OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 12 November 1985 *

Mr President,
Members of the Court,

1. ETA Fabriques d'Ébauches SA (hereinafter referred to as 'ETA'), a company incorporated under Swiss law, represented since December 1984 by Swatch SA for marketing purposes and for the servicing of the guarantee, mass-produces inexpensive quartz watches and markets them in the various Member States through 'agents', that is, exclusive distributors of the product in the territory allotted to them.

The distribution agreement requires the agent to buy a minimum number of watches. It further provides that the watches are guaranteed for 12 months from the date of purchase by the consumer, but subject to a maximum of 18 months after their delivery by ETA to the distributors.

On the basis of that clause, ETA applied to the Tribunal de commerce [Commercial Court], Brussels, for an injunction restraining the defendants in the main proceedings from providing the guarantee with the watches which they obtained by way of parallel imports.

Taking the view that the solution of the dispute brought before it raises a problem regarding the interpretation of Community law, the national court has referred the following question to the Court of Justice:

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

2. The question falls within the limits of the Court's jurisdiction in proceedings for a preliminary ruling.

In a consistent series of judgments, the Court has held that its jurisdiction in matters of interpretation relates solely to Community rules, whilst the task of applying them falls upon the national court which has made the reference (see, in particular, Case 56/65 *Société technique minière* v *Maschinenbau Ulm* [1966] ECR 235, at pp. 247 and 248).

Similarly, although the Comission has raised the question, the Court is not being asked to give a ruling on whether the agreement containing the contested clause may qualify for exemption under Article 85 (3) of the EEC Treaty. A decision concerning exemption is exclusively a matter for the Commission, subject to review by the Court, and hence lies outside the jurisdiction of the national courts (Article 9 (1) of Regulation No 17 of the Council, entitled 'First Regulation implementing Articles 85 and 86 of the Treaty', Official Journal, English Special Edition 1959-1962, p. 87; also Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775, paragraph 13 of the decision).

* Translated from the French.

Nor is the national court asking whether the distribution agreement as a whole is lawful. In particular, after pointing out that ETA tolerates parallel imports, it does not raise the question whether it is consistent with Article 85 (1) to insert in the agreement a clause prohibiting the agent from selling or distributing watches outside the territory allotted to him, and requiring him to notify the controlling company of any order received from another State. Accordingly, there is no need for the Court to state its views on that point, whatever its merits. The national court is simply asking the Court of Justice to determine whether the practice whereby an undertaking *limits the scope of the guarantee covering physical defects* by restricting the benefits of that guarantee to products sold exclusively through its distribution network and withholding it from those marketed by parallel importers, is in conformity with the abovementioned provisions.

It may be noted in passing that the fact that ETA has its registered office in a non-member country does not preclude the application of Article 85 'since the agreement is operative on the territory of the Common Market' (Case 22/71 *Béguelin Import* v *G.L. Import-Export* [1971] ECR 949, paragraph 11 of the decision).

That is the context in which the written and oral observations submitted by the parties in the main proceedings and by the Commission should be examined, in order to elicit a useful interpretation of the rules of the Treaty (Case 56/65, cited above, at p. 357, and Joined Cases 253/78 and 1 to 3/79 *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327, paragraph 6 of the decision).

3. The *plaintiff in the main proceedings* states at once that it has no intention of hindering parallel imports of the watches which it manufactures. However, it takes the view that in such cases the guarantee accompanying the products should not be provided. It maintains that the duty to provide a guarantee, which is an integral part of the distribution agreement, is of a contractual nature and therefore relates only to the watches sold through its network of distributors.

The plaintiff further claims that its refusal to extend the benefit of the guarantee to persons outside the network is justified by its concern to ensure observance of the maximum storage period of six months, which was imposed on distributors in order to make sure that watches sold to consumers were in working order. Distribution through a parallel network does not offer the same standard of service. Since the storage period can no longer be checked, a watch might be sold with a battery which is past its best, and this would impair the performance of the watch and, at the same time, harm ETA's brand image.

For those two reasons, ETA claims to be justified in withholding the benefit of its guarantee from all those who cannot show evidence of having purchased the product from an official 'Swatch' distributor whom ETA can identify.

At the hearing, two of the *defendant* companies relied in substance on the characteristic features of the products sold — mass production, low prices, no special infrastructure for after-sales service, distribution not only through specialized retailers but also through large stores — in order to refute any attempt by ETA to justify, by reference to the requirements inherent in the selective distribution of a product, the refusal to extend its guarantee to watches sold outside its distribution network.

For its part, the *Commission* describes the effects which such a guarantee scheme is likely to entail and which in its view are incompatible with Article 85 (1) of the EEC

Treaty. It points out that the guarantee which accompanies the product sold must always be available to the consumer. In that sense, the possibility of relying on the guarantee either in direct dealings with the manufacturer or through one of his distributors is undoubtedly an incentive to purchase for the consumer.

In that regard any distribution agreement which restricts the guarantee to products bought from distributors selected by the manufacturer, within the limits of their marketing areas, is caught by the prohibition laid down in Article 85 (1). In those circumstances, every dealer who is allotted an area within the territory of a Member State is artificially protected against parallel imports by the guarantee. The buyer for his part is encouraged, in order to benefit from the guarantee, to purchase the product from a sales outlet forming part of the exclusive distribution network in the Member State in which he resides. In short, the Commission contends that the refusal to extend the guarantee to parallel imports makes them less attractive. Consequently, that practice undoubtedly affects trade between Member States.

4. In my view, the interpretation of Community law in this case must be guided by two sets of considerations.

In the first place, as the Commission has pointed out, there is no doubt that, except in the case of loss or theft, neither of which is referred to in these proceedings, watches marketed by a parallel importer must necessarily originate from one of the 'links' in ETA's distribution network.

That obvious finding nullifies the arguments which are based, as far as the guarantee is concerned, on the rules of privity of contract. The manufacturer cannot logically rely upon those arguments in withholding the guarantee from a third-party purchaser of watches which are the subject of parallel imports. Such imports consist of products purchased from ETA by one of its sole distributors and then marketed outside the network either by that distributor or by one of his contractors.

In the second place, the maximum storage period cannot constitute a justification for withholding the guarantee either.

As was explained at the hearing, ETA generally honours the 12-month guarantee to the consumer even if the storage period exceeds six months. That comes as no surprise. If regard be had to the rules of privity of contract, it is difficult to see how ETA can refuse to honour the express undertaking to the user which accompanies the article sold by relying on a condition concerning the storage period which is valid only as against the agent.

5. Since the arguments put forward by ETA to justify its conduct cannot be accepted, it follows — and the oral proceedings were quite revealing in this respect — that the differential treatment accorded by ETA in the matter of the guarantee is governed by a very different logic.

The discriminatory practice whereby the plaintiff withholds its guarantee on the ground that the chain of distribution is not wholly identifiable tends in practice to eliminate the alternative channels created, on ETA's own admission, by certain unidentified members of its own network of distributors.

There is no doubt that the use of a guarantee clause which, in practice, has the effect of excluding parallel imports is contrary to the principle of a single market

and impairs the economic freedom of sole distributors which Article 85 is intended to guarantee (see, in particular, Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraphs 32 to 35 of the decision, from which the point may be inferred, together with paragraphs 41 to 46 thereof, and the Opinion of Sir Gordon Slynn at pp. 929 to 931; see also Case 25/75 *Van Vliet Kwastenfabriek* v *Dalle Crode* [1975] ECR 1103, paragraphs 12 to 17 of the decision, and Case 22/71 *Béguelin Import*, cited earlier, paragraph 12 *et seq.* of the decision). The Commission, referring to its Decision of 23 October 1978 relating to a proceeding under Article 85 of the EEC Treaty (Zanussi) (Official Journal 1978, L 322, p. 36), rightly pointed out that the guarantee should, in principle, be honoured *irrespective of where in the Common Market the product was purchased* (see also the 12th recital in the preamble to, and Article 5 (1), points 1 (a) and (b) of Commission Regulation No. 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (Official Journal 1985, L 15, p. 16).

In this case, ETA's agreement with its sole distributors that the guarantee accompanying its products is to have a limited territorial scope leads to two consequences in terms of the adverse effects on competition:

(i) by depriving users of the guarantee where the commercial source of the watches purchased is not wholly identifiable, it makes parallel imports less attractive to all those who market them;

(ii) by thus partitioning the national distribution networks it enables the manufacturer not only to protect artificially the competitive position of some of his distributors from the effects of the distribution of parallel imports but also to take precautions against the impact of such imports, *inter alia* by promoting sales of his more recent products to the detriment of cut-price sales of earlier models through parallel channels.

The application by a manufacturer, in the circumstances and with the consequences described above, of a guarantee clause inserted in the distribution agreement supports the conclusion that, in this respect, the agreement is incompatible with Article 85 (1), subject to the twofold condition that — to use the wording of that provision — the practice in question may 'affect trade between Member States' and have as its 'object or effect the prevention, restriction or distortion of competition within the Common Market . . .'.

In its consistent case-law, the Court has taken the view that:

'To decide, on the one hand, whether an agreement may affect trade between Member States it is necessary to decide on the basis of a set of objective factors of law or of fact and in particular with regard to the consequences of the agreement in question on the possibilities of parallel importation whether it is possible to foresee with a sufficient degree of probability that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States',

and that

'On the other hand, in order to decide whether an agreement is to be considered as prohibited by reason of the distortion of

competition which is its object or its efect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreement in dispute.'

The Court has come to the conclusion that:

'It is for the national court to decide, on the basis of all the relevant information, whether the agreement in fact satisfies the requirements necessary for it to fall under the prohibition laid down in Article 85 (1)' (Case 31/80 *L'Oréal*, cited above, paragraphs 18 to 20 of the decision; see also Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511, paragraphs 21 to 25 of the decision).

6. For those reasons, I propose that the Court should give the following answer to the question submitted by the Tribunal de commerce, Brussels:

The refusal by a manufacturer to apply the guarantee accompanying his products, as defined in the exclusive distribution agreement concluded by him with dealers established in the various Member States, to products which are marketed outside the territory allotted to those dealers, *solely on the ground that the distribution network is not wholly identifiable*, constitutes, where it may affect trade between Member States and have as its object or effect the prevention, restriction or distortion of competition within the Common Market, a practice prohibited by Article 85 (1) of the EEC Treaty.