 1975, p. 1), the approval under Article 85 (3) was only given in the light of the fact that there was a substantial amount of intra-brand competition and that all users of BMW cars were free to have them serviced by any garage, since spare parts were freely sold.

The Commission further adds that in the Saba decision it gave its approval subject to the condition that all persons who fulfil certain qualitative criteria are in fact appointed as Saba dealers (paragraph 27 of the decision). "Dealers must also be in a position to provide guarantee and after-sales services themselves or through third parties" (paragraph 28 of the decision). The Commission considered that the Saba arrangements did not provide an opportunity for eliminating competition (paragraphs 47 to 49 of the decision).

In the Commission's view the Hugin case is entirely different from the BMW and *Metro-Saba* cases. The Commission alleges that:

- Hugin is not willing to supply spare parts to anyone who fulfils objective qualitative criteria, or to allow any such person to enter its network;
- For the supply of spare parts Hugin has a complete monopoly, and no competition exists;
- There is no intra-brand competition if undertakings like Liptons are forced out of the market, and there can be no inter-brand competition in relation to Hugin spare parts and maintenance markets;
- The criteria for the selection of distributors of cash registers are not necessarily the criteria appropriate for selecting qualified undertakings to service cash registers;
- Users have no choice as to where they will obtain Hugin maintenance services: there is only one source in each Member State;
- Hugin never notified its distribution system to the Commission;
- In the *BMW* and *Metro-Saba* cases the Commission ensured that servicing and maintenance could be carried on by undertakings outside the network.

In the view of the Commission the judgment of the Court in Case 26/76 (*Metro-Saba*) corroborates its opinion.

(c) *Hugin* replies that the meaning of the words "or through third parties" used in paragraph 28 of the *Saba* decision is explained in paragraph 18 of that decision, which makes it clear that *Saba* dealers may subcontract for guarantee and repair service if they so wish and thus not to companies outside

Saba's distribution network.

The fact that the *BMW* decision ensured that spare parts be made available to independent maintenance companies is explainable, according to Hugin, by the specific characteristics of the car market, where there exists a large number of independent maintenance firms. Such a system is not necessarily suitable to the cash register market. Similarly, a policy which might be suitable to a large firm may be entirely inappropriate to a firm such as Hugin.

C — *The order to supply spare parts*

1. *Hugin* states that it has informed the Commission that although it disputes the Commission's finding of dominance and abuse, it will sell to Liptons available spare parts. Furthermore, supplies of spare parts by Hugin UK have resumed following the receipt of an order from Liptons. In this connexion Hugin reserves all its rights in connexion with the adverse consequences of the Commission's order.

Hugin takes exception to the Commission's suggestion as regards the price to be charged to Liptons for deliveries of spare parts. It takes the view that the Commission is thus forcing Hugin to treat Liptons as the equivalent of a dealer entitled to a "reasonable trade discount", whereas Liptons' situation cannot be compared to that of a Hugin dealer who assumes extensive obligations as regards sale and maintenance service, which Liptons has not undertaken.

Hugin alleges that if it were compelled to treat Liptons as the equivalent of a dealer with respect to prices it would treat alike purchasers who are in

different situations, thus putting the dealers at a competitive disadvantage as compared with Liptons.

In Hugin's view Liptons cannot claim to benefit from the same price for spare parts as that charged to the end users of Hugin spare parts, that is the final customers, because Liptons is not part of Hugin's selective maintenance or distribution system.

2. The *Commission* argues that Hugin is not compelled to give Liptons the same discount as it gives Hugin dealers; in so far as the circumstances, and in particular the obligations Liptons is willing to undertake, are different from those of Hugin dealers, a different level of discount could be justified.

Finally, the *Commission* states that it would not be compatible with the *Commission's* decision for Hugin to treat Liptons as an end user, that is an owner or lessee of Hugin cash registers, as such treatment would make it impossible for Liptons to make any profit on the resale of Hugin parts to end users.

D — The fine

1. *Hugin* argues that the imposition of a fine in this case is unwarranted on the following three grounds:

First, the challenged decision creates, in Hugin's view, new law in holding that a manufacturer can hold a dominant position, independently of his position on the market, for the supply of spare parts and maintenance services for its own products. Furthermore, in holding that a manufacturer commits an abuse by refusing to supply a firm which has chosen not to participate in the manufac-

turer's selective distribution and maintenance organization the decision extends the scope of the "abuse" concept. Hugin states that at the time when the supplies to Liptons were terminated, no case under Article 86 had been ruled upon by the Court of Justice. Accordingly, the imposition of a fine in such a case violates the principle "*nulla poena sine lege*". That principle bars the imposition of sanctions for the violation of a rule which is laid down by the very decision imposing the sanction, since undertakings could not know that rule at the time they adopted their course of behaviour; Hugin refers in this respect to the *Vegetable Parchment* decision (*Official Journal*, L 70 of 13 March 1978, p. 54).

Secondly, the termination of supplies occurred prior to the United Kingdom's accession to the Community so that Hugin can only be accused of having omitted to take steps to correct a situation resulting from a decision taken by it at a time when such a decision was perfectly legal, which is an infringement of a less serious nature than taking an unlawful decision.

Thirdly, for a fine to be imposed in the present case it is necessary for the *Commission* to prove that the consequences of Hugin's conduct were brought about by an intentional or negligent infringement: judgment of the Court in Case 26/75 *General Motors*, paragraphs 13 to 24 of the decision.

As regards the aggravating circumstances alleged by the *Commission*, and first with regard to the effect of the refusal to supply on Liptons activities, Hugin takes the view that it has shown that Liptons' share of the market is infinitesimal and that there exists no significant market for spare parts and independent maintenance service.

Secondly, it is incorrect to state that the withdrawal of supplies from Liptons was sudden and unforeseen, for the following reasons: there has only been an agreement between Liptons and Hugin GB, a company which, in spite of its name, did not belong to the Hugin group; Liptons was informed by said Hugin GB of the negotiations with Hugin AB and in particular of the fact that Hugin UK would not take over the rights and obligations relating to the agreement; the arrangement whereby Hugin UK supplied products to Liptons for a few months after the termination of the latter's agency agreement was only a temporary arrangement pending the answer from Liptons to Hugin UK's proposal to execute a new agreement with it.

Thirdly, Hugin argues that the losses which the Commission alleges that Liptons suffered are not quantified. The decision itself shows that Liptons has increased its income attributable to the rental of Hugin machines. The fact that Liptons has allegedly had to dismantle machines worth £9 000 in order to obtain spare parts proves nothing, as Hugin itself has not derived any benefit from the termination of supplies to Liptons which operates in a different sector of the market.

2. In the Commission's view its observations in the present case show that the decision has not created new law, but it adds that even if this were so, a fine could be imposed: *Joined Cases 6 and 7/73 Commercial Solvents v Commission* and *Case 27/76 United Brands v Commission*.

The Commission agrees that "*nulla poena sine lege*" is a principle of Community law, but it states that the principle is designed to protect the citizen against retroactive legislation and

against being punished for behaviour which he could not have known was illegal, and those circumstances did not exist in the present case.

The Commission argues that the refusal to supply is no less unlawful because it began in 1972; Hugin continued to refuse supplies to Liptons from January 1973 until January 1978 and its restrictive policy inside the common market began before 1973.

To Hugin's argument that its behaviour was not intentional or negligent the Commission replies that a dominant undertaking is considered as having intended or negligently disregarded the natural, reasonable and probable consequences of its behaviour. The Commission argues that it is not necessary for it to prove that a dominant undertaking was explicitly aware of the fact that it was violating the Treaty; only if a dominant undertaking is completely, and not culpably, unaware that what it is doing is open to criticism and if it fully corrects its behaviour and the consequences of its behaviour, is it deemed not to have committed an abuse. The Commission finally observes that Hugin must certainly have known that it was forcing Liptons to stop maintaining Hugin machines, as this was its purpose. In this respect the present case is distinguished from the *Vegetable Parchment* case.

As to the aggravating circumstances, the Commission states that if Liptons had rights under Community law, they could not be ended by any contract between Hugin GB and Hugin UK. In the Commission's view Liptons could not have foreseen that Hugin would treat it as qualified to maintain Hugin machines at one time and unqualified shortly afterwards.

In the Commission's opinion the fine is small in view of the substantial losses to Liptons and the corresponding benefits to Hugin and also Hugin's turnover.

In order to obtain spare parts Liptons was compelled to dismantle cash registers worth £9 000. The increase in Liptons' income from renting Hugin machines, from £2 170 in 1970 to £2 626 in 1975, is in fact a decline in real terms taking inflation into account. The percentage of Liptons' income from renting out Hugin machines fell from 62% to under 6% over the same period. The extent of the damage done by Hugin is certainly not to be measured only by the damage to Liptons, as all other independent maintenance companies which could have maintained Hugin machines have also been deprived of the chance to compete for that business.

IV — Oral procedure

A — 1. The Court asked Hugin what evidence there was for its claim that from September 1971 Liptons was kept informed by Hugin GB of the discussions with Hugin AB and the consequences to which those negotiations might lead for Liptons.

Hugin replied that on two occasions after the stated date Mr D. Pope, Managing Director of Hugin GB, drew the attention of Mr Lipton to the possible consequences. Hugin further replied that a draft distributorship agreement was presented to Mr Lipton on 14 April 1972.

2. The Court asked the Commission to give a more detailed explanation than that in its decision on the question why Liptons did not accept the offer of

Hugin UK, made in April 1972, to appoint it as distributor of Hugin machines for the geographical area of London.

The Commission replied that acceptance of that offer by Liptons would have involved a significant reduction of Liptons' sales territory for Hugin cash registers and of its profit on those machines.

3. The Court further invited the Commission to reply to the following question:

"Why did not Liptons accept Hugin's offer, made in September 1972, to seek an arrangement with regard to the delivery of spare parts intended for reconditioning 'trade-in' machines?"

According to the Commission Liptons did not accept Hugin's offer because it was an offer of only one consignment of spare parts whereas Liptons needed a continuing supply of spare parts.

4. In reply to a further question by the Court the Commission supplemented the information contained in its decision relating to Lipton's turnover stating in particular, for 1972 and subsequent years, its revenue from the sale and repair of cash registers divided up according to the makes of the machines.

5. The Court also asked the Commission whether Liptons has ever experienced difficulties in obtaining spare parts for the repair — as contrasted with the reconditioning — of apparatus of NCR, Sweda or Chubb Electronics manufacture and what quantities were purchased, if any.

The Commission replied that Liptons has never had any such trouble for NCR and Sweda cash registers, but that Liptons

does not repair Gross cash registers (Chubb Electronics). In this connexion the Commission gave details of Liptons' expenditure on the spare parts in question.

6. Finally, the Court invited the parties to give their views on the method of calculation indicated in a letter sent by Liptons to the Commission on 29 June 1978 which led to the finding in the decision that "Liptons dismantled Hugin cash registers to the value of £9 000 in order to use parts of these cash registers as spare parts for other machines".

Hugin observes in this connexion that it is clear from the letter that the machines dismantled by Liptons were "trade-in" second-hand machines.

In Hugin's view the figure of £9 000 corresponds to a fictitious cost not borne by Liptons, that is to say the cost of reconditioning such machines. Since the machines were not used for refurbishing but only for scrapping purposes, the cost of refurbishing is totally irrelevant in the context of this matter.

Hugin contends that the amount of loss which Liptons alleges that it suffered as a result of scrapping second-hand

machines is higher than the price at which it would have been able to buy those machines in new condition.

Hugin concludes that Liptons did not incur any real loss when purchasing and dismantling the second-hand machines concerned.

The Commission states that the figure of £9 000 is the average value of the cash registers referred to in the said letter when newly reconditioned. It adds that as no spare parts were available to refurbish those machines Liptons was compelled to dismantle them to use them for spare parts. As a result, the Commission declares, it is not possible to give an accurate estimate of the values of the machines as they stood immediately before they were dismantled.

B — The applicants, represented by W. van Gerven, and the Commission, represented by its Legal Adviser, J. Temple Lang, presented oral argument at the hearing on 13 March 1979.

C — The Advocate General delivered his opinion at the hearing on 2 May 1979.

Decision

1 By an application lodged on 24 February 1978 the Swedish company Hugin Kassaregister AB and its British subsidiary Hugin Cash Registers Ltd., hereinafter referred to jointly as "Hugin", seek primarily, the annulment of the Commission Decision of 8 December 1977 relating to a proceeding under Article 86 of the EEC Treaty (Official Journal, L 22 of 27 January 1978, pp. 23 to 35). In the alternative they seek the cancellation or reduction of the fine imposed on the two companies jointly by that decision.

- 2 Article 1 of that decision states that Hugin has infringed Article 86 by refusing to supply spare parts for Hugin cash registers to Liptons Cash Registers and Business Equipment Ltd, which has its registered office in London, as from 1 January 1973. It further states that Hugin Kassaregister AB has also infringed Article 86 by prohibiting its subsidiaries and distributors within the common market from selling such spare parts outside its distribution network. In the grounds for its decision the Commission states that Hugin occupies a dominant position within the meaning of Article 86, that it has abused that position and that trade between the Member States may be affected thereby.

Hugin's position on the market

- 3 As regards the question whether Hugin occupies a dominant position on the market the Commission takes the view that the facts of the case have shown that while Hugin has only a relatively small share of the cash register market — which is very competitive — it has a monopoly in spare parts for machines made by it and that consequently it occupies a dominant position for the maintenance and repair of Hugin cash registers in relation to independent companies which need a supply of Hugin spare parts. As regards the reconditioning of used machines and the renting out of such machines the Commission also takes the view that Hugin occupies a dominant position as regards cash registers of its own manufacture, since undertakings engaged in such activities depend on supplies of Hugin spare parts.
- 4 Hugin contests the validity of the Commission's findings on these various points. In its principal argument it states that the supply of spare parts and of maintenance services is certainly not a separate market but is an essential parameter of competition in the market for cash registers as a whole. It states that on that market after-sales service and the quality of repair and maintenance services, including the supply of spare parts, constitute such a significant competitive factor that Hugin runs those services at a loss.
- 5 To resolve the dispute it is necessary, first, to determine the relevant market. In this respect account must be taken of the fact that the conduct alleged against Hugin consists in the refusal to supply spare parts to Liptons and,

generally, to any independent undertaking outside its distribution network. The question is, therefore, whether the supply of spare parts constitutes a specific market or whether it forms part of a wider market. To answer that question it is necessary to determine the category of clients who require such parts.

- 6 In this respect it is established, on the one hand, that cash registers are of such a technical nature that the user cannot fit the spare parts into the machine but requires the services of a specialized technician and, on the other, that the value of the spare parts is of little significance in relation to the cost of maintenance and repairs. That being the case, users of cash registers do not operate on the market as purchasers of spare parts, however they have their machines maintained and repaired. Whether they avail themselves of Hugin's after-sales service or whether they rely on independent undertakings engaged in maintenance and repair work, their spare part requirements are not manifested directly and independently on the market. While there certainly exists amongst users a market for maintenance and repairs which is distinct from the market in new cash registers, it is essentially a market for the provision of services and not for the sale of a product such as spare parts, the refusal to supply which forms the subject-matter of the Commission's decision.
- 7 On the other hand, there exists a separate market for Hugin spare parts at another level, namely that of independent undertakings which specialize in the maintenance and repair of cash registers, in the reconditioning of used machines and in the sale of used machines and the renting out of machines. The rôle of those undertakings on the market is that of businesses which require spare parts for their various activities. They need such parts in order to provide services for cash register users in the form of maintenance and repairs and for the reconditioning of used machines intended for re-sale or renting out. Finally, they require spare parts for the maintenance and repair of new or used machines belonging to them which are rented out to their clients. It is, moreover, established that there is a specific demand for Hugin spare parts, since those parts are not interchangeable with spare parts for cash registers of other makes.

- 8 Consequently the market thus constituted by Hugin spare parts required by independent undertakings must be regarded as the relevant market for the purposes of the application of Article 86 of the facts of the case. It is in fact the market on which the alleged abuse was committed.
- 9 It is necessary to examine next whether Hugin occupies a dominant position on that market. In this respect Hugin admits that it has a monopoly in new spare parts. For commercial reasons any competing production of spare parts which could be used in Hugin cash registers is not conceivable in practice. Hugin argues nevertheless that another source of supply does exist, namely the purchase and dismantling of used machines. The value of that source of supply is disputed by the parties. Although the file appears to show that the practice of dismantling used machines is current in the cash register sector it cannot be regarded as constituting a sufficient alternative source of supply. Indeed the figures relating to Liptons' turnover during the years when Hugin refused to sell spare parts to it show that Liptons' business in the selling, renting out and repairing of Hugin machines diminished considerably, not only when expressed in absolute terms but even more so in real terms, taking inflation into account.
- 10 On the market for its own spare parts, therefore, Hugin is in a position which enables it to determine its conduct without taking account of competing sources of supply. There is therefore nothing to invalidate the conclusion that it occupies, on that market, a dominant position within the meaning of Article 86.

Hugin's conduct on the market

- 11 The Commission takes the view that Hugin abused its dominant position by refusing to supply spare parts to Liptons and, generally, to any independent undertaking outside its own distribution network. That practice, which results from Hugin's policy of restricting the maintenance and repair of Hugin cash registers to its own technical departments, is said to constitute an abuse in that its effect is to prevent users of Hugin machines from choosing freely the undertaking which is to service and repair those machines and in that it has the effect of excluding any competition, and in particular a substantial competitor, in the sector of the servicing, maintenance, repair, renting out and reconditioning of Hugin machines.

- 12 Hugin alleges that those statements are unfounded. In its view the practice in question did not substantially restrict competition and has not eliminated Liptons from the market or threatened its existence. That practice is, moreover, objectively justified by legitimate considerations relating to the commercial policy adopted by Hugin, which entails providing maintenance and repair services of the highest quality.
- 13 More particularly, Hugin states that it seeks to reserve maintenance and repair services to itself not as profitable operations in themselves but in order to maintain the good reputation for reliability of its cash registers in the face of competition from other makes which, it alleges, is evidenced by the fact that it maintains those services at a loss. Hugin explains, furthermore, that it is not engaged in the market in used cash registers or that of renting out cash registers and that it offered to supply Liptons with the spare parts it needed to recondition used machines. Nevertheless, in accordance with its commercial policy, Hugin wishes to reserve to its own technical departments the maintenance and repair of all Hugin cash registers, even those sold second-hand or rented out by independent undertakings.
- 14 In view of this dispute between the parties it is necessary, in this case, to examine first whether the condition laid down by Article 86 of the Treaty for the conduct in question to be covered by Community law is fulfilled. Article 86 stipulates that the prohibition laid down therein is applicable only in so far as the conduct regarded as an abuse of a dominant position occupied by an undertaking on the market may affect trade between Member States.

The effects on trade between the Member States

- 15 In its decision the Commission stated that "Liptons has been prevented from continuing to expand its business within a substantial part of the common market and is unable to purchase spare parts from other Member States". According to the Commission the distribution system practised by Hugin "has an appreciable effect on the structure of competition within the common market".
- 16 Hugin contests the validity of those statements. According to Hugin Liptons' activities do not extend beyond a single Member State and there does not really exist a market for spare parts extending beyond the territory of each Member State.

- 17 The interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the Treaty must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order.
- 18 For the purpose of applying these criteria to the facts in this case it is necessary to examine separately the effects on Liptons' commercial activities, on the one hand, and on trade in spare parts in general, on the other.
- 19 It is established that the centre of Liptons' activities is the London region and that, in any event, its commercial activities have never extended beyond the United Kingdom. As regards the future, there is no indication that Liptons envisages extending its activities beyond those geographical limits. That limitation is explained, moreover, by the particular nature of the activities in question. The maintenance, repair and renting out of cash registers and the sale of used machines cannot constitute profitable operations beyond a certain area around the commercial base of an undertaking. This characteristic is reflected in the structure of the undertakings concerned. It appears from the file that in the United Kingdom there exist large numbers of small, local undertakings which specialize in the provision of the services in question. There are grounds for believing that the commercial structure of this trade is the same in the other Member States in which Hugin also applies its policy of not supplying spare parts outside its own distribution network.
- 20 The conclusion to be drawn from these considerations is therefore that trade between Member States is not affected by the obstacles which Hugin's conduct places in the way of the activities of independent undertakings which specialize in the provision of maintenance services.

- 21 As regards the distribution of Hugin spare parts as a distinct commercial activity it is established that Liptons has tried in vain to obtain such parts from Hugin distributors in certain other Member States. Moreover, Hugin does not deny that its policy of not supplying spare parts outside its own network, whilst it does not involve a prohibition on exports, necessarily implies that the refusal to supply independent undertakings applies whatever the geographical location of the undertaking.
- 22 The question is, therefore, whether it may be assumed that trade between Member States in Hugin spare parts would exist if the market conditions were entirely free and not subject to restrictive practices such as those applied by Hugin in this instance.
- 23 It should be recalled in this respect that the value of the spare parts is in itself relatively insignificant. Accordingly they are not such as to constitute a commodity of commercial interest in trade between Member States, quite apart from the fact that an independent undertaking would derive no economic advantage from buying them from a Hugin subsidiary in another Member State rather than from the parent company. Indeed, it has not been alleged that Hugin applies differentiated prices on the various local markets. It is logical to suppose that an independent undertaking which could not obtain a spare part from the Hugin subsidiary established in its country would turn to the parent company, that is to say, in this instance, to a supplier based in a non-member country, rather than to a subsidiary in another Member State. If the latter course were followed it would constitute an exception rather than a normal commercial transaction.
- 24 In the present case Liptons turned to Hugin subsidiaries and distributors in certain other Member States precisely because Hugin's restrictive policy prevented it from satisfying its spare parts requirements through normal commercial channels. Its attempts to obtain spare parts in the other Member States can therefore not be regarded as an indication of the existence, whether actual or potential, of a normal pattern of trade between the Member States in spare parts. In other words, if Liptons had been able to obtain spare parts from a Hugin subsidiary in another Member State it

would have been because Hugin was willing to sell those parts outside its own distribution network. In such a case, however, it would be customary for Liptons to apply to the Hugin subsidiary in its own country rather than to a subsidiary in another Member State.

- 25 In those circumstances Hugin's conduct cannot be regarded as having the effect of diverting the movement of goods from its normal channels, taking account of the economic and technical factors peculiar to the sector in question.
- 26 It must therefore be concluded that Hugin's conduct is not capable of affecting trade between Member States. Consequently the Commission's decision does not satisfy all the conditions laid down by Article 86 of the Treaty. It must therefore be annulled.

Costs

- 27 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the Commission has failed in its submissions it should be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Annuls the Commission Decision of 8 December 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.132-Hugin/Liptons).

2. Orders the Commission to pay the costs.

Mertens de Wilmars	Mackenzie Stuart	Pescatore	
Sørensen	O'Keeffe	Bosco	Touffait

Delivered in open court in Luxembourg on 31 May 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber
Acting as President

**OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 2 MAY 1979¹**

*Mr President,
Members of the Court*

The proceedings in which I am today delivering my opinion concern a decision adopted by the Commission on 8 December 1977 in application of Article 86 of the EEC Treaty against Hugin Kassaregister AB (hereinafter referred to as "Hugin AB") and its British subsidiary company Hugin Cash Registers Ltd. (hereinafter referred to as "Hugin UK") concerning the abuse of a dominant position on the market.

Hugin AB, an undertaking founded in Stockholm in 1928 and wholly owned by the Federation of Swedish Consumers, Köoperativa Forbundet, manufactures

cash registers and similar equipment. In the common market the undertaking has a market share of 12% and in the United Kingdom, which is of particular relevance in the present case, it has a market share of 13% whilst the market shares of other manufacturers are 36, 15 and 13% in the common market and 34, 18 and 16% in the United Kingdom. The machines are marketed in some parts of the Community, namely in the United Kingdom, Belgium, Denmark, France and the Federal Republic of Germany, by subsidiary companies of Hugin AB and for the rest, in Ireland, Italy and the Netherlands, by general agents or main distributors with whom corresponding agreements were concluded for the years 1971 to 1976.

¹ — Translated from the German.