JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

15 December 2010 *

In Case T-427/08,

Confédération européenne des associations d'horlogers-réparateurs (CEAHR), established in Brussels (Belgium), represented by P. Mathijsen, lawyer,

applicant,

v

European Commission, represented initially by X. Lewis and F. Ronkes Agerbeek, and subsequently by F. Ronkes Agerbeek and F. Castilla Contreras, acting as Agents,

defendant,

* Language of the case: English.

supported by

Richemont International SA, established in Bellevue (Switzerland), represented by J. Ysewyn, lawyer, and H. Crossley, Solicitor,

intervener,

APPLICATION for annulment of Commission Decision C(2008) 3600 of 10 July 2008 rejecting the complaint lodged by the applicant in Case COMP/E-l/39097,

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and K. O'Higgins, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 3 February 2010,

gives the following

Judgment

Facts giving rise to the dispute

1 The applicant, the Confédération européenne des associations d'horlogers-réparateurs (European confederation for watch repairer associations; CEAHR), is a non-profit making association consisting of seven national associations of six Member States representing the interests of independent watch repairers.

2 On 20 July 2004, the applicant lodged a complaint with the European Commission (formerly the Commission of the European Communities) against several undertakings, including the intervener, active in the watch manufacturing sector ('the Swiss watch manufacturers'), alleging the existence of an agreement or a concerted practice between those manufacturers and the abuse of a dominant position resulting from their refusal to continue to supply spare parts to independent watch repairers.

3 By letter of 28 April 2005, the Commission communicated to the applicant its provisional position regarding the complaint ('the provisional position document'). It stated that, following its investigation, it had found no evidence of the existence of a concerted practice or of an agreement between manufacturers of luxury watches. Furthermore, it took the view that there was no separate market in repair and maintenance services, but that the supply of those services was a feature of the highly

competitive luxury watch market. Consequently, it concluded that the facts set out in the complaint did not infringe Articles 81 EC and 82 EC.

4 By letter of 20 July 2005, the applicant sent to the Commission its observations in response to the provisional position document, in which it maintained that the Swiss watch manufacturers' refusal to continue to supply spare parts constituted an infringement of the Community competition rules.

5 By letter of 13 December 2007, the Commission informed the applicant that, pursuant to Article 7(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), after examination of the factual and legal elements put forward by the applicant in its complaint and its other observations, the Commission maintained its preliminary finding that there was insufficient Community interest in continuing the investigation into the alleged infringements. By letter of 30 January 2008, the applicant replied to that letter, maintaining its initial position.

6 On 10 July 2008, the Commission adopted Decision C(2008) 3600, in which it rejected the complaint on the ground that there was insufficient Community interest in continuing the investigation into the alleged infringements ('the contested decision').

7 The Commission based its conclusion that there was insufficient Community interest on four main considerations.

8 Firstly, the Commission stated that the complaint concerned, at most, a market or market segment of a limited size, and thus its economic importance was also limited (contested decision, point 8).

9 Secondly, the Commission added that, on the basis of the information at its disposal, it was unable to conclude that an anti-competitive agreement or concerted practice existed between the Swiss watch manufacturers and that, in particular, it was unlikely that the selective distribution systems implemented by them were not covered by the block exemption granted by Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21) (contested decision, point 43).

10 Thirdly, the Commission stated that it had examined the primary market for luxury and prestige watches, as well as two after markets, namely the market for spare parts and the market for repair and maintenance services in connection with luxury and prestige watches, and had reached the *prima facie* conclusion that those two after markets did not constitute distinct markets and that, therefore, a dominant position did not appear to exist, with the result that the question of the existence of abuse was irrelevant (contested decision, point 44).

11 Fourthly, the Commission stated that, given its assessment of the alleged infringements, it appeared that, even if further resources were allocated to the investigation of the complaint, there would be little likelihood of establishing an infringement of the competition rules, and any such allocation of resources would therefore be disproportionate (contested decision, points 8 and 45). It added that, in any event, even if infringements of the Community competition rules could be established, the national competition authorities and courts, having jurisdiction to apply Articles 81 EC

and 82 EC, appeared to be well placed to deal with such infringements (contested decision, point 8).

Procedure and forms of order sought by the parties

12 By application lodged at the Court Registry on 24 September 2008, the applicant brought the present action.

13 By document lodged at the Court Registry on 27 January 2009, Richemont International sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By order of 30 March 2009, the President of the Fourth Chamber of the Court granted that leave to intervene.

14 The intervener lodged its statement in intervention and the other parties lodged their observations thereon within the prescribed periods.

15 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, it requested the parties to answer certain questions in writing and to produce certain documents. The parties complied with those requests within the time-limit set.

16 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 February 2010. At the hearing, the applicant requested that a passage from the Commission's answer to a written question put by the Court be removed from the file, claiming that it contained a line of argument which was

not related to the question asked and which, furthermore, was additional to the arguments put forward by the Commission in the contested decision, its defence and rejoinder.

17 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— order the intervener to pay the costs incurred by the applicant as a result of its intervention.

18 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

19 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs incurred by the intervener.

Law

20 The applicant advances five pleas in support of its action. The first plea is divided into two parts and alleges, first, an erroneous assessment of the existence of a Community interest and, second, illegalities in relation to the finding that the size of the market to which the complaint relates, and thus its economic importance, are limited. The second plea is based on an erroneous definition of the relevant market. The third and fourth pleas allege, respectively, an infringement of Article 81 EC and Article 82 EC. The fifth plea is based on a misuse of powers because of an over-late reliance on the lack of Community interest, a distortion of the content of the complaint and a lack of objectivity in the Commission's investigation.

21 It should be noted that the grounds for the Commission's conclusion that there was insufficient Community interest in continuing to examine the complaint are disputed by the applicant not only in the context of its first plea, but also in its second, third and fourth pleas. Therefore, the Court deems it useful to examine, first of all, the second part of the first plea, concerning the size of the market to which the complaint relates and its economic importance, and not to examine the first part of that plea, concerning the existence of sufficient Community interest, until it has ruled on the merits of the second, third and fourth pleas.

1. *The size of the market to which the complaint relates and its economic importance*

Arguments of the parties

22 The applicant submits that the Commission stated, in point 8 of the contested decision, in support of its conclusion that there was insufficient Community interest in continuing the investigation, that the complaint concerned only a market (segment) 'of a limited size and thus its economic importance [was] also limited'. It failed, however, to identify that market, to quantify its size and to describe its economic importance, thereby infringing its duty to give reasons. Similarly, the Commission failed to take account of the fact, pointed out by the applicant during the administrative procedure, that independent watch repairers in the 27 Member States are affected by the practices of Swiss watch manufacturers and that such practices pose a threat to the very existence of an entire profession of craftsmen.

23 The Commission, supported by the intervener, contends that the full analysis and reasoning of its position on the lack of sufficient Community interest is set out not only in the introductory part to the contested decision criticised by the applicant, but also throughout the contested decision, and in particular in points 12 to 26. In those points the contested decision clearly states which is the relevant primary market (the market for luxury/prestige watches) and which are the after markets (the maintenance and repair services market for luxury/prestige watches and the market for spare parts for such watches).

24 The Commission adds that the finding in point 8 of the contested decision that the market is of a limited size and, consequently, its economic importance is also limited, is supported by the statement in that same point that it is apparent from the

information which it received that 'the after-sales services related to luxury/prestige watches amounts only to [an] insignificant part of [the] general turnover achieved in the sale of luxury/prestige watches, whereas it must be borne in mind that [those watches] constitute only a certain segment of [the] total watches market'.

25 The Commission adds that the allegations of a failure to state reasons is a consequence of the applicant's disagreement with its definition of the relevant market. In the Commission's view, the two after markets must be considered together with the primary market, that is to say the market for luxury/prestige watches (contested decision, point 16), to which they are closely related. The contested decision made clear that, since the primary market is competitive, the after markets are likewise competitive (contested decision, point 18), with the result that there was no need to determine the size and economic importance of the after markets since these are not the only markets on which competition is assessed. The fact that the applicant does not agree with that market definition does not mean that the contested decision does not adequately state the reasons on which it is based in that respect.

Findings of the Court

26 According to the case-law, the Commission, entrusted by Article 85(1) EC with the task of ensuring the application of Articles 81 EC and 82 EC, is responsible for defining and implementing the competition policy of the European Union and for that purpose has a discretion as to how it deals with complaints (Case T-193/02 *Piau* v *Commission* [2005] ECR II-209, paragraph 80, and the judgment of 12 July 2007 in Case T-229/05 *AEPI* v *Commission*, not published in the ECR, paragraph 38).

27 When, in the exercise of that discretion, the Commission decides to assign different priorities to the examination of complaints submitted to it, the Commission may not only decide on the order in which they are to be examined but also reject a complaint on the ground that there is an insufficient Community interest in further investigation of the case (Case T-62/99 *Sodima* v *Commission* [2001] ECR II-655, paragraph 36; see, to that effect, Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraphs 59 and 60).

28 The Commission's discretion is not unlimited, however. It must take into consideration all the relevant matters of law and of fact in order to decide on what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention (see Case C-450/98 P *IECC* v *Commission* [2001] ECR I-3947, paragraph 57 and the case-law cited). Similarly, it is under an obligation to state reasons if it declines to continue with the examination of a complaint, and those reasons must be sufficiently precise and detailed to enable the Court effectively to review the Commission's use of its discretion to define priorities (Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraphs 89 to 91, and *Sodima* v *Commission*, cited in paragraph 27 above, paragraphs 41 and 42).

29 In the present case, the Commission found as follows in points 8 and 9 of the contested decision:

'8 In particular, the Commission observes that the complaint concerns at most the market (segment) of a limited size and thus its economic importance is also limited. It is true that despite having sent several questionnaires to watch manufacturers, it proved to be difficult to obtain precise statistics and figures concerning the size of the markets complained about — whether primary or secondary. However, from the information received by the Commission, it is immediately apparent that the size of the after-sales services related to luxury/prestige watches amounts only to [an] insignificant part of the general turnover achieved in the sale of luxury/prestige watches, whereas it must be borne in mind that "luxury/

prestige watches" constitute only a certain segment of [the] total watches market. Moreover, the *prima facie* assessment of the complainant's submissions has not provided any reliable information on the basis of which it would be possible to conclude at this stage that there are likely infringements of competition law in this case. It also seems unlikely that such infringements would be found after devoting further investigatory resources. Finally, even if it was possible to establish infringements in the present case, national competition authorities or national courts appear to be well placed to investigate and deal with such infringements. They have the power and the obligation to apply Articles 81 [EC] and 82 [EC].

9 Consequently, in light of the above considerations devoting the Commission's scarce resources to continue investigating the case appears to be disproportionate. As a result, the Commission has come to the conclusion that the complaint must be rejected for lack of Community interest on grounds derived from limited impact of possible effects of the alleged infringements on the functioning of the common market, complexity of the investigation required and limited likelihood of establishing proof of infringements.'

30 In the first place, it is necessary to examine the applicant's complaint that the Commission failed to take account of the fact, raised in the complaint, that the practices referred to therein concern the entire territory of the European Union.

31 It should be noted that the applicant's statement, in its complaint, regarding the geographical extent of the practices concerned was not disputed by the Commission in either the provisional position document or in the contested decision. In addition, at the hearing, the Commission admitted that it was in possession of information

indicating that those practices existed in 'five or six Member States' and that it could neither confirm nor deny that such practices also existed in other Member States.

32 Furthermore, the Court considers that the extent of the territory concerned is necessarily relevant for the size of the market or markets concerned by the complaint and for the economic importance of that or those markets. In addition, the importance of that factor put forward by the applicant in its complaint is reinforced, in the present case, by the fact that it clearly indicates that the complaint does not concern a local market, but a market which covers, or markets which cover, the territory of at least five Member States, or possibly even the entire territory of the European Union.

33 Thus, by failing to take note of that aspect in its assessment of the size of the market concerned and of its economic importance, the Commission infringed its obligation to take into consideration all the relevant matters of law and of fact and to consider attentively all the matters of fact and of law which the applicant brought to its attention (see the case-law cited in paragraph 28 above).

34 In the second place, it is necessary to examine the applicant's complaint alleging that the Commission insufficiently grounded its conclusion, in the contested decision, concerning the limited size of the market to which the complaint relates.

35 Firstly, in so far as concerns the identity of the market to which that conclusion relates, the contested decision contains, as the Commission points out, more precise findings in respect of the markets examined, particularly in point 15 thereof. The Commission stated in that point that it had undertaken its investigation on the assumption that 'the luxury/prestige watches market [was] a separate (relevant) primary market' and that it had therefore 'examined the market for luxury/prestige watches as the primary market, as well as two after-markets - one for the repair and maintenance [services] of luxury/prestige watches, and one for spare parts for [such] watches.' It

is also apparent from the contested decision that the Commission worked on the assumption that the two after markets did not constitute independent relevant markets, but had to be considered together with the primary market, that is to say the market for luxury/prestige watches.

36 In that regard, the Commission affirmed at the hearing, in response to a question put by the Court, that its finding concerning the limited size of the market (segment) at issue in the complaint concerned the market for luxury/prestige watches, since the Swiss watch manufacturers at issue in the complaint produce only such watches.

37 However, it should be noted that, in point 3 of the contested decision, the Commission itself stated that, according to the applicant's claims, its complaint concerned a restriction of competition 'on the market for … [watch] repair and maintenance [services]'.

38 Next, the second sentence of point 8 of the contested decision refers to several markets to which the complaint relates, since the Commission states in that point that it 'proved to be difficult to obtain precise statistics and figures concerning the size of the markets complained about — whether primary or secondary'. That statement stands in contrast to the use of the singular in the first sentence of that point, according to which 'the complaint concerns at most the market (segment) of a limited size'.

39 Accordingly, it is impossible for the Court to establish with certainty whether the Commission's finding concerning the limited size of the relevant market(s) relates to the market for luxury/prestige watches, the watch repair and maintenance services market for such watches or both of those markets.

40 Secondly, the contested decision does not contain any figures or estimates relating to the size of those markets, nor, for that matter, to the size of the market for watches in general or the market for spare parts. The Commission bases its conclusion that the market for luxury/prestige watches and/or the repair and maintenance services market for such watches are of limited size on the sole argument that the market for luxury/prestige watches is more limited than the market for watches in general and that the size of the after market for such watches is even more limited than that of the market for luxury/prestige watches.

41 In the absence of an absolute point of reference, which could be in the form of figures or estimations concerning the size of at least one of those markets, the mere references to the relative sizes of those markets in comparison to the others do not enable the Court to assess the accuracy of the finding that the complaint concerns, at most, a market of limited size and, thus, the economic importance of that market is also limited.

42 In addition, the Commission admitted at the hearing that that finding was not based on exact figures.

43 Therefore, the Commission did not provide sufficient grounds for its statement that the complaint concerns, at most, a market (segment) of a limited size and consequently of a limited economic importance.

44 The other considerations mentioned by the Commission in the contested decision and raised before the Court are not such as to call that finding into question.

45 Firstly, the Commission's observation, in point 8 of the contested decision, regarding the difficulties in obtaining information concerning the size of the markets to which the complaint relates cannot support its position. There was no rule of law requiring the Commission to determine the size of the market or markets to which the complaint relates. By contrast, since it decided to rely on the finding that 'the complaint concern[ed] at most the market (segment) of a limited size and thus its economic importance [was] also limited' to justify its position that there was insufficient Community interest in continuing the investigation of the complaint, the Commission had a duty to give sufficient reasons for that finding.

46 Secondly, the Commission's argument that it considered in the contested decision that the after markets had to be examined together with the primary market for luxury/prestige watches cannot affect the Court's finding, in paragraph 43 above, in relation to the lack of sufficient grounds. The Commission also failed to provide figures or estimations relating to the combined size of all those markets.

47 Thirdly, the Commission's finding in the contested decision that, essentially, the after markets are competitive since the primary market is competitive has no effect on the reasoning given for its finding in relation to the limited size of the market (segment) to which the complaint relates, since the finding that the size of the market is limited cannot be inferred from the fact that it is competitive.

48 In addition, although it is true that, to a large extent, the Commission founded its conclusion relating to the low probability of establishing an infringement of the Community competition rules on its finding concerning the competitive nature of the market for luxury/prestige watches, the fact none the less remains that, as is apparent from point 8 of the contested decision, in the broad logic of its reasoning seeking to establish the lack of sufficient Community interest, the finding that the size of the market (segment) to which the complaint relates is limited constitutes a ground which is independent of the finding concerning that competitive nature.

49 Accordingly, the applicant's complaints relating to the limited size and economic importance of the market (sector) to which the complaint relates must be upheld. Consequently, the Court holds that the Commission infringed not only its duty to give reasons but also its duty to take into consideration all the relevant matters of law and of fact and to consider attentively all of those matters which the applicant brought to its attention.

2. *The definition of the relevant market*

Arguments of the parties

50 The applicant submits that the Commission wrongly rejected the definition of the relevant market which it had proposed in its complaint and maintained throughout the administrative procedure, namely the 'maintenance and repair services market for watches worth repairing'.

51 In the first place, by substituting the phrase 'luxury/prestige watches' for 'watches worth repairing', the Commission artificially modified the scope of the complaint, in particular in point 12 of the contested decision. It thus tried to reduce the market examined to a small segment of the market in question, which made it easier for it to conclude that the size of the market or market segment concerned was insignificant. The definition of the market as being the market for 'luxury/prestige watches' is not supported by any of the documents sent to the Commission and is pure invention on its part.

52 In the second place, the applicant submits that the Commission refers to the 'product' market and to the 'luxury/prestige watch market', despite the applicant's repeated assertions during the administrative procedure that that product market is of no direct interest to independent watch repairers.

53 Next, the Commission wrongly took the view, in points 17 and 18 of the contested decision, that the repair and maintenance services market did not constitute a 'separate relevant market', but rather had to be 'viewed together with the primary market'. By confusing those markets and claiming that there was competition on the product market, the Commission wrongly concluded that competition likewise existed on the services market.

54 The applicant also disputes the Commission's finding that 'the spare parts market' for luxury/prestige watches does not constitute a separate relevant market. As far as points 24 and 25 of the contested decision are concerned, it states that the Commission bases its statements that the 'spare parts market' is not the relevant market, first and foremost, on the fact that consumers could switch to the secondary products of another manufacturer. However, this substitutability exists only in the case of spare parts for movements manufactured by the company ETA, found in most Swiss watches, precisely because those movements, and the compatible spare parts, are

manufactured by a separate company from the manufacturers against which the complaint was directed. By contrast, other spare parts are specific to each Swiss watch producer, and there is no substitutability between parts designed for one manufacturer's watches and those designed for another's. Accordingly, the provision of maintenance and repair services depends entirely on the supply of spare parts from the manufacturer concerned, who therefore has a monopoly.

55 Finally, the applicant disputes the Commission's statement in point 26 of the contested decision that 'the spare parts market' is not a relevant market if it is possible for the consumer to switch to another primary product. According to the applicant, even if it is possible for the consumer to switch to another brand on the watch market, the Commission fails to demonstrate that the owner of a Swiss watch would switch to another brand, and the Commission's reference to this point is therefore irrelevant.

56 In the first place, the Commission contends that its investigation showed that repair and maintenance services and the supply of spare parts constituted an after market separate from the primary watch manufacturing market.

57 Next, the Commission points out that it stated in point 14 of the contested decision that it was not possible to define the market accurately on the basis of the information it had at its disposal. It therefore assumed (contested decision, point 15), even though it had doubts in this regard (contested decision, point 14), that the primary market for luxury/prestige watches constituted the relevant market, together with the related repair and maintenance and spare parts after markets.

58 Notwithstanding the difficulties in defining the market, the Commission found no evidence of the existence of any agreement or concerted practice between the undertakings referred to in the complaint. It also found that the undertakings against which the complaint was brought did not collectively hold a dominant position because of the strong competition that existed between them (contested decision, point 40). Consequently, it was legitimately able to conclude that it had not found any evidence of the existence of an infringement of the competition rules on any market, however defined.

59 In the second place, the Commission disputes the argument advanced by the applicant that it was wrongly found in the contested decision that the market for 'watch maintenance and repair services' does not constitute a separate market but must be viewed together with the primary market.

60 The Commission could legitimately establish a link between the primary market of the manufacture and sale of luxury watches and the two after markets (see, inter alia, contested decision, point 18). The applicant merely expresses its disagreement with the Commission's assessment but does not adduce any evidence or arguments to demonstrate how that assessment is erroneous.

61 According to the Commission, the conclusion which it reached in the contested decision with respect to the relevant market is based both on the information provided by the applicant in its complaint and on the results of its own investigation. Furthermore, it makes reference in the contested decision to specific data concerning the relevant product market, in particular in relation to the maintenance and repair after market, on the one hand, and the spare parts after market, on the other hand (contested decision, points 19 to 26 and footnotes 15, 18, 19 and 20).

62 The intervener contends that the Commission was entitled to conclude, in point 22 of the contested decision, that the cost to the customer of after-sales services over the lifetime of the watches was minor in comparison with the initial cost of the watch itself and was considered by the consumer as a relatively inconsequential element of the overall price. The intervener's experience shows that the service and repair costs are not of immediate and primary concern to the purchaser of a watch. At the same time, the after-sales services for high-quality, highly technical branded watches have specific characteristics which must be taken into account. Each watch is composed of a very high number of components and these components are different for each watch model. The skills, expertise and tools required to repair such watches are thus very substantial.

63 Furthermore, the intervener submits that it is of utmost importance for each brand that the quality of the after-sales service and the repair work is high, as consumers perceive such services as part of the quality of the watch itself. In the intervener's experience, this can be ensured only through extensive training, equipment, guidance and control requiring significant investment on its part.

64 The intervener therefore endorses the Commission's view that the after markets for repair and spare parts are not distinct downstream markets. Rather, they are ancillary parts of, and wholly dependent upon, the highly competitive primary market.

Findings of the Court

65 According to settled case-law, review by the Courts of the European Union of the Commission's exercise of the discretion conferred on it in this regard must not lead them to substitute their assessment of the Community interest for that of the Commission, but focuses on whether the contested decision is based on materially incorrect facts, or is vitiated by an error of law, manifest error of appraisal or misuse of powers (Case T-115/99 *SEP* v *Commission* [2001] ECR II-691, paragraph 34, and *Piau* v *Commission*, cited in paragraph 26 above, paragraph 81).

66 Similarly, in so far as the definition of the relevant market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the Courts of the European Union (see, to that effect, Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 482, and Case T-151/05 *NVV and Others* v *Commission* [2009] ECR II-1219, paragraph 53).

67 The concept of the relevant market in fact implies that there can be effective competition between the products or services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned (see, to that effect, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 28, and Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 80). The interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37, and Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 91).

68 It is also apparent from the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, paragraph 7) that '[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

69 According to that notice, the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small but lasting change in relative prices and evaluating the likely reactions of customers to that increase. In point 17 of the notice, the Commission states:

'The question to be answered is whether the parties' customers would switch to readily available substitutes … in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes … are included in the relevant market.'

70 In addition, point 56 of the notice states:

'There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article [82 EC]. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the

primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.'

71 In the present case, the Commission stated, before making its *prima facie* assessment of the existence of the anti-competitive practices complained of (contested decision, points 27 to 42), that it was working on the assumption that there was a primary product market, namely the market for luxury/prestige watches, as well as two after markets – one for the repair and maintenance of luxury/prestige watches, and one for spare parts for such watches (contested decision, paragraph 15). On the basis of its *prima facie* assessment it considered that the two after markets did not constitute separate relevant markets, but should be viewed together with the primary market (contested decision, point 17).

72 The applicant essentially puts forward two complaints in respect of those findings. First, it considers that the Commission wrongly substituted the phrase 'luxury/prestige watches' for 'watches worth repairing', which it had used during the administrative procedure. Second, it submits that the Commission wrongly considered that the watch repair and maintenance services market and 'the spare parts market' did not constitute separate markets, but had to be examined together with the luxury/prestige watch market. It also maintains that spare parts which are specific to a given brand are not substitutable, with the result that every producer holds a monopoly in respect of the specific spare parts which it produces.

The first complaint, alleging an erroneous substitution of the phrase 'luxury/prestige watches' for 'watches worth repairing'

73 As regards the applicant's first complaint, it must be noted, first of all, that the applicant itself stated, on page 5 of its complaint, that the demand for watch spare parts exists only 'for expensive watches', given that cheaper watches are simply replaced by a new one when they stop working. Second, in its letter of 30 January 2008, the applicant states that the watches concerned cost between EUR 1 500 and EUR 4 000 when bought 'new', whereas, according to an expert cited by the Commission in the provisional position document, the essential function of a watch, namely to tell the time, is fully and accurately served by a watch costing around EUR 25.

74 Since the price of the watches in the range referred to by the applicant is 60 to 160 times higher than the price of the cheapest watches which still serve their main function and do so reliably, the Court considers that the Commission did not err in finding that the watches concerned by the complaint of are 'luxury/prestige watches'.

75 Accordingly, the applicant's first complaint must be rejected.

The second complaint, alleging a failure to examine separately the watch repair and maintenance services market and the market for spare parts

76 By it second complaint, the applicant criticises the fact that the Commission did not treat the watch repair and maintenance services market and the market for spare parts as separate relevant markets, but examined them together with the market for luxury/prestige watches as a whole. In addition, the applicant complains that the Commission failed to take account, in the contested decision, of the fact that spare parts which are specific to a given brand are not substitutable.

77 As regards those after markets, the Commission made the following general findings in the contested decision:

'(d) Aftermarkets

(17) As explained in paragraph 15 above, the Commission has examined two aftermarkets - one for after-sales services (repair and maintenance) and one for spare parts, both these markets being considered as standard examples of aftermarkets. The *prima facie* assessment of the situation on both the primary market for the production and sales of luxury/prestige watches and the after-markets leads to the conclusion that the aftermarkets should not be considered as the separate relevant product markets, but should be viewed together with the primary market...

(18) Moreover, even if they were to be regarded as separate relevant markets, the fact that the primary market appears to be competitive makes possible anti-competitive effects very unlikely. In particular, price increases in the aftermarkets tend to be unprofitable due to their impact on sales in the primary market, unless prices in the primary market are lowered to offset the higher aftermarket prices. Consequently, competition in the primary market is very likely to ensure that the overall price of the bundle of goods and services on both primary and aftermarkets is competitive (even if customers did not base their choice on accurate life cycle calculations).'

— The assessment of the market for spare parts

78 It is first necessary to examine the Commission's finding that the market for spare parts for luxury/prestige watches does not constitute a separate relevant market. In that regard, the Commission considered the following:

'(ii) Components and spare parts for luxury/prestige watches

(23) As mentioned before, the luxury/prestige watch components aftermarket seems to be dependent on the primary market for luxury/prestige watches and closely linked to it. This is contrary to the conclusions drawn by [the applicant] who believes that the spare parts market is a distinct market in the present case...

(24) Furthermore, the Commission took into consideration that an aftermarket consisting of the secondary products (spare parts) of one brand of primary product may not be a relevant market in two situations. Firstly, if it is possible for a consumer to switch to the secondary products of another producer; secondly, if it is possible for him to switch to another primary product and thus avoid higher prices in the aftermarket. In the present case it is apparent that consumers are not locked-in without having an option to shift to another primary or secondary product.

(25) Where it comes to the possibility to switch to the secondary products of another producer, it must be noted that [the applicant] has not managed to provide a full, clear-cut and consistent explanation of the extent of and limitation on substitutability of spare parts for luxury/prestige watches.

(26) However, as for the possibility to switch to another primary product, potential luxury/prestige watches purchasers are fully free to choose among numerous available luxury/prestige watch brands which compete with each other. As for the customers who already own luxury/prestige watches, it is in principle possible to switch to another primary product, mainly due to the fact that many luxury/prestige watches may have high residual values on numerous second-hand markets and the switching costs do not involve any investments, such as training, changing routines, installations, software, etc. making the switch even easier. In view of the above, it turns out that consumers are equipped with a wide scope of possibilities to shift, without incurring extraordinary costs, between primary products.'

79 Thus, according to the general finding in point 24 of the contested decision, the spare parts market for primary products of a particular brand may not be a separate relevant market in two situations: first, if it is possible for a consumer to switch to spare parts manufactured by another producer; second, if it is possible for the consumer to switch to another primary product in order to avoid a price increase on the market for spare parts.

80 The applicant does not dispute that general finding as such. In addition, the Court considers that that finding is compatible with the case-law cited in paragraph 67 above and with the notice on the definition of relevant market, provided however that it is shown that, in the event of a moderate and permanent increase in the price of secondary products, a sufficient number of consumers would switch to other primary or secondary products, in order to render such an increase unprofitable.

81 Therefore, it is necessary to examine the considerations set out by the Commission in the contested decision relating to the application of the test which it sought to establish in point 24 of that decision.

82 It should be noted at the outset that, even if elsewhere in the contested decision the Commission regarded the 'market for spare parts' as a single after market (see in particular points 17 and 23 of the contested decision), in point 24 of that decision it examined the situations in which a 'market for [spare parts] for one brand of primary product' might not constitute a separate relevant market.

83 Therefore, it must be observed that points 24 to 26 of the contested decision refer to two partially distinct parts of the definition of relevant market. First, there is the issue as to whether all spare parts for luxury/prestige watches form a single market, or constitute numerous markets, in which spare parts which are specific to a particular brand constitute separate markets. The factors related to that issue — the possibility for the consumer to switch to spare parts manufactured by other producers in order to avoid a price increase by a particular producer — are addressed by the Commission in point 25 of the contested decision. Second, there is the issue of whether the market for spare parts or the numerous markets for spare parts must be regarded as separate relevant markets or whether it is necessary to examine them together with the primary market for luxury/prestige watches as a single, unified relevant market. The factors related to that issue — concerning the possibility for the consumer to switch to another primary product in order to avoid a price increase for the spare parts of a particular producer — are examined by the Commission in point 26 of the contested decision.

84 In the first place, as regards the possibility for the consumer to switch to spare parts manufactured by other producers, it should be noted, at the outset, that for the purposes of the case-law and the notice on the definition of the relevant market, cited in paragraphs 67 to 70 above, the issue of the existence of such a possibility and, thus, the issue as to whether there is a single market for spare parts or there are numerous spare parts markets specific to certain brands, depends primarily on the existence of a sufficient degree of substitutability of the spare parts manufactured by the various producers.

85 In that regard, it is apparent from the wording of the contested decision that the Commission chose to not expressly take a stance on the substitutability of the spare parts manufactured by the various producers, in so far as it merely stated, in point 25

of the contested decision, that '[the applicant] has not managed to provide a full, clear-cut and consistent explanation of the extent of and limitation on substitutability of spare parts for luxury/prestige watches'.

86 That approach stands in contrast to the provisional position document in which the Commission affirmed explicitly that, generally speaking, there is no substitutability between spare parts belonging to different brands because of the differences in size, design and other factors. Thus, according to the provisional position document, luxury/prestige watch manufacturers are the only suppliers of specific ranges of spare parts for their own brands.

87 Similarly, the intervener stated that the components of each watch were different and that a large number of the spare parts for its watches were not interchangeable with parts manufactured by other producers since they are not compatible with the primary products.

88 Furthermore, it is apparent from the file that, during the administrative procedure, the applicant produced copies of the decision of the Swiss competition authorities in Case ETA SA Manufacture horlogère suisse (Receuil des décisions et communications des autorités suisses de concurrence, 2005/1, p. 128) and of a provisional position, dated 12 July 2002, of the Netherlands competition authority concerning a complaint similar to the one lodged with the Commission. The Netherlands competition authority considered that 'the spare parts for the watches concerned [were] linked with the brand and [were] not substitutable', with the result that there were numerous markets, that is to say a market for specific spare parts belonging to each brand. The Swiss competition authority considered that the watch components compatible with a specific family of watches were not substitutable with components which are compatible with other families, with the result that the components and spare parts manufactured by ETA belonged to a number of relevant markets.

89 Irrespective of the question whether those factors needed to be taken into account by the Commission in the contested decision, or whether they are such as to cast doubt on the Commission's assessment, it should be noted that the possibility for the consumer to switch to spare parts manufactured by another producer in order to avoid an increase in the price of spare parts was in no way established in the contested decision. Consequently, the Commission was not entitled to base its decision on that hypothesis when defining the relevant market in the present case.

90 In addition, it cannot be ruled out that, if the Commission had decided to adopt a position as to the substitutability of the spare parts, it would have reached the conclusion, in particular on the basis of its assessment in the provisional position document and the factual elements contained in the decision of the Swiss competition authority and the provisional position of the Netherlands competition authority, that, generally speaking, there is no substitutability between the spare parts belonging to the different brands, with the result that there cannot be effective competition between those parts, at least in respect of the parts which are brand-specific.

91 In the second place, it is necessary to examine the Commission's finding that consumers may avoid price increases for spare parts by switching to another primary product.

92 First, according to the contested decision, such a possibility exists even if the consumer already owns a luxury/prestige watch, since that watch may have a high residual value on the second-hand market. In addition, that possibility is facilitated by the fact that it does not involve any training, changing routines, installations or software, inter alia.

93 It should be noted that, due to the complexity involved in repairing and maintaining watches, the demand for spare parts does not, in principle, come from watch users, but from specialists who provide those services. Therefore, from the point of view of the consumer, a price increase for spare parts is normally included in the price of those services.

94 Next, in its analysis which led to its conclusion that it was possible for the consumer to switch to another primary product, the Commission takes no account of its finding, in point 22 of the contested decision, that the cost of after-sales services over the life time of a watch is minor in comparison with the initial cost of a luxury/prestige watch itself, and that the consumer will consider such costs as a relatively minor element in the price of the overall package.

95 In that regard, it is apparent from the documents provided at the Court's request and the intervener's statements that the total cost of repair and maintenance services for those watches over a ten-year period remains, for the majority of models, less than 5 % of the purchase price of a new watch. Furthermore, the price of the spare parts is normally included in that cost, and thus represents an even lower percentage of the purchase price of the new watch. Accordingly, it is evident that a moderate price increase for spare parts remains a negligible sum in comparison to the price of a new luxury/prestige watch.

96 That factor is capable, in itself, of undermining the validity of the Commission's finding concerning the possibility for the consumer to switch to another primary product. The Commission does not show that the consumer could reasonably choose to switch to another primary product, with the aim of avoiding a price increase for repair and maintenance services resulting from a moderate price increase for spare parts, given

the fact that the purchase of another primary product would involve a substantially higher cost.

97 The Commission's reference to the existence of a market for second-hand watches cannot compensate for that omission in its assessment. It merely stated, in point 26 of the contested decision, that 'it is in principle possible to switch to another primary product, mainly due to the fact that many luxury/prestige watches may have high residual values on numerous second-hand markets'.

98 In that regard, the Commission does not claim that all, or even the majority of, luxury/prestige watches have a high residual value on the second-hand market. Thus, according to the contested decision, a sale of a luxury/prestige watch at a reasonable price on the second-hand market is just one eventuality. In addition, the Commission in no way examined the issue whether, even in the case of a sale on the second-hand market, the difference between the price received and the price paid for another watch – and thus the loss incurred by the consumer as a result of changing watch – is less than the amount which could be saved by avoiding a moderate price increase for spare parts of a certain brand.

99 It should be added that in order to sell a watch on the second-hand market the watch must, in principle, be in good condition. Thus, in principle, the consumer must have a watch repaired before selling it, and if not, it is the purchaser who has to pay the cost of such repairs, which would have repercussions, in any event, on the sale price received by the consumer. Therefore, the Commission's claim that the consumer may avoid a price increase for spare parts by selling his watch on the second-hand market and buying another watch is wholly implausible as any price increase for spare parts must be borne by the consumer in any event.

100 Finally, the Commission considers, in point 26 of the contested decision, that the cost of switching to another primary product does not involve any investment such as training, changing routines, installations or software, which makes such a switch even easier.

101 It should be noted, in that regard, that the Commission chose to consider the market for spare-parts from the point of view of the final consumer (the user of the watch). The use of such an item of consumer goods does not typically involve any investment in training, changing routines, installations or software. Thus, the Commission cannot validly claim that the fact that such investments are not necessary facilitates the switch to another primary product.

102 On the basis of the foregoing, it must be concluded that the Commission did not show, in point 26 of the contested decision, that consumers who already own luxury/prestige watches may reasonably switch to another primary product in order to avoid a price increase for spare parts. The factors raised by the Commission merely indicate a purely theoretical possibility of switching to another primary product, which is not a sufficient demonstration for the purposes of the definition of the relevant market. That definition is based on the concept that effective competition exists, which presupposes that a sufficient number of consumers would actually switch to another primary product in the event of a moderate price increase for spare parts in order to make such an increase unprofitable (see paragraphs 67, 69 and 70 above).

103 Second, it is also necessary to examine the effect of the statement, in point 26 and footnote 27 of the contested decision, that potential purchasers of luxury/prestige watches may chose freely between many existing brands of luxury/prestige watches which are in competition. In that regard, the Commission stated, at the hearing, that

the factors raised, in the contested decision, with regard to consumers already owning watches did not constitute the main basis of its conclusion relating to the definition of the relevant market. It submits that the reason why it is necessary to treat the primary market and the after markets as a single unified market ('system market') is that price increases on the after markets cause a shift in demand to products from other manufacturers on the primary market, which would render such an increase unprofitable.

104 The Court observes that this practice is compatible with the case-law, given that the definition of the relevant market is not to be assessed solely in relation to the objective characteristics of the products and services at issue, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (see paragraph 67 above).

105 However, it is apparent from the case-law cited in paragraph 67 above and the notice on the definition of the relevant market that to be able to treat the primary market and the after markets jointly, possibly as a single unified market or 'system market', it must be shown, in the scenario described by the Commission (see paragraph 103 above), that a sufficient number of consumers would switch to other primary products if there were a moderate price increase for the products or services on the after markets and thus render such an increase unprofitable (see also, to that effect, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 75). In other words, contrary to what the Commission suggests in point 26 and footnote 27 of the contested decision, the mere possibility for the consumer to choose from several brands on the primary market is not sufficient to treat the primary market and the after markets as a single market, unless it is established that that choice is made, among others, on the basis of the competitive conditions on the secondary market.

106 In the present case, the Commission has not shown, in the contested decision, that price increases of a specific producer on the after markets would have any effect on the volume of its sales on the primary market. On the contrary, it repeatedly stressed that the cost of repair and maintenance services (which includes the price of spare parts) is minor and insignificant in comparison to the initial price of the luxury/prestige watch itself (see paragraph 94 above). According to the Commission's statement in footnote 27 of the contested decision, that cost remains minor over the life of a luxury/prestige watch in comparison with the initial cost of the watch, with the result that it is unlikely that potential purchasers will calculate that cost over the life of the primary product. The Commission concludes, in that same footnote, that 'the consumer does not consider the cost of after-sales servicing as a criterion when choosing a watch'.

107 Accordingly, it is apparent from the foregoing that the Commission has not shown that consumers who already own a luxury/prestige watch may reasonably switch to another primary product in order to avoid a price increase for spare parts, or that, in general, the price of spare parts has an impact on competition between primary products. Consequently, it has not shown that a moderate price increase for spare parts by a particular producer would cause a shift in demand to watches from another producer, rendering such an increase unprofitable. Thus, it made a manifest error of assessment in examining them together as forming part of a single relevant market.

108 That conclusion is supported by the fact that, as is apparent from the decision of the Swiss competition authority in Case ETA SA Manufacture horlogère suisse, ETA is the largest manufacturer of components and spare parts for Swiss watches, including for luxury/prestige watches. However, ETA does not manufacture complete watches. According to the case-law, if certain economic operators are specialised and are active solely on the after market of a primary market, that constitutes in itself a strong indication of the existence of a specific market (see, to that effect and by analogy, *Hilti* v *Commission*, cited in paragraph 105 above, paragraph 67).

109 Therefore, it cannot be ruled out that, had that error not occurred, and had the Commission taken account of its finding in the provisional position document concerning the general lack of substitutability between the spare parts belonging to different brands, and the factors put forward by the applicant in that regard (see paragraphs 86, 88 and 89 above), it would have concluded that separate brand-specific markets for spare parts existed as a function of their substitutability.

— The examination of the market for repair and maintenance services

110 As regards the market for repair and maintenance services, it should be examined whether the Commission's conclusion, in point 17 of the contested decision, that that market should not be treated as a separate relevant market is justified by the grounds set out in points 19 to 22 of the contested decision.

111 The Commission stated as follows in those points:

'(i) After-sales maintenance and repair

(19) It is apparent that the natural evolution of the market, as it seems to be, consisting in the resurgence of demand for complex mechanical movements in the

luxury/prestige watches sector has led a majority of the luxury/prestige watch manufacturing groups to change their policy and to allow maintenance and repair of luxury/prestige watches only within their selective distribution system. Over [the] last 20 years, one by one, and depending on each individual manufacturer's focus on the luxury segment luxury/prestige watch manufacturers adopted this specific strategy to the provision of such after-sales services.

(20) The Commission notes that the watch manufacturers regard after-sales maintenance and repair as ancillary service to the distribution of watches which is demonstrated, inter alia, by the value of watch manufacturers' revenue on the said market. Such value is not significant and on average constitutes a small part of the total revenue obtained. Furthermore, the luxury/prestige watch manufacturers see the establishment of a consistent and uniform high-quality after-sales service network as an essential, customer-driven ingredient and as an integral and vital element of their competitive strategy on the primary market. According to the manufacturers, the value of the primary product to the customer would be diminished if its image were associated with anything other than brand-related state-of-the-art post-sales servicing, carried out either by the watch manufacturers themselves, or in approved service centres.

(21) When it comes to independent watch repairers, it appears that they are not always able to meet the quality-based selection criteria introduced by the watch manufacturers with respect to their authorised point of repairs … Moreover, according to some watch manufacturers, up to 30 % of repair work done in their after-sales services centres concern the damage caused by the inappropriate and wrongful repair executed by the watch repairers who do not possess proper knowledge and skills.

(22) It must be also noted that the product concerned is also specific in that the cost to the customer of after-sales services over the life-time of a luxury/prestige watch is minor in comparison with the initial cost of the watch itself, and will therefore be considered by the consumer as a relatively-minor element in the price of the overall "package".

112 First, it should be noted that (see paragraph 108 above), if certain economic operators are specialised and are active solely on the market linked to the primary market or on the after market, that constitutes in itself a strong indication of the existence of a specific market.

113 The applicant submitted, during the administrative procedure, that the fact that the independent watchmakers, which make up a profession, are not active on the watch market, but solely on the market for watch repair and maintenance services, in itself constitutes evidence of the existence of a separate market for those services. The Commission failed to take account of that strong indication submitted by the applicant.

114 Second, even if the circumstances in the present case are very specific in the light of the fact that both a product market and an after-sales services market are at issue, the Commission cannot disregard the case-law relating to the definition of the relevant market when it decides to consider the after market together with the primary market, possibly as a single relevant market.

115 With the exception of the indication that the cost of after-sales services is minimal in relation to the initial cost of a luxury/prestige watch, none of the considerations set out by the Commission in points 19 to 22 of the contested decision relates to the factors referred to in the case-law cited in paragraph 67 above, nor, furthermore, to those set out in the notice on the definition of the relevant market (see paragraphs 68 to 70 above).

116 In addition, the Commission did not carry out the analysis which it has deemed to be the most relevant in relation to the market or markets for spare parts, that is to say, *mutatis mutandis*, the analysis seeking to determine whether consumers may avoid a price increase for repair and maintenance services by switching to primary products from other manufacturers.

117 Third, it should be noted that, according to point 22 of the contested decision, the cost of after-sales services was minor in comparison with the initial cost of the watch itself and that, according to footnote 27 of that decision, 'the consumer [would] not consider the cost of after-sales servicing as a criterion when choosing a watch'.

118 Accordingly, in the light of those elements and in the absence of alternative evidence in the contested decision that account was taken of the criteria established by the case-law and the notice on the definition of the relevant market (cited in paragraphs 67 to 70 above), the Court considers that the Commission has failed to establish that a moderate price increase on the services market would cause a shift in demand on the

luxury/prestige watch market which could render such an increase unprofitable, nor that, in general, the price of services affects competition between primary products.

119 Consequently, the Commission was not entitled to conclude, on the basis of the findings which it set out in points 19 to 22 of the contested decision, that the market for watch repair and maintenance services did not constitute a separate relevant market but, on the contrary, had to be examined together with the market for luxury/prestige watches. Consequently, the Commission committed a manifest error of assessment in that regard.

120 Since the Commission's findings that the watch repair and maintenance services market and the market(s) for spare parts do not constitute relevant markets to be examined separately are vitiated by manifest errors of assessment, it is necessary to examine whether, in spite of those errors, the Commission was legitimately able to conclude that there was insufficient Community interest in continuing its investigation.

121 It is clear from the contested decision that the low probability of the existence of infringements of Articles 81 EC and 82 EC is one of the main reasons supporting the Commission's conclusion that there was no such interest. It is therefore necessary to examine whether the erroneous definition of the relevant market could have affected the Commission's findings in relation to the likelihood of the existence of infringements of the Community competition rules.

3. *Infringement of Article 81 EC*

Arguments of the parties

122 The applicant maintains that the Swiss watch manufacturers did indeed collude to eliminate independent watch repairers from the Community market in watch maintenance and repair services, thereby infringing Article 81 EC. In addition, it considers that the Commission erred in taking the view that the practice of refusing to supply spare parts to independent repairers constitutes a selective distribution system covered by the block exemption provided for in Regulation No 2790/1999.

123 With regard to points 27 and 28 of the contested decision, in which the Commission claims not to have found any evidence of a concerted practice, the applicant submits that the existence of this kind of practice is normally indicated not by hard proof but by circumstantial evidence. In this case, in the course of the administrative procedure the applicant furnished several pieces of evidence in this regard. It pointed out, firstly, that the majority of the Swiss watch manufacturers had interrupted their supply of spare parts within a particular period of time, secondly, that practically all the manufacturers against which the complaint was directed belong to well-organised 'groups' of manufacturers, and, thirdly, that all of them meet regularly to discuss questions of strategy as members of the Fédération Horlogère Suisse (Swiss Watch Manufacturer Association; 'FHS'). However, the Commission failed to take account of those factors and simply disputed the length of the period over which the Swiss manufacturers' actual refusal to continue to supply spare parts took place (contested decision, point 16). Even that finding by the Commission is unfounded given that the applicant supplied the Commission with a document showing the concentration in temporal terms of the contested refusals in a given Member State.

124 In any event, the applicant states that the Commission wrongly concluded that the practice in question could qualify for exemption from Article 81(1) EC, since the conditions laid down in Article 81(3) EC, as specified in Regulation No 2790/1999, are not met.

125 The Commission maintains that, as it explained in points 27 and 28 of the contested decision, in the course of its investigation it found no evidence of the existence of a concerted practice or an agreement between the luxury/prestige watch manufacturers. The applicant provided it with no reliable information on the basis of which it could have established an infringement of Article 81 EC. Quite the contrary, the primary market for watches appears to be competitive, a fact which the applicant does not dispute.

126 With regard to the document, submitted by the applicant concerning the concentration of the refusals in temporal terms, the Commission points out that that document was drawn up by the applicant itself, its source is not disclosed and it concerns one Member State only. Consequently, the document has little probative value. In any event, it shows the progressive refusal to supply spare parts for watches from 1985 to 2008, which reflects a natural development of the market.

127 The Commission maintains that the selective distribution system implemented by the Swiss watch manufacturers is compatible with the provisions of Regulation No 2790/1999, and that there is no evidence of the existence of practices contrary to Article 4(a) of that regulation. The fact that the Swiss watch manufacturers changed their practice by opting for a selective distribution system based on qualitative criteria is totally market-driven and responds to consumers' demands and the manufacturers' aim to guarantee better-quality services.

128 The intervener submits that the applicant's allegation concerning the concentration of refusals in temporal terms — extending over a period of 'about two years' prior to the lodging of the complaint — is materially inaccurate.

129 In addition, the intervener concurs with the Commission's finding that the quality of after-sales services provided by independent watch repairers is the subject of more complaints than the quality of repairs carried out by authorised retailers or the manufacturer itself.

Findings of the Court

130 First, as regards the applicant's complaint relating to an agreement between the Swiss watchmakers, it should be noted that the applicant has not established that the Commission's finding, in point 28 of the contested decision, that the applicant did not provide any evidence of a suspected agreement or concerted practice seeking to eliminate independent watchmakers from the watch repair and maintenance services market for luxury/prestige watches is vitiated by illegality.

131 In particular, the document entitled 'progression of refusals' shows that in 1985 only 3 brands refused to provide spare parts, in 1990 that number had risen to 5, in 1995 to 15, in 2000 to 35, in 2005 to 38 and, finally, in 2008 the number had risen to 50.

132 Therefore, even that document, which was drawn up by the applicant, tends to confirm the Commission's position that the progression of refusals was not the result of an agreement, but of a series of independent commercial decisions adopted by the Swiss watch manufacturers.

133 Second, the applicant submits that the practice of selective distribution of spare parts — entailing the refusal to provide those parts to independent watch makers and the prohibition on undertakings within the network from providing those parts to operators outside the network — is a practice which is contrary to Article 81 EC and cannot qualify for the block exemption provided for in Regulation No 2790/1999.

134 Article 2(1) of that regulation provides as follows:

'Pursuant to Article 81(3) [EC] and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements").

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1) ("vertical restraints")'.

135 According to Article 3 of that regulation, 'the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services.'

136 In addition, according to point 94 of the guidelines on vertical restraints (OJ 2000 C 291, p. 1):

'Where a supplier produces both original equipment and the repair or replacement parts for this equipment, the supplier will often be the only or the major supplier on the after-market for the repair and replacement parts... The relevant market for application of … Regulation [No 2790/1999] may be the original equipment market including the spare parts or a separate original equipment market and after-market depending on the circumstances of the case, such as the effects of the restrictions involved, the lifetime of the equipment and importance of the repair or replacement costs.'

137 The Commission concluded as follows, in point 33 of the contested decision, in that regard:

'… As explained before, the analysis made by the Commission for the purpose of current proceedings has led to the conclusion that the spare parts aftermarket is not to be viewed as a market distinct from the primary market. Consequently, an overall market power of a particular watch manufacturer must be assessed, and in particular its position and strength on the primary market is to be taken into consideration. Therefore, taking into account that none of the watch manufacturer[s] being subject to the complaint appears to have either a dominant position on the primary market, or its market share exceeds 30 %, it seems that they could benefit from the Block Exemption Regulation.'

138 It cannot be ruled out that, had the Commission not committed the manifest error of assessment found in paragraph 107 above, it might well have concluded that the spare parts specific to individual brands constituted separate relevant markets, depending on their substitutability.

139 However, the contested decision does not show that the market share of the Swiss watch manufacturers is also less than 30% on the markets for brand-specific spare parts.

140 Accordingly, in those circumstances it cannot be ruled out that, had the manifest error of assessment found in paragraph 107 above not taken place, and if the Commission had included in the contested decision its finding in the provisional position document that the manufacturers of luxury/prestige watches were the only suppliers of the specific ranges of spare parts for their own brands, it would have concluded that the exemption provided for in Regulation No 2790/1999 was inapplicable, in the light of Article 3 thereof.

141 In addition, in point 43 of the contested decision, under the heading 'Conclusion', regarding the low probability that the selective distribution systems infringe Article 81 EC, the Commission does not refer to any factor other than the applicability of the block exemption under Regulation No 2790/1999. Therefore, the Court considers that that factor was of decisive importance in that regard.

142 Consequently, it must be found that the manifest error of assessment found in paragraph 107 above also vitiates the Commission's conclusion concerning the low probability of an infringement of Article 81 EC.

4. *Infringement of Article 82 EC*

Arguments of the parties

143 The applicant submits, with regard to the Commission's findings in points 39 to 42 of the contested decision, that the Commission recognised in its provisional position document that each Swiss watch manufacturer holds a dominant position or a monopoly with respect to the spare parts specific to its brand. By refusing to continue to supply their spare parts, those producers have committed an abuse.

144 In the applicant's view, the fact that the Swiss watch market is, according to the Commission, a competitive market has no bearing on the state of competition on the repair and maintenance services market, which should have been considered to be a separate relevant market in this case. It observes that the latter market is no longer competitive, with the exception of a degree of residual competition between independent watch repairers and the Swiss watch manufacturers. The manufacturers' practice of refusing to continue to supply spare parts seeks to eliminate even that residual competition.

145 The Commission contends that, according to its analysis, the primary market is the watch market, on which the after market of watch spare parts is totally dependent. The watch market appears to be sufficiently competitive and there is no evidence of the existence of a collective dominant position on the part of the Swiss watch manufacturers, let alone of an abuse of a dominant position.

146 The intervener contends that it does not occupy a dominant position on the primary market. Similarly, the conditions required to establish a collective dominant position are lacking.

Findings of the Court

147 The Commission stated as follows in point 41 of the contested decision:

'… as far as aftermarkets are concerned, it has already been established that in the Commission's view it seems unlikely that they would constitute a market to be assessed on a distinct basis, and thus the question of dominance is not to be assessed on them separately from the primary market.'

148 In point 44 of the contested decision, under the heading 'Conclusion', the Commission stated as follows:

'… [the] analysis has lead to the *prima facie* conclusion that the aftermarkets in the present case do not constitute distinct markets, and therefore dominance, either collective or single, on the examined aftermarkets does not seem to exist. In the absence of dominance, the question of abuse lost its relevance.'

149 As has already been noted in paragraph 109 above, it cannot be ruled out that, had the manifest error of assessment found in paragraph 107 above not occurred, the

Commission might have concluded that, depending on their substitutability, the brand-specific spare parts constituted separate relevant markets.

150 It should be noted that the contested decision does not contain any analysis of the position which the Swiss watch manufacturers hold on the markets for spare parts specific to their own brands. Thus, in the contested decision, the Commission did not depart from its finding in the provisional position document that manufacturers of luxury/prestige watches were the only suppliers of specific ranges of spare parts for their own brands, nor did it adopt a position on the applicant's claim that the Swiss watch manufacturers held a dominant position on the markets for spare parts specific to their own brands.

151 Accordingly, it cannot be ruled out that, if that Commission had concluded that separate relevant markets existed, constituted by spare parts specific to brands, and had thus examined the position of Swiss watch manufacturers on those markets, it would have confirmed its finding in the provisional position document, namely that luxury/prestige watch manufacturers were the only suppliers of specific ranges of spare parts for their own brands. Therefore, it cannot be ruled out that it might have established, on that basis, that those manufacturers held a dominant position, or a monopoly, at the very least in respect of certain ranges of their spare parts which constitute relevant markets.

152 Given that the Commission based its conclusion that there was a low probability of an infringement of Article 82 EC on the fact that the Swiss watch manufacturers did not hold a dominant position, the manifest error of assessment committed in relation to the definition of the relevant market also vitiates that conclusion.

5. *The assessment of a sufficient Community interest in continuing the investigation*

Arguments of the parties

153 The applicant considers that the Commission's statements in point 9 of the contested decision relating to the limited impact of the alleged infringement on the functioning of the common market, the complexity of the investigation required and the limited likelihood of being able to prove infringements, are incorrect or, at the very least, unsupported by any evidence or arguments. In particular, it takes the view that the contention that the alleged infringements are of limited impact is incorrect given the prospect of the disappearance of a profession of craftsmen in the European Union.

154 The applicant also submits that, in point 14 of the contested decision, the Commission states that it 'is not convinced that the luxury/prestige watches market is a relevant (primary) market in [this] case', but this does not prevent it from taking that definition as the basis for its assessment. Similarly, having failed to define the relevant market, the Commission could not conclude, without committing an error of logic, that 'there [was] no indication that the functioning of the market [was] disturbed'.

155 The Commission also failed to take account of the fact that the anti-competitive conduct alleged concerns all Member States, and that it is therefore best placed to adopt measures to re-establish healthy competition within the common market. The applicant refers to the case-law on the question whether, by referring the complainant to the national courts, the Commission had taken account of the extent of the protection which national courts can grant. In this case, the decision of a single national

authority or court could not make good the impairment of competition, in particular since Swiss watch brands are not all represented in all the Member States.

156 The Commission refers to *Ufex and Others* v *Commission*, cited in paragraph 28 above (paragraph 79). It contends that the issue of whether there is sufficient Community interest in continuing the investigation must be judged under a balancing test. Applying that test, the Commission may properly conclude that a complaint lacks sufficient Community interest to be further investigated, based on a single factor or a combination of multiple factors. In view of the fact that the assessment of the Community interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment the Commission may refer to should not be limited, nor conversely should it be required to have recourse exclusively to certain criteria.

Findings of the Court

157 It is settled case-law that, where the Commission decides upon certain priorities in examining complaints brought before it, it may establish the order in which those complaints are to be examined and refer to the Community interest in a particular case as being a criterion for determining priority (*Tremblay and Others* v *Commission*, cited in paragraph 27 above, paragraph 60; see, to that effect, Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 83 to 85).

158 In order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case and, in particular, of the matters of law and fact set out in the complaint referred to it. In particular,

it must weigh the significance of the alleged infringement as regards the functioning of the common market against the probability of its being able to establish the existence of the infringement and the extent of the investigative measures necessary in order to fulfil, under the best possible conditions, its task of ensuring the observance of Articles 81 EC and 82 EC (see, to that effect, *Automec* v *Commission*, cited in paragraph 157 above, paragraph 86; *Tremblay and Others* v *Commission*, cited in paragraph 27 above, paragraph 62; and *Sodima* v *Commission*, cited in paragraph 27 above, paragraph 46).

159 In that regard, the Court must, inter alia, examine whether it is clear from the decision that the Commission weighed the significance of the impact which the alleged infringement may have on the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of ensuring that Articles 81 EC and 82 EC are complied with (see *Sodima* v *Commission*, cited in paragraph 27 above, paragraph 46 and the case-law cited).

160 In addition, the Court notes once more the case-law cited in paragraph 65 above, according to which review by the Courts of the European Union of the exercise by the Commission of the discretion conferred on it in this regard must not lead them to substitute their assessment of the Community interest for that of the Commission but focuses on whether the contested decision is based on materially incorrect facts, or is vitiated by an error of law, a manifest error of assessment or misuse of powers.

161 Finally, it should also be recalled that a manifest error of assessment is not sufficient to warrant annulment of the contested decision if, in the particular circumstances of the case, it could not have had a decisive effect on the outcome (Case T-60/05 *Ufex and Others* v *Commission* [2007] ECR II-3397, paragraph 77; see, to that effect, Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraphs 48 and 49). Similarly, in order to satisfy its duty to state reasons, it is sufficient

if the Commission sets out the facts and the legal considerations having decisive importance in the context of the decision (see Case T-211/05 *Italy* v *Commission* [2009] ECR II-2777, paragraph 68 and the case-law cited).

162 Therefore, it is necessary to examine the importance, in the context of the contested decision, of the considerations vitiated by a lack of reasoning (see paragraph 49 above), the Commission's failure to take account of the relevant factors, in spite of it's obligation to consider attentively all the matters of fact and of law which the complainant brings to its attention (see paragraph 33 above), and the manifest errors of assessment (see paragraphs 107 and 119 above), with a view to determining whether those illegalities could have affected the Commission's weighing of the significance of the alleged infringement on the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required.

163 In that regard, it should be noted that the Commission's finding concerning the insufficient Community interest in continuing its investigation is based on four essential considerations. First, the complaint concerns only one market or a segment of a market of limited size, with the result that their economic importance is also limited. Second, the Commission cannot conclude, on the basis of the documents at its disposal, that there was an agreement or concerted practice, and it is unlikely that the selective distribution systems put in place by the Swiss watch manufacturers are not covered by the block exemption provided for in Regulation No 2790/1999. Third, since the two after markets do not constitute separate markets, a dominant position does not appear to exist, with the result that the question of the existence of an abuse is irrelevant. Fourth, given the Commission's assessment of the alleged infringements, even if further resources were allocated to the investigation of the complaint, there would be little likelihood of establishing an infringement of the competition rules. In any event,

even if infringements could be established, the national competition authorities and courts appear to be well placed to deal with them (see paragraphs 8 to 11 above).

164 First, the Court holds that the consideration that the complaint concerns only one market or a segment of a market of limited size, with the result that their economic importance is also limited, played an important role in the Commission's weighing of the factors to be assessed in determining the existence of sufficient Community interest in continuing the investigation. However, that consideration is vitiated by a lack of reasoning and an infringement of the duty to consider attentively all the matters of fact and of law which the applicant brought to its attention (see paragraph 49 above).

165 Second, the manifest errors of assessment made by the Commission in defining the relevant market also vitiate its conclusions concerning the low probability that Articles 81 EC and 82 EC were infringed.

166 The Commission's argument, in point 14 of the contested decision, that it 'is not convinced that the luxury/prestige watches market is a relevant (primary) market in [this] case' and that, in any event, it was not necessary to establish an exact delineation of the relevant market since 'there [was] no indication that the functioning of this market [was] disturbed' cannot compensate for those illegalities.

167 In point 33 of the contested decision (see paragraph 137 above), the Commission considered the following in that regard:

'[T]he analysis made by the Commission … has led to the conclusion that the spare parts aftermarket is not to be viewed as a market distinct from the primary market. Consequently, an overall market power of a particular watch manufacturer must be assessed, and in particular its position and strength on the primary market is to be taken into consideration. Therefore, taking into account that none of the watch manufacturer[s] being subject to the complaint appears to have either a dominant position on the primary market, or its market share exceeds 30 %, it seems that they could benefit from the Block Exemption Regulation.'

168 Similarly, in point 44 of the contested decision (see paragraph 148 above), the Commission concluded as follows:

'[The] analysis has lead to the *prima facie* conclusion that the aftermarkets in the present case do not constitute distinct markets, and therefore dominance, either collective or single, on the examined aftermarkets does not seem to exist. In the absence of dominance, the question of abuse lost its relevance.'

169 Therefore, it is clear from the contested decision that the Commission relied on the *prima facie* market definition to underpin its conclusion that there was a low probability of there being any infringements of Articles 81 EC and 82 EC, and on that latter conclusion to base its finding that there was no evidence of disturbance of the market in question. Thus the Commission cannot validly claim that it did not need to define the relevant market because there was no evidence of disturbance of the market in

question, given that its finding concerning the absence of such disturbance was based precisely on the definition of the relevant market which it had in fact made.

170 Similarly, the illegalities on the part of the Commission in defining the relevant market cannot be neutralised by its statement, in point 18 of the contested decision, that 'even if they were to be regarded as separate relevant markets, the fact that the primary market appears to be competitive makes possible anticompetitive effects very unlikely[;] [i]n particular, price increases in the aftermarkets tend to be unprofitable due to their impact on sales in the primary market, unless prices in the primary market are lowered to offset the higher aftermarket prices'.

171 The Commission does not support its assertion that 'price increases in the aftermarkets tend to be unprofitable due to their impact on sales in the primary market' with any analysis or any evidence. On the contrary, in the contested decision it calls its assertion into question by pointing out that 'the consumer does not consider the cost of after-sales servicing as a criterion when choosing a watch'. That has the plausible consequence that an increase in the price of those services – or in the price of spare parts included in the price of those services – does not affect demand for the watches of the brand which increases prices on the after markets (see paragraph 106 above).

172 Third, since the main considerations supporting the Commission's conclusion as to the absence of sufficient Community interest in continuing the investigation are vitiated by insufficient reasoning, the failure to take account of a relevant factor raised in the complaint, and manifest errors of assessment, it needs to be examined whether the sole remaining valid ground, namely that the national competition authorities and

courts are well placed to investigate possible infringements of Articles 81 EC and 82 EC and to deal with them, is sufficient in itself to justify the Commission's conclusion regarding the absence of sufficient Community interest.

173 According to settled case-law, where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings in respect of those infringements have been brought before the courts and competent administrative authorities of that Member State by the complainant, the Commission is entitled to reject the complaint for lack of Community interest, provided however that the rights of the complainant can be adequately safeguarded by the national courts, which presupposes that the latter are in a position to gather the factual information necessary in order to determine whether the practices at issue constitute an infringement of the abovementioned provisions of the Treaty (judgment of 3 July 2007 in Case T-458/04 *Au lys de France* v *Commission*, not published in the ECR, paragraph 83; see, to that effect, *Automec* v *Commission*, cited in paragraph 157 above, paragraphs 89 to 96).

174 Similarly, the previous cases, in which the Court has already ruled on a ground raised by the Commission relating to the possibility which complainants have to defend their rights before the national authorities and courts, concerned situations in which the extent of the practices complained of were essentially limited to the territory of a single Member State and proceedings had already been brought before those authorities or courts (Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraphs 76 and 77; *Tremblay and Others* v *Commission*, cited in paragraph 27 above, paragraphs 73 and 74; *AEPI* v *Commission*, cited in paragraph 26 above, paragraph 46; and *UFEX and Others* v *Commission*, cited in paragraph 161 above, paragraph 157).

175 By contrast, in the present case, even if the Commission states that there are slight variations between the Member States as regards the extent of the practice of which the applicant complains, it admitted that that practice concerns the territory of at

least five Member States, and it neither disputes nor confirms that the practice takes place throughout the entire European Union.

176 Thus, in the present case, even supposing that the national authorities and courts are well placed to address the possible infringements complained of, as the Commission concluded in point 8 of the contested decision, that consideration alone is insufficient to support the Commission's final conclusion that there is no sufficient Community interest. The practice complained of exists in at least five Member States, or possibly in all the Member States, and is attributable to undertakings which have their head offices and places of production outside of the European Union, which suggests that action at European Union level could be more effective than various actions at national level.

177 In the light of all of the foregoing considerations, it must be concluded that the illegalities on the part of the Commission are such as to affect its assessment of the existence of sufficient Community interest for it to continue its examination of the complaint.

178 Consequently, the contested decision must be annulled, and there is no need to examine the applicant's other pleas and arguments, or its application for removal from the file of a passage in the Commission's reply to the written questions put by the Court.

Costs

179 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Where there are several unsuccessful parties the Court shall decide how the costs are to be shared.

180 In the present case, since the Commission and the intervener have been unsuccessful, the intervener must be ordered to pay, in addition to its own costs, those incurred by the applicant as a result of the intervention, and the Commission must be ordered to pay, in addition to its own costs, the remainder of the applicant's costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Commission Decision C(2008) 3600 of 10 July 2008 in Case COMP/E-1/39097;**

2. **Orders Richemont International SA to pay, in addition to its own costs, those incurred by theConfédération européenne des associations d'horlogers-réparateurs (CEAHR) as a result of the intervention;**

3. Orders the European Commission to pay, in addition to its own costs, the remainder of those incurred by the CEAHR.

Czúcz Labucka O'Higgins

Delivered in open court in Luxembourg on 15 December 2010.

[Signatures]

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