JUDGMENT OF THE COURT (Fifth Chamber)

13 January 1994 *

In Case C-376/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht (Higher Regional Court) Düsseldorf (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Metro SB-Großmärkte GmbH & Co. KG

and

Cartier SA,

on the interpretation of Article 85 of the EEC Treaty with regard to a selective distribution system established by the defendant,

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, D.A.O. Edward, R. Joliet (Rapporteur), G.C. Rodríguez Iglesias and F. Grévisse, Judges,

* Language of the case: German.

Advocate General: G. Tesauro,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Metro SB-Großmärkte GmbH & Co. KG, by H. Wissel, of the Düsseldorf Bar,

— Cartier SA, by W. Tilmann, of the Düsseldorf Bar,

— the Greek Government, by D. Raptis, State Legal Adviser, acting as Agent,

— the French Government, by P. Pouzoulet, Deputy Director in the Legal Affairs Department of the Ministry of Foreign Affairs, and H. Duchêne, Secretary for Foreign Affairs at the same Ministry, acting as Agents,

— the Commission of the European Communities, by B. Langeheine, a member of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Metro SB-Großmärkte GmbH & Co. KG, Cartier SA, the French Government and the Commission, represented by Götz zur Hausen, Legal Adviser, acting as Agent, at the hearing on 23 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 27 October 1993,

gives the following

Judgment

1 By order of 22 September 1992, which was received at the Court on 12 October 1992, the Oberlandesgericht Düsseldorf referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the 'imperviousness' of a selective distribution system as a condition of its validity under Article 85 of the EEC Treaty.

2 That question was raised in proceedings brought by Metro SB-Großmärkte GmbH against Cartier SA for a declaration that the latter was under an obligation to provide its guarantee free of charge in respect of the Cartier watches which it offered for sale.

3 Metro SB-Großmärkte GmbH (hereinafter referred to as 'Metro'), a company established in Düsseldorf, is a subsidiary of the Metro Group which operates, in the Federal Republic of Germany and in other European States, a large number of self-service wholesalers organized on a cash and carry basis.

4 Cartier SA (hereinafter referred to, together with the Cartier Group, as 'Cartier'), a company established in Paris, is a subsidiary of, and distribution company for Cartier Monde, whose registered office is in Luxembourg and which has similar distribution companies in several countries. Cartier products are generally considered to be luxury products.

5 Cartier does not make watches itself but obtains them from a manufacturer established in Switzerland. It markets them through a selective distribution network. Within the common market, that network is based on contracts concluded, in the various Member States, by Cartier subsidiaries or, if none, by wholesale importers selected by the parent company, with retailers, known as licensees, who are selected in accordance with qualitative criteria. Those distribution contracts are drawn up on the basis of a standard contract.

6 That standard contract was notified in 1983 to the Commission, which examined its compatibility with Article 85(1) of the Treaty and criticized some of its clauses. Cartier removed those clauses and forwarded an amended contract to the Commission, whereupon the latter notified it in an official letter of 21 December 1988 that the file on the matter could be closed.

7 According to the terms of that contract, Cartier undertakes to supply Cartier products within the Community only to authorized dealers. In return, those dealers undertake to sell those products within the Community only to final consumers or else to other authorized dealers established there.

8 Metro does not belong to the network of Cartier licensees. For several years, however, it has managed to obtain Cartier watches from non-member countries such as Switzerland where there are gaps in Cartier's selective distribution system. The watches are purchased there by Metro from independent dealers who obtain them, it would seem, from licensees belonging to Cartier's international network, who cannot under Swiss law be required to resell only to authorized Cartier licensees. The watches so obtained are subsequently resold by Metro within the common market.

9 Cartier watches are sold with a manufacturer's guarantee. The guarantee is in the form of a certificate which must be completed at the time of purchase. On the basis of a clause in the international guarantee that is provided with each watch, Cartier undertakes to honour the guarantee on condition that the certificate bears the stamp and the signature of an authorized Cartier licensee.

10 For some time, however, Cartier provided services under the guarantee in respect of watches sold by Metro. Since 1984, it has refused categorically to provide its guarantee free of charge in respect of watches which have not been obtained from its authorized dealers. Metro accordingly decided to organize its own guarantee system, which constitutes a considerable financial burden for that company.

11 Taking the view that the restriction of the guarantee was incompatible with Article 85(1) of the Treaty, Metro applied in 1984 to the Landgericht (Regional Court) Düsseldorf for a declaration that Cartier was under an obligation to grant the guarantee in respect of Cartier watches sold with a guarantee certificate completed and signed by Metro.

12 Ruling at first instance, the Landgericht Düsseldorf dismissed Metro's application for a declaration as unfounded.

13 On appeal, the Oberlandesgericht (Higher Regional Court) Düsseldorf upheld the Landgericht's dismissal of the case. In particular, it considered that it was irrelevant whether the restriction of the Cartier guarantee was contrary to Article 85 of the Treaty.

14 On 10 November 1987, the Bundesgerichtshof (Federal Court of Justice) quashed that judgment on the ground that the Oberlandesgericht had not investigated the facts to a sufficient extent. In particular, it pointed out that the question whether Cartier's selective distribution system was lawful could not be left open. In its view, if Cartier's guarantee system was not incorporated in a permissible selective distribution system but operated on its own, it would be contrary to Article 85(1) of the Treaty.

15 In the second appeal proceedings, the Oberlandesgericht upheld Metro's application for a declaration. That court considered certain terms of the standard distribution contract, which, in its view, made cross-deliveries between authorized retailers, whether carried out within a single State or of a cross-frontier nature, conditional on special authorization granted by the Cartier subsidiaries. It concluded that Cartier's selective distribution system was contrary to Article 85(1) of the Treaty on account of those terms. Since Cartier's selective distribution system was unlawful, in its view, the Oberlandesgericht considered that the restriction of the Cartier guarantee could not be justified either.

16 In a further appeal on a point of law, the Bundesgerichtshof quashed on 19 December 1989 the second judgment of the Oberlandesgericht. It considered that the Oberlandesgericht's interpretation of the terms relating to cross-deliveries between authorized retailers was incorrect and that the contested terms were not contrary to Article 85(1) of the Treaty. Furthermore, the Bundesgerichtshof emphasized that the restriction of the Cartier guarantee was the result of a contractual undertaking given by Cartier to its retailers and therefore fell within the scope of Article 85(1) of the Treaty. Finally, and above all, it pointed out that the restriction of the guarantee was permissible only in so far as the selective distribution system for Cartier watches in the common market was 'impervious' ('lückenlos'). The Bundesgerichtshof accordingly referred the case back to the Oberlandesgericht for that court to determine whether or not Cartier had an 'impervious' selective distribution system within the common market.

17 In the third appeal proceedings before the Oberlandesgericht, the dispute focused essentially on the question whether or not Cartier's distribution system was 'impervious'. In its order for reference, the Oberlandesgericht starts from the premise that in non-member countries there is no selective distribution system for Cartier watches which is protected by contract and is enforced in practice, and that accordingly such watches can lawfully come on to the common market in large quantities, where Metro is free to sell them. If, according to the Oberlandesgericht, the view is taken, as would seem to follow from the judgment of the Bundesgerichtshof, that the fact that third parties actually obtain and then freely sell the goods, or even the mere fact that they are able to do so, is sufficient to defeat the system, then Metro's claim must or, at any rate, can be upheld. If, on the other hand, the existence of imports from non-member countries in which the distribution system is not 'impervious' either in theory or at least in practice is not a crucial factor, Metro's application will have to be dismissed if Cartier's contractual structure is consistent, from the point of view of the manner in which the licensees are selected, with the principles laid down by the Commission and the Court of Justice of the European Communities, as the Oberlandesgericht would not appear to doubt is the case.

18 By order of 22 September 1992, the Oberlandesgericht raised the question whether the 'imperviousness' of the system in countries outside the Community was a con-

dition of the validity of the selective distribution system within the EEC and it accordingly referred to the Court the following question for a preliminary ruling:

'Is an EEC selective distribution system for prestige products (watches in the upper-medium and luxury price ranges) which precludes the application of Article 85(1) and (2) of the EEC Treaty to be denied recognition on the ground that in countries outside the European Community a selective distribution system based on an appropriate contractual structure does not (fully) exist, so that goods which in the EEC are covered by that distribution system can be freely obtained there by persons outside the system and lawfully brought on to the common market?'

19 As the Commission points out, it is only by reference to German law that it is possible to understand why the national court has raised the question whether the 'imperviousness' of a selective distribution system worldwide is a condition of the validity under Community law of the selective distribution system established within the Community.

20 The concept of 'imperviousness' has been developed in the Federal Republic of Germany in connection with actions for unfair competition (actions for an injunction or for damages) brought against third parties who market products covered by an exclusive sales licence, or who sell at prices below those contractually imposed by the manufacturer. The concept was subsequently extended to actions against persons who are not parties to a selective distribution system.

21 The 'imperviousness' ('Lückenlosigkeit') of a selective distribution system means that an unauthorized dealer can obtain the goods covered by that system only by participating in the breach by an authorized dealer of his contractual obligations. The system must be 'impervious' both in theory and in practice. In theory it presupposes that the manufacturer has concluded, with the dealers which he has selected, a series of contracts to ensure that the products which are the subject of

selective distribution reach consumers only through authorized dealers. In practice it entails proof by the manufacturer that he is enforcing his system by taking action against such of his partners as are in breach of contract or against third parties who obtain the goods from dealers in breach of their contractual obligations.

22 That doctrine is significant first of all in terms of the burden of proof. Once he has demonstrated that his distribution system is 'impervious' in theory and in practice, a manufacturer who takes action against third parties alleged to be engaging in unfair competition benefits from a reversal of the burden of proof: those parties are then presumed to be acting unfairly since they cannot have obtained the goods at issue except in an underhand manner, either by encouraging an authorized dealer to commit a breach of contract or simply by exploiting such a breach.

23 'Imperviousness' also has a substantive dimension. Under German law, it is a condition for implementing the selective distribution system in relation to those who have assumed obligations under the contract. It is only if the system is 'impervious' that the manufacturer can act against an authorized dealer in order to compel him to comply with his contractual obligations. If the lack of 'imperviousness' of the system leads to competition against authorized dealers from independent dealers, the manufacturer will no longer be able to compel the members of his network to comply with their contracts.

24 In reply to the question submitted for a preliminary ruling, viewed in that context, it must be emphasized first of all that the concept of 'imperviousness' has been developed in connection with actions for unfair competition directed against persons who are not parties to agreements granting exclusive sales licenses, fixed price agreements or agreements establishing a selective distribution system. In such proceedings for unfair competition, the question of the validity of the contract under Article 85 of the Treaty arises in the form of a preliminary issue. A manufacturer can allege that a third party has been involved in the breach of a contractual obligation only if that obligation itself is valid under Article 85. That does not mean that it is necessary, on the other hand, in order to appraise the lawfulness of an agreement under Article 85 of the Treaty, to enquire whether the conditions are fulfilled for that agreement to be capable of being enforced against third parties by means of an action for unfair competition.

25 Nor can the application of the prohibition on agreements, decisions and concerted practices laid down by Community law depend on a condition which is peculiar to a national system. As the Commission has rightly pointed out, the requirement of 'imperviousness' laid down in German law does not exist in the law of most of the other Member States. For example, the French Court of Cassation has held that the fact that an unauthorized dealer offers for sale products whose packaging is marked 'sold exclusively by authorized dealers' constitutes in itself unfair competition (French Court of Cassation, Commercial Court, judgment of 27 October 1992 in *Rochas*, Dalloz 1992, Jurisprudence 505). Accordingly it is not even necessary under French law to establish that an unauthorized dealer has been supplied by an authorized dealer in breach of contract and has taken part in that breach.

26 Moreover, as the Commission has correctly perceived, to make the validity of a selective distribution system under Article 85(1) of the Treaty conditional on its 'imperviousness' would lead to the paradoxical result that the most inflexible and most tightly sealed distribution systems would be treated more favourably under Article 85(1) of the Treaty than distribution systems that are more flexible and more open to parallel transactions.

27 Finally, recognition of the validity of a selective distribution network in the common market cannot depend on the manufacturer's ability to ensure that the network is 'impervious' everywhere, given that the legislation of certain Member States may hinder or even prevent the achievement of that objective.

28 It follows from those observations that the 'imperviousness' of a selective distribution system is not a condition of its validity under Community law.

29 In the light of the foregoing considerations, the answer to the national court's question must be that an EEC selective distribution system for prestige products (watches in the upper-medium and luxury price ranges) which precludes the application of Article 85(1) and (2) of the Treaty is not to be denied recognition on the

ground that in countries outside the European Community a selective distribution system based on an appropriate contractual structure does not (fully) exist, so that goods which in the EEC are covered by that distribution system can be freely obtained there by persons outside the system and lawfully brought on to the common market.

30 As stated above (see paragraph 17), the Oberlandesgericht makes clear in its order for reference that an answer to the question whether the system is 'impervious' would enable it to resolve the dispute before it. If the 'lack of imperviousness' of the system were to render it invalid under Article 85 of the Treaty, the restriction of the guarantee would be unlawful and the action brought by Metro would, in its view, have to be declared well founded. If, on the other hand, the 'lack of imperviousness' had no such effect, the restriction of the guarantee would be lawful and the action brought by Metro would have to be dismissed.

31 Since it is apparent from the answer to the question submitted for a preliminary ruling that the 'imperviousness' of the selective distribution system is not a condition of its validity, it remains appropriate to consider in what circumstances the restriction of the guarantee to watches obtained from authorized dealers may be considered lawful under Article 85 of the Treaty. In response to a letter from Metro requesting it to frame its question in those terms, the Oberlandesgericht explained in an order of 9 November 1992 that 'that question (was) already the subject of the order for reference'. In the proceedings before the Court, that question was discussed at length by the parties, both in their written observations and during the oral procedure.

32 In that regard, it should be noted that a contractual obligation to restrict the guarantee to dealers within the network and to refuse to grant it in respect of goods sold by third parties leads to the same result and has the same effect as contractual terms which reserve the right to sell to members of the network. Like such terms, the restriction of the guarantee is a means whereby the manufacturer can prevent persons outside the network from marketing products covered by the system.

33 Where contractual terms whereby the manufacturer undertakes to sell only through authorized dealers and whereby those dealers themselves undertake to

resell only to other authorized dealers or to consumers are lawful, there are no grounds for applying stricter treatment to arrangements for restricting the guarantee by contract to products sold through authorized dealers. Under Article 85 of the Treaty, only the purpose of that restriction and its effect are relevant.

34 It must be stated, therefore, with regard to the problem raised before the national court, that where a selective distribution system satisfies the criteria for validity laid down in Article 85 of the Treaty, as defined by the Court in its case-law (see the judgment in Case 31/80 *L'Oréal* [1980] ECR 3775), the restriction of the manufacturer's guarantee to products covered by the contract which are obtained from authorized dealers must also be regarded as valid.

Costs

35 The costs incurred by the Greek Government, the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Oberlandesgericht Düsseldorf, by order of 22 September 1992, hereby rules:

1. An EEC selective distribution system for prestige products (watches in the upper-medium and luxury price ranges) which precludes the application of Article 85(1) and (2) of the EEC Treaty is not to be denied recognition on

the ground that in countries outside the European Community a selective distribution system based on an appropriate contractual structure does not (fully) exist, so that goods which in the EEC are covered by that distribution system can be freely obtained there by persons outside the system and lawfully brought on to the common market.

2. Where a selective distribution system satisfies the criteria for validity laid down in Article 85 of the EEC Treaty, as defined by the Court in its case-law, the restriction of the manufacturer's guarantee to products covered by the contract which are obtained from authorized dealers must also be regarded as valid.

Moitinho de Almeida Edward Joliet

Rodríguez Iglesias Grévisse

Delivered in open court in Luxembourg on 13 January 1994.

J.-G. Giraud
Registrar

J.C. Moitinho de Almeida
President of the Fifth Chamber