2. Orders the Commission to pay the costs.

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 31 May 1979.

A. Van Houtte
Registrar

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

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 MAY 1979 [1]

Mr President,
Members of the Court

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

Hugin AB, an undertaking founded in Stockholm in 1928 and wholly owned by the Federation of Swedish Consumers, Kooperativa Forbundet, manufactures cash registers and similar equipment. In the common market the undertaking has a market share of 12% and in the United Kingdom, which is of particular relevance in the present case, it has a market share of 13% whilst the market shares of other manufacturers are 36, 15 and 13% in the common market and 34, 18 and 16% in the United Kingdom. The machines are marketed in some parts of the Community, namely in the United Kingdom, Belgium, Denmark, France and the Federal Republic of Germany, by subsidiary companies of Hugin AB and for the rest, in Ireland, Italy and the Netherlands, by general agents or main distributors with whom corresponding agreements were concluded for the years 1971 to 1976.

1 — Translated from the German.

The commercial policy of Hugin AB is characterized by the fact that maintenance and repair of Hugin cash registers is exclusively carried out by technicians in the service of Hugin AB or its subsidiaries and main distributors and thus independent maintenance and repair undertakings are excluded from this field of activity.

Until 1968 there were in the United Kingdom two companies with exclusive sales rights for Hugin cash registers in which Hugin AB had no interest: one, Cash Machines Ltd, a subsidiary of the English Co-operative Wholesale Society, was responsible for marketing to co-operative shops; the other, the Gledhill undertaking, was responsible for sales to other outlets. In 1969 the contractual relationship with Gledhill came to an end and Cash Machines took over the corresponding marketing activities, altering its trade name to Hugin Great Britian Ltd (hereinefter referred to as "Hugin GB"). Apparently because Hugin GB had fallen into financial difficulties, in 1972 Hugin AB founded the above-mentioned British subsidiary Hugin Cash Registers Ltd. ("Hugin UK"). Following an agreement between Hugin GB and its parent company, on the one hand, and Hugin AB and Hugin UK on the other, in March 1972 Hugin UK assumed part of the rights and obligations of Hugin GB. The latter then changed its trading name to Century Cash Registers Ltd. and became a non-trading company.

In the United Kingdom there also exists the company Liptons Cash Registers and Business Equipment Ltd (hereinafter referred to as "Liptons") which was established some 25 years ago in London and which is engaged in the maintenance, refurbishing, sale and renting out of cash registers of most makes. From the end of the fifties until 1969 it obtained from Cash Machines, as the importer of Hugin cash registers, spare parts for those machines. Pursuant to an agreement concluded with Hugin GB in 1969 for a period of five years Liptons, in view of the introduction of the decimal system in the United Kingdom in 1971, became general agent for the marketing of Hugin cash registers in England, Scotland and Wales. That agreement was terminated by Hugin GB in April 1972; in any event, as is clear from a letter of the chairman of Hugin GB of 10 January 1973, it was not taken over by Hugin UK in the context of the above-mentioned agreement of March 1972. During the period when Liptons was general agent for Hugin GB the latter apparently retained responsibility for after sales service for Hugin cash registers. From 1969 to 1971 however Liptons technicians were also apparently involved in servicing new Hugin cash registers which had been sold. In addition, Liptons continued to provide after-sales service in the context of its own business, the refurbishing and sale of used cash registers and, as from 1970, also the renting out of cash registers, and, we have been informed, obtained the necessary spare parts therefor from Hugin GB without difficulty. After the establishment of Hugin UK and the building-up of a new sales organization in the United Kingdom including 13 main distributors each responsible for a certain territory but not having to provide after-sales service Liptons, which allegedly had been informed as from December 1971 of the negotiations with Hugin GB and the likely consequences, was offered by Hugin UK in April 1972 a contract whereby Liptons was to be the

authorized dealer for the London region. While the negotiations were under way Liptons continued to be supplied by Hugin UK with cash registers and spare parts. After Liptons had refused the contract offered by Hugin UK in October 1972 on the grounds that the sales territory assigned to it and the trade profit margins stipulated were too small Hugin UK refused to supply cash registers at wholesale prices and refused to supply spare parts for Hugin cash registers.

For that reason in October 1975 Liptons applied to the Commission of the European Communities asking it to initiate a procedure against Hugin under Article 3 of Regulation No 17. The procedure was formally commenced by a Commission decision of 22 April 1977. After the Commission had sent various requests for information to those concerned and had heard their oral observations in June 1977 the procedure was concluded with a decision on 8 December 1977 (published in the Official Journal, L 22 of 27 January 1978, p. 23).

Article 1 of that decision declared that Hugin AB and Hugin UK had infringed Article 86 of the EEC Treaty by refusing to supply spare parts for Hugin cash registers to Liptons from 1 January 1973 and that Hugin AB had also infringed Article 86 of the Treaty by prohibiting its subsidiaries and distributors within the common market from selling such spare parts outside its distribution network. Article 2 imposed a fine on the two said undertakings of 50 000 units of account, that is 20 833 pounds sterling, to be paid within three months of the date of the notification of the decision to the undertakings. Article 3 laid down that the undertakings were to bring the infringement to an end without delay and that Hugin AB was to submit for the approval of the Commission, within one month of the notification of the decision, proposals relating to the resumption of supplies of spare parts for Hugin cash registers to Liptons. Finally, Article 4 provided that if Hugin UK failed to comply with the obligation set out in Article 3 within the period fixed, a periodic penalty payment of 1 000 units of account for each day of delay would be payable.

The applicants lodged an application with the Court of Justice claiming that the Court should annul the decision or, alternatively, cancel or reduce the fine imposed.

None the less, Hugin UK complied with the obligation imposed on it. On 3 January 1978 it informed the Commission that it was prepared to supply spare parts to Liptons and at the same time it asked that a list of Lipton's urgent requirements and an estimate of its probable requirements for five months should be sent to it. In the subsequent months, however, it received only very small orders from Liptons, which had also been informed of the Commission's decision.

I — In examining this case it is necessary first to examine whether the assumption that the applicants hold a *dominant position on the market* within the meaning of Article 86 of the EEC Treaty was correct.

The contested decision, in which Hugin AB and its wholly owned subsidiary company are regarded as a single economic unit, makes that assumption in respect of the supply of Hugin spare

parts. They can in fact not be replaced by components of cash registers of other manufacturers and, not least because Hugin AB has exclusive rights over most components, they cannot be produced in any other way. In this respect, therefore, Hugin has an absolute monopoly. Furthermore, without the use of Hugin spare parts Hugin cash registers cannot be maintained properly, with the result that Hugin has a dominant position in the field of after-sales services for its machines, in particular in respect of persons renting Hugin machines.

The applicants, on the other hand, take the view primarily that the Commission relied on too narrow a definition of the relevant market — the supply of Hugin spare parts and the servicing of Hugin machines. In reality those services should be viewed in conjunction with the market for cash registers. In that market they are but *one* element of competition which, as is shown by Hugin's share of the market and the growing success of Japanese producers in the common market, is extremely fierce. Accordingly it is not possible to assume that the Hugin group holds a dominant position as regards purchasers of Hugin cash registers even with regard to spare parts and after-sales service. This is also confirmed by Hugin's conduct on the market which has not led to detrimental effects for customers because after-sales service and supplies of spare parts are provided at very low prices and even at a loss for Hugin. It is said to be quite wrong to restrict the examination to the question whether a dominant position as against undertakings such as Liptons can be taken to exist. Any dependence of such undertakings on Hugin is ruled out by the mere fact that Hugin spare parts can also be obtained through other channels, namely from old, scrapped Hugin cash registers or by producing them elsewhere, which cannot be prevented even by means of Hugin's property rights.

1. In this dispute it can hardly be denied that the supply of spare parts and the servicing of cash registers are elements of competition on the market in cash registers which naturally are of importance for customers when they acquire cash registers. As the applicants have correctly emphasized they are part of the conditions of sale in that for a period of one year, which is apparently the general practice, a guarantee is given free of charge and in addition customers are informed, in the course of the sales negotiations, of the details of the after-sales service for which they may conclude contracts at a fixed rate which ensure regular servicing including the supply of spare parts. It is therefore certainly possible to describe after-sales service in a certain sense as an activity which is *accessory* to the sale of cash registers.

On the other hand, in my view this does not necessarily lead to the conclusion that such services are *only* to be viewed in conjunction with the market for cash registers and that they do not have *any* independent significance, thus denying the existence of a particular market for spare parts and servicing. If a customer has acquired a cash register which is said to have an average life of eight years, there is then for a considerable period demand only for spare parts and servicing from the purchaser. A considerable proportion of customers (according to the applicants, more than one third) do not make use of the possibility of concluding maintenance contracts with Hugin but ask for

servicing and the supply of spare parts as they need them. Similarly, the fact should not be overlooked that there exist independent workshops engaged in such activities — in the United Kingdom there are apparently some 40 other undertakings apart from Liptons — and that, because other manufacturers of cash registers do not have the same after-sales policy as Hugin, spare parts are supplied by them to independent repair undertakings. According to the evidence submitted by the Commission this applies to NCR, Sweda, Anker and Gross.

I am therefore of the opinion that the Commission was right to assume that there is a particular market for spare parts and after-sales service for cash registers and to raise the question whether Hugin occupies a dominant position on a market defined in that way. In this respect it is irrelevant whether the market is substantial according to the volume of business, as that factor is certainly irrelevant for the purposes of Article 86 on condition that the dominant position relates at least to a substantial part of the common market. None the less, the figures given by the Commission for Hugin's turnover in spare parts and servicing in the United Kingdom and in the common market show that it is certainly not a completely subsidiary market.

2. If the market is defined in that way the fact, which has not been contested, that spare parts are not interchangeable between the different makes but are adapted to the respective mechanisms, which in some cases differ considerably from one to another, is important in assessing Hugin's position on the market for spare parts for Hugin machines. It can therefore in fact be said that Hugin has a monopoly for the supply of Hugin spare parts and therefore holds a dominant position within the meaning of Article 86, as was also the case in the General Motors Case (judgment of 13 November 1975, Case 26/75 *General Motors Continental NV* v *Commission* [1975] 2 ECR 1367); in that case a particular market for the provision of certain services, namely the issue of documents necessary for the approval of vehicles, was found to exist, and General Motors was deemed to have a monopoly as its Belgian subsidiary alone could issue the said documents for General Motors vehicles imported from other Member States.

That conclusion is not affected by the objection put forward by Hugin that Hugin spare parts could be manufactured elsewhere. In fact such manufacture does not at present exist and it is hardly to be expected. In this respect it is not necessary to examine the disputed question whether there are *legal* barriers to such manufacture and in particular whether in the United Kingdom, which is the market which is primarily in question, the Design Copy Act 1968 precludes such manufacture. Nevertheless, in the light of the Commission's observations in Annex V to its rejoinder the impression may be gained that the existing doubts and the threat of considerable penalties make the attempt to manufacture Hugin spare parts appear too hazardous. In addition, manufactures independent of Hugin would find themselves in a hopeless position because of Hugin's lead as regards know-how. Furthermore, production independently of Hugin

would not be profitable and in any event would in view of the limited extent of production not be able to compete with Hugin, not least because in view of the great variety and large number of different spare parts only small series could be produced. In view of this situation and taking account of the small value of the individual spare parts which, on average, make up only 3% of the value of the cash register it is certainly not possible, at least while Hugin does not demand wholly excessive prices, to count on finding an undertaking to manufacture Hugin spare parts.

The conclusion that in practice Hugin has a monopoly in the supply of Hugin spare parts is not affected by the other objection that spare parts may be obtained not only from manufacturers but also from old cash registers which are to be scrapped. That fact certainly cannot be denied, and the practice is pursued by Liptons, albeit partly under pressure, because Hugin no longer supplies spare parts. This source of supply, however, can certainly not be regarded as serious competition, for several reasons. We have heard that some 30% of the cash registers accepted by the manufacturers in part payment which appear on the used machine market are subsequently refurbished and then sold or rented out. In respect of those machines it would, as Liptons has shown, be far more uneconomic to dismantle them at comparatively large expense to acquire spare parts than to refurbish them for relatively moderate outlay and thus obtain usable machines whose value far exceeds that of the spare parts. Where that is not possible — and such machines constitute the genuinely cheap sources of spare parts — account must be taken not only of the fact that their competitiveness is detrimentally affected by the need to maintain larger stocks of used machines and to strip more and more machines in order to obtain *one* spare part; it is also relevant that in this way only *old* spare parts are obtained, and often in particular not those parts which are subject to particular wear. For newer models, proper servicing is in these circumstances — in this respect I refer to the arguments concerning the rapid development of cash registers — impossible or only possible to a very restricted extent.

It can thus in fact be held that Hugin occupies a position at least similar to a monopoly for *original* spare parts and that such competition as exists in the form of used spare parts is so limited that, in particular as according to the decided cases a dominant position may be held to exist not only where there exists no competition at all, the conclusion that Hugin occupies a dominant position on the market for spare parts remains unaffected.

3. However, it is not enough to draw that conclusion, in view of what the applicants have stated with regard to the relationship between after-sales service and competition on the market in cash registers and taking account also of the decided cases (for example the judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte GmbH & Co.* v *Commission* [1977] 2 ECR 1875) according to which a dominant position on the market exists when completely independent conduct is possible permitting a trader to operate without regard to competitors, customers and consumers. It is necessary rather to examine whether this condition for a dominant position on the market is

satisfied in the present case. In this respect reference should be made to the relationship between Hugin and ordinary cash register customers who acquire cash registers for use in their own business. The question further arises as to whether a particular category of customers for spare parts may be constituted who, like Liptons, need spare parts in order to service their own rented machines or machines of others and to refurbish old cash registers and to what extent such a class of customers is dependent on Hugin.

(a) As regards the first point the applicants take the view that in fact as regards normal cash register customers they have no possibility of independent conduct in marketing spare parts. If they fix excessive prices they run the risk of immediately losing customers who would certainly be able to replace cash registers before the expiry of their normal working life and in so doing would be able to give used cash registers in part payment. In addition, it must be borne in mind that the cash register market is not an expanding market but constitutes, to the extent of some 95%, a replacement market. In such a situation, if excessive prices were fixed for spare parts the risk would arise that on the expiry of the normal working life of a cash register customers would turn to a machine of another make and this is a good reason for fixing competitive prices.

To my mind it can certainly be accepted that such factors do indeed prevent *excessive* prices being fixed for spare parts. I do believe, however, that at the same time there remains scope for independent conduct within the meaning of Article 86 of the EEC Treaty, at least to a certain extent.

One important factor is the value of spare parts in relation to the value of cash registers and the value of maintenance service. According to the applicant's turnover figures, as the Commission has shown, spare parts cost on average 3% of the price of the cash register; their value is also relatively small in comparison with the cost of the annual servicing for which the applicants charge £ 25, that is to say roughly one eighteenth of the price of the cash register. In view of that situation it can certainly be assumed that even relatively substantial increases in the price of spare parts are possible without affecting the customer's choice of a make of cash register.

On the other hand, the fact that customers are able to replace machines before the expiry of their normal working life of approximately eight years and, by so doing, to avoid any increases in the price of spare parts should limit the room for manoeuvre of spare parts suppliers only to an insignificant extent. In the course of the proceedings it was shown on the basis of statements made by manufacturers of cash registers that in certain cases old cash registers are, in principle, not accepted in part payment (this is Sweda's position for example). In so far as they are accepted, either no exact value is stated — Anker and Sweda decide in each individual case in so far as they accept old registers in payment at all — or, as with NCR, a very low value is given (£10 to £50 for electro-mechanical machines; £50 for electronic machines) and it was also stated that only standard models are taken in payment and that the purchase must amount to a certain minimum sum: £500

over the value of the old machine. Moreover, that also corresponds to the applicant's statement regarding the salvaging of spare parts from old machines, namely that the prices of such machines are so low that stripping them is worthwhile. When, on the other hand, and contradicting themselves to a certain extent, they stated that after one year of use 90% of the new value can be obtained, such replacement transactions certainly constitute rare exceptions. In addition, however, comparison of the depreciation after one year (around 12% of the value of the machine) with the abovementioned low cost of spare parts shows clearly that even such favourable trade-in transactions entail a loss for the purchaser of cash registers; in this respect of the supply of spare parts and the fixing of prices for such parts, which can be fully used without the risk arising of business relations being terminated prematurely.

(b) Finally, it is not necessary to go into this matter in great detail for, as the Commission correctly assumes, there exists a separate category of customers for spare parts, that of the independent servicing undertakings, which may be taken to be even more genuinely dependent on Hugin, which in turn leaves considerable scope for the independent fixing of prices.

It may in fact be assumed that sales of spare parts take place at two levels, to ordinary cash register customers on the one hand and to workshops on the other, and that as those levels involve the satisfaction of different requirements, they must be kept separate in an examination of the market. That was a view taken by the Bundesgerichtshof in its judgment of 26 October 1972 (WuW 2/1973, p. 118) which also concerned a refusal to supply spare parts for cash registers to an independent repair business. In that judgment it was stressed that although spare parts for technically sophisticated machines constitute, because of their close connexion with the main product, an element of competition in the marketing of the main product, they nevertheless form an independent market. The determination of the market depends on the extent to which the product can cover demand in respect of the other aspect of the market. In this respect, however, as differing economic functions and various economic stages are concerned, consumer demand cannot be treated as being the same as that of retailers or maintenance undertakings.

On the other hand, it is clear that undertakings engaged in servicing Hugin cash registers which refurbish and sell used Hugin cash registers or rent out new and used Hugin cash registers to shops are more dependent on Hugin, albeit to an unequal degree, than normal cash register customers with regard to Hugin spare parts. For the former it is not so simple a matter as for the latter to switch to other makes in reaction against excessive prices for spare parts. In this respect I refer to the uncontested statement that in 1972 and 1973 many of the Hugin cash registers distributed by Liptons were still in use and had to be serviced. Some of them were certainly

cash registers rented out for longer periods which Liptons was obliged to service. In addition, the fact must be borne in mind that Liptons also had staff specially trained to deal with Hugin cash registers, who could properly be employed only on such machines. In view of that degree of dependence, however, it may certainly be assumed that Hugin had considerable scope for independent conduct. It may therefore be assumed that Hugin, at least in relation to Liptons and comparable undertakings, occupied a dominant position for Hugin spare parts.

Nor, for that reason, is it necessary to examine an additional consideration put forward by the Commission in this connexion based on a form of words used repeatedly in the decided cases to the effect that a dominant position may be assumed to exist when the undertaking in question can impede the maintenance of effective competition, as is stated for example in the judgment of 8 June 1971 in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] 2 ECR 487. The question whether that was intended to refer to situations such as that here can be left open. Nevertheless, I would conclude my remarks on the matter by observing that there is no gainsaying the fact that Hugin is clearly able, without running the risk of an unfavourable reaction from its ordinary cash register customers, to pursue a policy in connexion with its spare parts which eliminates independent maintenance companies from competition in the field of Hugin machines.

4. For the sake of completeness it is necessary to consider whether two further arguments put forward by the applicants affect that conclusion. On the one hand, it is argued that the fact that Liptons is not dependent on Hugin is clear from the fact that in 1978, after the adoption of the Commission's decision, Liptons submitted only a very small order to Hugin which, moreover, concerned for the most part cash register accessories which are used only for servicing and which Hugin has always been prepared to deliver. Secondly, reference is made to Hugin's actual conduct on the market which, as its prices for servicing are extremely low, and are even run at a loss, is certainly no evidence of a dominant position on the market.

(a) As regards the first point it should, in my opinion, be said that Lipton's conduct approximately five years after the termination of its business relations with Hugin hardly allows of any conclusion as regards the question whether it was largely dependent on Hugin in 1972 and 1973. That conduct should rather be regarded as the natural consequence of the suppression of business relations sought by Hugin, which *inter alia* constrained Liptons to obtain spare parts by stripping old machines and which is also evident in the figures given by the Commission relating to the trend in Lipton's income from servicing Hugin cash registers and renting out such machines from 1972 to 1977.

In addition, Liptons has given plausible explanations for the small size of the above-mentioned orders. For example, Liptons first wanted to know the applicant's current prices; transmission of price lists was much delayed and they showed that Hugin was prepared to

allow only a very small profit-margin. Together with the circumstance already referred to, even though the cost of spare parts in itself is small, that may have deterred Liptons from putting in a larger order at first. That does not however mean (at least, Lipton's statements are to be understood in this sense) that once the situation has been finally cleared up the business relationship might not develop afresh and that if suitable conditions are granted larger orders might not be given.

(b) With regard to Hugin's conduct on the market, on the other hand, even though it is certain that abusive conduct is an important indication of the presence of a dominant position on the market, the absence of such abuse by no means proves that an undertaking lacks power on the market. It is therefore unnecessary to examine whether the amount charged by Hugin for servicing contracts is very low and whether for servicing without long-term contracts no higher charges are made than those of competitors, just as it is unnecessary to examine Hugin's contention that the flat-rate amount laid down for servicing contracts in fact does not cover the costs of the annual inspection, so that Hugin makes a loss on those contracts even if the costs of guarantee services are omitted from the statement of costs submitted by it. In this respect, however, reference should at least be made to the fact that according to the uncontested statement of the Commission Liptons has evidently carried on its servicing activities at a profit, which supports the assumption that the prices applied by Hugin are the expression of its market strategy rather than the result of pressure of competition.

II — As therefore, there is nothing to invalidate the statement in the contested decision that Hugin holds a dominant position on the market for Hugin spare parts and, as that opens the way to a monopoly of the after-sales service market for Hugin machines, also on the latter market, it is now necessary to examine Hugin's alleged abuse of its dominant position.

In the Commission's view the abuse consists in the fact that without sufficient objective reasons Hugin refuses to supply spare parts to independent servicing undertakings and persons renting Hugin cash registers and has also prohibited its subsidiary companies and authorized dealers from making such supplies available. It is alleged that that conduct is an abuse as regards Liptons in particular in that not only has Liptons bought Hugin spare parts for a long time, being in 1972 one of its main customers for spare parts, but also because Liptons was for many years the largest main distributor for Hugin machines in England, Scotland and Wales. To that extent the mere fact that in 1972 Liptons did not remain an authorized dealer for Hugin cannot constitute an objective reason justifying the refusal to continue supplies.

1. In answer to that allegation the applicants claim, first, that the policy pursued by them which was criticized by the Commission does not lead to any substantial restriction of competition as the market for spare parts and servicing of cash registers, in which hardly any independent undertakings are active, is not an important market. In so far as a

restriction of competition does exist the fact must be borne in mind that it has the effect of intensifying competition on the cash register market, which is already fierce. With regard to Liptons in particular, in September 1972 Hugin was prepared to supply certain spare parts for cash registers which were to be refurbished but Liptons did not take up that offer. In addition, Liptons is only an insignificant customer and in fact, because it serves a different circle of customers, it does not compete with Hugin. Finally, Liptons has moreover not disappeared from the market nor has it suffered detrimental effects to its business activities. Liptons was in fact able to obtain spare parts from used cash registers and, as its turnover figures show, to continue its business of renting out Hugin cash registers. In so far as a slight falling-off in its business is visible it is merely within the limits of what was normal following the tailing-off of the boom of 1971 and 1972.

(a) It should first be said with regard to this dispute that reference to Article 86 is in principle justified when an undertaking in a dominant position makes use of that dominant position in order to eliminate what is in practice the only important competitor on a secondary market and thus to monopolize the secondary market which is related to the market in which a dominant position is held. That constitutes a forbidden alteration of the competitive structure by the strengthening of a dominant position; it is also appropriate to think of the prohibition on the imposition of additional services based on Article 86 (b) and Article 85 (1) (e) because cash register customers interested in spare parts are obliged to allow Hugin to provide maintenance as well.

In this respect the Commission was able to refer to the practice in such matters at national level of, for example, the British Monopolies Commission and the American anti-trust authorities with regard to the exclusion of independent film-developing companies or that of the Bundesgerichtshof with regard to the above-mentioned refusal to supply spare parts to an undertaking engaged in servicing cash registers. In this respect the well-known Sugar Case (Judgment of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] 2 ECR 1663), in which the application of Article 86 (b) to the limitation of the sales outlets of competitors was approved, is also relevant. Reference may also be made to the judgment of 16 March 1974 in Cases 6 and 7/73 *(Istituto Chemioterapico Italiano* v *Commission* [1974] 1 ECR 223) and to the Bananas Case (judgment of 14 February 1978 in Case 27/76 *United Brands* v *Commission* [1978] 1 ECR 207). In the first-mentioned decision, as the Court will recall, the refusal to supply raw materials by an undertaking occupying a dominant position on the market in raw materials was classified as an abuse as it had the effect of restricting competition on the market on which the products derived from the raw materials were sold. In the second case, the termination of supplies by United Brands to a Danish purchaser who was a long-standing customer, who abided by normal commercial practice and whose orders were in no way out of the ordinary was classified as an abuse on the ground that the refusal to supply limited sales outlets and pursued the

unlawful objective of strengthening the supplier's dominant position.

(b) As regards the applicant's claim in the present case, in contrast thereto, that the refusal of supplies of spare parts does not basically affect competition as there are virtually no independent maintenance undertakings, I would refer to the fact that other producers are quite prepared to supply spare parts to independent maintenance undertakings. That fact alone shows that in fact there is competition in after-sales service for cash registers. In addition, in the course of the proceedings mention was made not only of Liptons but of arount 40 other similar undertakings in the United Kingdom. In this respect it is here irrelevant whether those other undertakings in fact only deal in used cash registers for which spare parts can be obtained from cash registers which have become valueless or whether, as the applicants allege elsewhere, they are merely not in a position to offer a first-class maintenance service. In any event, the applicants could not deny that Liptons at least has obtained spare parts from Hugin for many years and was engaged in providing servicing for Hugin cash registers, as in fact Lipton's mechanics were even directly trained by Hugin for that purpose.

(c) I further agree with the Commission that an undertaking which refuses to supply brand-new original spare parts which cannot be obtained elsewhere to independent undertakings and which thus seeks to monopolize the market in after-sales servicing in so far as it is dependent on new spare parts, can in principle not rely on the objection that the market is of merely minor importance and that there are therefore no significant detrimental effects on competition.

In my opinion in the *Hoffmann-La Roche* case I have already pointed out that the theory of the "perceptibility" of detrimental effects on competition has been extended to Article 85 of the EEC Treaty, that is to a field in which normal and effective competition is restricted only by agreements. In that connexion that theory is quite logical, but it is not so logical on a market on which competition is in any event limited because an undertaking occupies a dominant position. Otherwise it would be possible — and it is to my mind unacceptable — for an undertaking with a dominant position on the market without difficulty to exclude small undertakings from business in reliance on their small share of competition.

In addition, the present case concerns not only certain orders of magnitude which may be neglected without more ado. The applicants in fact make the mistake of having regard only to *existing* competitors and their turnover. If, however, regard is had to the extent of the relevant market, as I think is correct, that is Hugin's turnover in spare parts and after-sales service, whether in the whole of the common market or only in the United Kingdom — the figures are set out in the contested decision — it can certainly not be said that the exclusion of independent servicing undertakings from this field of activity — in any event in the course of time they might obtain a larger share — is irrelevant for the purposes of competition law in view of their size.

(d) Nor is it possible — and in this respect also I am in agreement with the

Commission — to justify the attempt to monopolize after-sales service by the argument that concentration of after-sales service in the hands of Hugin permits increased competition on the cash-register market which benefits consumers.

In my opinion there are fundamental objections to such a "balancing out" of factual situations which involve the complete elimination of independent maintenance undertakings and thus a fundamental alteration of the structure of competition. No support for the applicant's view is to be found in the previous case-law. This is true on the one hand of the above-mentioned Sugar Case to which the applicants referred in this connexion. Although in that case prohibitions on competition in trade representation contracts were declared to be unobjectionable that was only because such a prohibition corresponds to the essence and logic of such a relationship, since trade representatives as a rule are to be regarded as subsidiary bodies which form an economic unit with the undertaking they represent. In addition, the fact should not be forgotten that that judgment also ruled that the conclusion of such a contract may constitute an abuse by an undertaking holding a dominant position on the market if thereafter foreign competitors find that there are no independent operators who can market the product in question. The same applies to the judgment in the Metro Case (Case 26/76) to which reference was also made. In that case in fact certain restrictions on competition were held to be permissible having regard to the strengthening of competition in other areas, but solely in the context of the application of Article 85 (3), that is in the context of a discretionary decision of the Commission, and an important factor was that competition at one economic level was not eliminated but that rather the selective distribution system which was under examination in that case left sufficient scope for workable inter-brand competition from the authorized dealers.

If considerations of the kind put forward by the applicants in the context of Article 86 are held to be reasonable the fact is not insignificant that in the course of the proceedings the applicants have not argued that their commercial policy has such an effect — that is, the strengthening of competition between cash register producers — and that it is linked to beneficial effects for consumers, particularly in the field of after-sales service and supplies of spare parts.

(e) It is not possible to argue that Hugin has not abused its market position in relation to Liptons in particular by stating that as Liptons has a different circle of customers from Hugin it cannot be regarded as a competitor of Hugin. As the Court is aware, the applicants rely on that argument on the ground that Liptons does not provide customer after-sales service for new cash registers but is primarily engaged in the refurbishing of simple machines which are disposed of to small undertakings and with renting out cash registers, whilst Hugin itself in preference supplies large commercial chains — and only with new cash registers — and rents out cash registers only in exceptional circumstances. It is apparent from the agreement with Hugin GB that in the years 1969 to 1971 Liptons was indeed to a certain extent also engaged in providing after-sales service and was not only concerned in the conversion of cash registers to the decimal system. In any event, proof of the applicants' contrary view cannot be derived from a letter of Liptons of November 1972 in which cash register customers are

referred to Hugin for servicing or from three repair bills from Hugin to Liptons dating from July to October 1972, as those may equally well be explained by the fact that at that time Hugin was not making sufficient quantities of spare parts available to Liptons. On the other hand, it must be assumed that Liptons is competing with Hugin even if Liptons cannot be shown to provide proper after-sales service for new cash registers, at least in so far as Liptons markets refurbished cash registers and rents out Hugin cash registers and every diminution of its business caused by the refusal to supply spare parts in this field benefits Hugin as a supplier of new cash registers.

Similarly, in the light of everything that has been stated above, the argument that in view of the size of Liptons' business Liptons is not an important competitor for Hugin is no justification. For that reason the question whether the figures for Liptons' turnover in 1974 submitted by the applicants reflect the normal trend of business following the end of the cash register boom of 1971/1972 or whether, at least in part, they were caused by Hugin's commercial policy, can be left open. To my mind it is only important that for many years Liptons was the only serious competitor in the United Kingdom for the servicing of Hugin cash registers.

That assessment is not affected by reference to the fact that in September 1972 Hugin was prepared to supply certain spare parts to Liptons but that Liptons did not take up that offer. In that respect it is irrelevant whether, as Liptons argues, it was an isolated offer or whether Hugin was seeking a longer-term solution. The decisive factor is rather that it related only to Liptons' activities in the field of refurbishing used cash registers, in other words that Hugin was not prepared to supply spare parts for other important fields of business, that is, general servicing and renting.

Finally, it is not possible to say that there has been no abuse against Liptons on the ground that that undertaking has not disappeared from the commercial world and that a certain falling-off of its business is the result of the general economic trend rather than Hugin's commercial policy, particularly as Hugin was always prepared to provide after-sales service for the cash registers rented out and refurbished by Liptons. In this respect it should be remarked, on the one hand, that it is not only when a competitor is, as it were, given the death blow that an abuse within the meaning of Article 86 is constituted. That is shown by the United Brands Case in which Article 86 was applied although with other brands of bananas. On the other hand, it may certainly be assumed that Hugin's commercial policy detrimentally affected Liptons' commercial activities. In any event, at least the servicing of Hugin cash registers with original spare parts, which earlier had in fact been delivered in certain quantities, was rendered impossible. In addition, it must be assumed that even if Hugin is prepared to provide after-sales service the refusal of supplies had an effect on the business in refurbished and rented cash registers, as without such a formal undertaking from Hugin naturally not all of Liptons' customers would be prepared to rely on prompt Hugin after-sales service or to accept the inconvenience of dealing with two undertakings. The exact extent of losses is not of importance here. It is sufficient to refer to the change in Liptons' revenue from

the servicing and renting of Hugin cash registers from 1970 to 1975, which clearly shows in absolute figures — in which inflation also has to be taken into account — and in percentages that its business diminished.

2. The applicants also argue that their conduct is not covered by Article 86 by relying on other objective grounds of justification. They argue that for modern cash registers, being a highly technical product, exacting and exclusive service is important, primarily as a weapon in competition for small expansion-orientated undertakings. Accordingly, in restricting after-sales service to its own mechanics Hugin is, in principle, only following a policy which, on a number of occasions, has been declared to be unobjectionable in competition law in the context of selective marketing systems. In particular, no objection can be raised against the exclusion of Liptons from after-sales service. In this respect not only must the fact be taken into account that at the time of the termination of business relations (Autumn 1972) Article 86 was not yet applicable in the United Kingdom; it is also relevant that Liptons was from the beginning certain that it could engage in providing servicing only on a temporary basis. Liptons is not in a position to provide first-class after-sales service, as even during the years 1969 to 1971 it never provided real after-sales service and in addition was not abreast of the new, rapidly advancing developments.

(a) As regards this line of argument it may be accepted that the market for cash registers and the servicing thereof shows peculiarities which do not exist on the markets for other technical equipment. They are related to the fact that there are many different models which are adapted to special requirements, are produced only in small series and are subject to rapid change. Their servicing requires relatively costly stores and special training which in part is confined to a few models and which must repeatedly be brought abreast of the latest developments.

That is, however, a characteristic of the cash register market as a whole and thus applies not only to Hugin cash registers. In that respect it is nevertheless of interest that other producers do not restrict after-sales service to themselves or their authorized dealers but also admit independent workshops, albeit subject in some cases to restrictive conditions. In the case of NCR that cannot convincingly be explained away by the mere fact that its interest in the cash register market is diminishing, nor can it be explained by the differing sizes of the undertakings. In reality, even smaller producers which, just as Hugin, are concerned with expanding and establishing the good name of their products, pursue a more liberal policy. From that I conclude that that part of Hugin's commercial policy which has been criticized — the provision of after-sales service exclusively by Hugin technicians — cannot be justified by reference to the particular nature of the product. In this respect as well reference may be made to the above-mentioned judgment of the Bundesgerichtshof which correctly emphasizes that the inadequacies of an outside maintenance undertaking do not necessarily lead to

negative inferences regarding the quality of the product.

With regard, on the other hand, to the attempt at justification by reference to administrative practice and the case-law concerning selective marketing systems it is of course not permissible to practice unilaterally without more ado what appears permissible on the basis of agreements concluded with independent market operators and notified to the Commission. Furthermore, the view that because such marketing systems are unobjectionable from the point of view of competition law they are not covered by Article 85 at all is incorrect. The judgment in Case 26/76 ruled only that such a distribution system accords with Article 85 (1) provided that resellers are chosen on the basis of objective conditions of a qualitative nature and that such conditions are not applied in a discriminatory fashion. In addition, the judgment presupposes that Article 85 (1) is certainly applicable in certain cases and that in the examination required thereby for exemption under Article 85 (3) all the circumstances are to be taken into account and in particular it is to be ensured that competition is not eliminated. If one also takes into account the fact that the BMW decision, which was also mentioned, expressly required that the provision of after-sales service by independent workshops be permitted — such conditions are possible under Article 85 (3) — then the system applicable in the present case, in which no outside repair shops are permitted to provide after-sales service and in which, as there is only one undertaking responsible for after-sales service in each Member State, there is no effective intra-brand competition, can barely be justified by reference to the principles applicable to selective distribution systems.

(b) With regard, furthermore, to the particular question whether Liptons was legitimately excluded, the fact that at the time of the termination of business relations with Liptons Article 86 of the EEC Treaty was not yet applicable in the United Kingdom is certainly irrelevant. The present proceedings hinge on Hugin's general commercial policy, which was applied over a long period and which was also continued after the accession of the United Kingdom.

Similarly, in my opinion, the fact that under the agreements with Hugin GB Liptons was to be engaged in after-sales service only on a provisional basis and that even in 1972 Liptons was aware that supplies of spare parts were only being continued pending the conclusion of a distribution contract is also of no importance. It does not affect the fact that Hugin's general commercial policy, pursuant to which Liptons was excluded, is unacceptable. In this respect the fact should be taken into account in favour of Liptons that it had been involved in business relations with Hugin GB for many years and that Hugin AB was aware of that fact, whilst the refusal of the contract offered by Hugin, for which it can hardly be denied that Liptons had logical reasons — restriction of its distribution territory and limiting of its profit-margins — should have been irrelevant.

Finally, the argument that Liptons had to be excluded from servicing as it did not satisfy the particular requirements laid down by Hugin for after-sales service is also unconvincing. Even though it is not directly evident what Liptons' actual activities in the field of after-sales servicing were before 1972 — additional information from the Commission on this point would have been useful — it is none the less certain that at the time when Hugin GB was the sole importer in

the United Kingdom Liptons carried out servicing to a certain extent and that for that purpose Liptons' mechanics were also trained by Hugin AB. Liptons is also apparently in a position to service NCR cash registers of a similar sort and furthermore no specific evidence is to be found for the applicants' allegation that before the termination of business relations with Hugin Liptons did not provide satisfactory after-sales service — although Hugin evidently had no hesitation in accepting Liptons into its distribution network, taking for granted the necessary qualifications. However, in so far as it was emphasized that Liptons *at present* no longer satisfies the necessary requirements, the failure to keep up to date with the most recent technical developments in Hugin machines must be left out of account, the Hugin group itself being responsible for it since it never offered to give further training to Liptons technicians and, in contrast to other manufacturers, did not send Liptons any information as to details of new models.

(c) Accordingly it can be held only that there appear to be no objective reasons to exclude the application of Article 86 to the applicants' commercial policy with regard to after-sales service and in particular in relation to Liptons.

3. That does not, however, conclude the examination as to whether Article 86 was correctly applied in the present case. As the Court is aware, proof of a dominant position in a substantial part of the common market and an abuse thereof are not sufficient for that purpose; such a situation is covered by Article 86 only in so far as the abuse "may affect trade between Member States". We now come to what in my opinion is the particularly critical question of the delineation of the sphere of application of Community law as against national law which, as in Cases 56 and 58/64 (*Consten and Grundig* v *Commission*, judgment of 13 July 1966 [1966] ECR 299) and in Cases 6 and 7/73, is to be undertaken with regard to the aforesaid expression. It will then become evident whether the Commission was right to deal with a case such as this or whether, as in the case decided by the Bundesgerichtshof, the application of measures under national law would be more appropriate.

The applicants evidently take the latter view. They point out that Liptons, the undertaking with which the contested decision is primarily concerned, is only active in business in the London area. Even while Liptons was Hugin GB's authorized dealer for the whole of Great Britain no cash registers were marketed abroad, which is to be explained largely by the fact that the cash registers are adapted to the particular circumstances in each country (language, currency etc.) and that conversion for export would be uneconomic. Similarly, Liptons has never provided after-sales service abroad. In so far, however, as the decision refers to Hugin's general commercial policy under which spare parts are in principle not supplied to outside undertakings, it is important to realize that, in particular in the light of a corresponding clarification

by Hugin, that does not constitute a prohibition on exports. Moreover, quite generally it may be assumed that Hugin cash registers are not obtained from vendors in another country but from the nearest distributor in the same country and that servicing quite naturally follows the same rules.

(a) In this connexion it is first necessary to clarify how the said expression in Article 86, which is also to be found in Article 85, is to be understood in the light of the decided cases.

We may be certain, as is clear from the wording, that current measurable effects on inter-State trade are not the exclusive determining factors. As was stated in the judgment in Case 56/65 (judgment of 13 June 1966 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235) it is necessary rather to examine the direct or indirect, actual or potential influence on the pattern of trade. The point depends on whether the conduct in question might impede the realization of a single market and whether it is possible to foresee with a sufficient degree of probability that it may have an influence on the pattern of trade.

In my view no support for the argument that the position with respect to Article 86 may be different can be derived from the judgments in Cases 6 and 7/73 and Case 27/76. In the first-mentioned judgment it was, it is true, emphasized that it is to be assumed that trade has been adversely affected if the conduct in question affects the structure of competition in the common market it does not matter whether the abusive conduct relates to the export trade or the trade of the undertaking in question in the common market. Similar terms are used in the United Brands judgment, in which it was held that where a competitor is being eliminated it is immaterial whether the behaviour relates to trade between Member States. None the less, the fact must not be overlooked that in the first-mentioned judgment stress was also laid on the finding that the undertaking concerned exported products to two Member States and that that activity was endangered by the contested boycott. Similarly, in the other above-mentioned judgment, the fact was relevant that it had been made impossible for the Danish undertaking concerned to purchase bananas in the Federal Republic of Germany and to market them in Denmark. In both cases, therefore, the conduct involved was certainly not confined to a single Member State, thereby not affecting trade between Member States. To me it would at any event appear unacceptable to treat the criterion of an effect on trade as being virtually the same as an effect on competition. That would be an interpretation contrary to the wording, according to which the element of an effect on trade is of particular importance in delineating the sphere of application, which can only mean that that element must have an independent meaning.

(b) If, accordingly, one examines whether Hugin's general commercial policy — no supplies of spare parts to independent maintenance undertakings — and Hugin's conduct towards Liptons have an influence on trade between Member States or at least, with a sufficient degree of probability, may lead to the exertion of such influence, the following individual conclusions may be made:

(aa) With regard to Hugin's general commercial policy in the common

market there was never the intention, in spite of the wording to that effect in agreements with distributors and in instructions to subsidiary companies, to create a true prohibition on exports of spare parts, but only a prohibition on supplies to outside undertakings. Hugin has already emphasized that at the hearing before the Commission, and corresponding explanations, the draft of which was sent to the Commission on 7 November 1977, were contained in a letter sent at the end of November 1977. The possibility is not therefore to be excluded that a distributor may obtain spare parts from a distributor or subsidiary company in another Member State, although that might happen only very rarely.

On the other hand, with regard to the prohibition on the supply of spare parts to independent undertakings which makes it impossible for those undertakings to service Hugin cash registers and so impairs their other business activities such as renting out Hugin cash registers and refurbishing used Hugin cash registers, it has to be stated that apparently there has been no actual examination of the market outside the United Kingdom which would support the conclusion that the prohibition affects trade between the Member States. It is therefore not known to what extent such undertakings exist in other Member States and whether they engage in trade between the Member States or would be in a position to do so. At any event it may be assumed that that is extremely unlikely, since according to all that we have heard the particular nature of the market in question is not such as to give rise to large independent servicing undertakings.

With regard to Hugin's general commercial policy therefore — I shall refer to the particular case of Liptons presently — a conclusion relating to the conceivable effects on trade between States is not possible. As, in my view, it is not sufficient to find that the structure of competition has been affected in each individual Member State, since those effects may be of a purely local nature, the only conclusion to be drawn is that the Commission has not produced sufficient evidence to justify the application of Article 86 to Hugin's general commercial policy.

(bb) As regards Hugin's conduct towards Liptons, the matter depends, on the one hand, on the effects of the refusal to supply spare parts on the servicing of Hugin cash registers, on trade in the refurbishing of used cash registers and on trade in the renting out of machines, that is, on all Liptons' economic activities in the marketing of goods and the provision of services; on the other hand, it turns on the fact that it is impossible for Liptons to obtain Hugin spare parts from other Member States.

In respect of the first point it has been established from the statements in the course of the proceedings that it is true that until 1972 Liptons marketed Hugin cash registers throughout Great Britain, although outside the London region this took place not by means of its own distribution network but only by means of representatives. We are not here concerned with such trade — Liptons having refused to form part of Hugin's distribution network — but solely with the servicing of cash registers, the refurbishing of used cash registers and

the renting out of cash registers. In this respect it is quite clear and uncontested that Liptons' activities are for the most part confined to London and an area of 50 miles around London, while outside that territory it engages in very little activity. In particular, Liptons has never engaged in international trade, genuine possibilities for which exist at least in Ireland, there being no problems of adaptation there. Nor was any evidence produced to suggest that such a development is imminent, for example in the context of an expansion of its business activities which, in respect of cash registers of other manufacturers, would present no obstacles. Similarly, it is uncontested that Liptons has never provided any after-sales service outside the United Kingdom and in that respect as well it has no concrete plans. The only conclusion to be drawn from those facts is that the criterion of an effect on trade between Member States is not satisfied, as in my view it is not sufficient to that end that a mere hypothesis should exist but rather that a sufficient degree of probability should be demonstrated in relation to the question whether commercial relations are to be expected between States and whether their development is being impeded.

I should add immediately that the same applies to the second matter raised. In this respect it cannot be denied that Liptons attempted to obtain spare parts from other Member States without success when Hugin refused such supplies. That was evidently not a normal business practice, however. It is quite clear, and this was also admitted in the course of the proceedings, that undertakings engaged in servicing naturally apply to the nearest Hugin company or, if spare parts are not available there, directly to Hugin AB in Sweden. Even if it were established that the refusal to provide supplies outside the Hugin network is unlawful (there exists no real prohibition on exports), Liptons (no evidence to the contrary has been brought as regards other undertakings engaged in servicing) is concerned only with supplies within one country or orders in a third country. Clearly, neither concerns trade between Member States or effects on such trade within the meaning of Article 86 of the EEC Treaty.

(cc) It remains only to conclude, without going into the question whether *perceptible* effects to trade between the Member States are necessary for the application of Article 86, that the abuse of a dominant position on the market, which may be presumed to exist in the present case, is not, since it concerns a merely local occurrence without international implications, covered by Article 86 of the EEC Treaty but may at the most fall within the ambit of national law relating to competition.

III — Consequently, the statement contained in Article 1 of the Commission decision to the effect that Article 86 has been infringed cannot be upheld and therefore the application for the annulment thereof should be upheld. It is thus evident that there is no legal basis for the fine laid down in Article 2 or for the order contained in Article 3, the enforcement of which is ensured by the periodic penalty payment provided for in Article 4. In accordance with the application the whole of the contested decision should consequently be annulled.

It is therefore no longer necessary to examine the arguments put forward relating specifically to the imposition of the fine.

The conclusion which I have reached also renders otiose any examination of whether there is any objection to the obligation to supply parts specified in the grounds for the decision.

IV — It is my opinion, therefore, that the Commission decision challenged by Hugin AB and Hugin UK should be annulled and that the Commission should bear the costs of the proceedings.