OPINION OF MR ADVOCATE GENERAL TESAURO

delivered on 27 October 1993 *

Mr President,
Members of the Court,

1. In these proceedings, the Court must in my view give a ruling on two questions, both concerning the application of Article 85(1) of the Treaty to selective distribution systems:

— whether a selective distribution system is incompatible with Article 85(1) because the producer is unable to ensure its *imperviousness*, in other words he is unable to prevent the products covered by the contract from being sold on the same market not only by authorized licensees but also by dealers not forming part of the official distribution network;

— whether, under a selective distribution system, a manufacturer is entitled to limit his guarantee solely to products sold through the official network, thereby excluding products lawfully marketed by dealers outside the network.

2. Let me point out first of all that the two questions concern a selective distribution system for luxury products, namely Cartier watches. It is possible, however, that the criteria laid down by the Court may assume — especially so far as concerns the scope of the producer's guarantee — general significance, and apply also to other important categories of product, frequently marketed through selective distribution networks.

Background

3. The two aforesaid questions have arisen in a dispute between a company of the Metro group — a group which operates in various European countries a number of self-service wholesale stores on a cash and carry basis — and Cartier, a world leader for certain categories of luxury products.

The facts of the case are fairly straightforward. Cartier markets its products, worldwide it contends, through a selective distribution network. That system is based on a standard contract, concluded by the group's national subsidiaries (or, if none, by the wholesale importer) with the various authorized licensees.

* Original language: Italian.

While Metro is not part of the official sales network, it has managed to obtain Cartier products (especially watches) on a regular basis and to market them in its own stores.

4. In the national proceedings, it has not been established where Metro obtains its supplies. At the hearing, in reply to a question from me, Metro stated that it obtained Cartier watches in Switzerland, from independent dealers who in turn obtain their supplies from authorized Swiss licensees within the Cartier network, which is permitted by Swiss law.

In any event, it is common ground (both in the national proceedings and in the proceedings before the Court) that the purchase and marketing of Cartier products by Metro is *lawful*. In addition, it is apparent from the figures produced before the Court that sales of Cartier products by Metro, especially in Germany, are by no means negligible (approximately 10% of the total volume of Cartier sales in one year).

Until 1984 Cartier honoured guarantees on watches sold by Metro. Subsequently, also as a result of an amendment to the agreements concluded with authorized dealers, Cartier refused to provide its guarantee free of charge in respect of watches purchased outside the official distribution network. In the case of such watches, Cartier carried out the necessary repairs, but at the customer's expense.

5. Cartier's refusal to guarantee the watches sold by Metro gave rise to a lengthy and complex dispute before the national courts, which is summarized in the Report for the Hearing. In particular, the Bundesgerichtshof — called upon to adjudicate for the second time on the appeal lodged against the decision of the lower court — emphasized that the refusal to honour the guarantee would cease to be lawful if it were part of a selective distribution system that was not impervious, in other words under a system in which dealers outside the network — such as Metro — can lawfully obtain supplies of the product covered by the contract. The Bundesgerichtshof accordingly referred the case back to the lower court, the Oberlandesgericht Düsseldorf, in order to enable the latter to establish the facts.

6. In the light of those findings, the Oberlandesgericht Düsseldorf referred the following question to the Court 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?'

Subject-matter of the proceedings

7. There is some difficulty in defining the subject-matter of the proceedings. Strictly speaking, the Oberlandesgericht seeks a ruling from the Court solely on the relevance of the criterion of imperviousness for the purposes of the application of Article 85(1). It must be emphasized, however, that the Oberlandesgericht is asking that question in order to be able to adjudicate on the real question which forms the subject-matter of the dispute in the main proceedings, that is to say whether Cartier's refusal to honour the guarantee in respect of products sold outside the network is lawful. The national court considers that if the Cartier system is unlawful, in that it is not impervious, then by the same token the refusal to honour the guarantee is also unlawful.

It is quite clear, however, that the question of the guarantee can be considered on its own, and not only by reference to the legality of the distribution system of which it forms part. In other words, it is legitimate to ask whether the refusal to honour the guarantee can constitute *of itself*, irrespective of the legality of the Cartier system, a breach of Article 85(1). Those two approaches are closely connected, as confirmed moreover, by the fact that (with the sole exception of the Greek Government) all the parties which have submitted observations have considered both aspects in depth.

Accordingly, to confine oneself solely to the question whether the system is impervious, without reference to whether the refusal to honour the guarantee as such is compatible with Article 85(1), would be tantamount to providing the national court with an admittedly swifter and more straightforward answer, though one that is far from complete and is of limited use for the purpose of resolving the dispute before it. To do so, moreover, would be particularly unjustified in that the parties' arguments have focused, both in the written procedure and at the hearing, primarily on the question of the guarantee, thereby enabling the Court to glean all the information it needs to make an assessment in that regard. Accordingly, reasons of procedural economy also lend weight to the view that the Court should examine *ex professo* the question of the guarantee in the context of these proceedings.

I therefore consider that, in this case, in view of the subject-matter of the dispute in the main proceedings and in order to provide the national court with a ruling on the interpretation of Community law enabling it resolve the question of law before it, it is necessary to consider — as practically all the parties have done in the course of the proceedings — whether the restriction of the guarantee can constitute *of itself* a breach of Article 85(1).

8. In its pleadings, Metro maintains not only that Cartier's distribution system is not impervious and that the refusal to honour the guarantee is unlawful, but it also raises a series of further objections to the selective distribution agreements concluded between Cartier and its licensees. In its view, the Cartier system is in breach of Article 85(1) on four grounds:

— the official licensees cannot obtain supplies from other official licensees established outside the EEC (prohibition on cross-deliveries from non-member countries);

— cross-deliveries within the EEC are in fact hindered;

— the criteria for selecting licensees are not justified and are therefore excessively restrictive;

— the system lacks objectivity and leads to selection on the basis of criteria which are not 'purely qualitative'.

9. Does the Court have to consider those criticisms in substance? In my view, that question is to be answered in the negative. The grounds outlined above are only indirectly concerned with the subject-matter of the dispute in the main proceedings, as described earlier. Furthermore, it would seem that those grounds have never been assessed by the national courts at any stage of the proceedings. Finally, they have not really been discussed by the parties in the procedure before the Court either: in the written procedure, only Metro put forward observations in that regard while, at the hearing, those grounds were essentially disregarded.

10. In my view, therefore, those grounds are unconnected with these proceedings. That solution, moreover, is clearly wholly without prejudice to Metro's right to raise its objections to Cartier's distribution system whether before the national court, which is competent to assess their substance in the light of Article 85(1) and (2), or before the Commission, in the form of a complaint under Article 3 of Council Regulation No 17/62.

'Lack of imperviousness' of the Cartier system

11. Metro claims that the Cartier system is anything but impervious. A large volume of Cartier products is marketed by independent dealers, that is to say dealers not belonging to the official network. The result is a distortion of competition between official dealers and independent dealers: both the former and the latter sell the same products on the same markets, although the former are subject to burdens (arising from the fact that their stock range and their dealings are centred on the products covered by the contract) which are not borne by the latter.

12. Cartier contends, on the other hand, that its distribution system is impervious both in theory and in practice. The marketing of the products is entrusted worldwide to a network of selected dealers who are contractually bound to resell the products themselves either to final consumers or to dealers *forming part of the official network*. In the latter case, moreover, sales are subject to a special system of registration. Accordingly, the system is organized in such a way as to ensure that the products are handled exclusively within the official network and not through independent dealers. According to Cartier, the only instance of independent sales on the European market is the case of Metro, which avails itself of the substantial resources at its disposal in order to obtain in non-member countries small quantities of Cartier products, which are on each occasion stocked in the Metro group's various stores. It must be emphasized, however, that Cartier has

waived the right to *prove* that its network is impervious worldwide.

As pointed out earlier, moreover, Cartier, in the case which it is defending, has not contended that the acquisition and marketing of its products by Metro constitute unlawful acts and, in particular, unfair competition.

13. Cartier — supported by the French and Greek Governments and, with some reservations, by the Commission — goes on to assert that, in any event, the imperviousness of a selective distribution system is not a fundamental prerequisite for the legality of the system itself. In fact, a degree of openness — reflected in the existence on the market of one or more Member States of a given volume of sales of products covered by the contract by independent dealers — must be regarded as a factor which stimulates competition and therefore militates in favour of the compatibility, as opposed to the incompatibility, of the system itself with Article 85(1).

14. In that regard, it must be pointed out first of all that, as the Court has consistently held, selective distribution systems are considered compatible with Article 85(1), provided that the selection of dealers is justified by requirements relating to the nature of the product in question and is made on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises; furthermore, those criteria must be uniformly applied without discrimination to all potential resellers (see the judgment in Case 31/80 *L'Oréal* [1980] ECR 3775).

15. As a matter of principle, the establishment of a selective distribution system is undoubtedly justified in the case of products — such as Cartier watches — which fall within the category of high-quality luxury goods. In that sector, the channelling of distribution through selected dealers engaged in brand sales is an important requirement for the promotion of the image and commercial reputation of the product.

16. Since the establishment of a selective distribution system for products such as Cartier watches is justified in principle, we must determine whether the *lack of imperviousness* of the system itself is capable of invalidating its legality.

17. In that regard, it must be pointed out first of all that imperviousness is a criterion of national law. It is clear from the documents before the Court that its significance under German law is twofold. In the first place, in procedural terms, that criterion serves to reverse the burden of proof in proceedings for unfair competition brought by a producer who has established a selective distribution system against third parties, being dealers outside the network, who have marketed his products. In that situation, if the distribution system is impervious, the outsider is *presumed* to have acted unfairly, either by inducing an authorized licensee to commit a breach of contract or simply by

relying on such a breach. The presumption of unfair conduct on the part of a third party will thus enable the producer to bring the resale of his products by that party to an end and to obtain compensation for the damage suffered.

Secondly, in substantive terms, the criterion of imperviousness constitutes a condition for the *effectiveness* of such clauses of the selective distribution contract as they impose on the licensee certain obligations such as, specifically, the obligation not to sell the products covered by the contract at a price below the minimum price imposed by the manufacturer, or not to sell the products to dealers outside the network. If the system is not impervious, and the authorized licensee is therefore faced with competition on the part of independent third parties, the licensee will be able to avoid compliance with those obligations by relying, in relation to the producer, on *the unlawful exercise of the right*, an objection which deprives the contractual clauses relied upon by the producer of any legal effects. Accordingly, the system, found not to be impervious, essentially loses any binding force in relation to the licensees.

Moreover, as I believe was made clear during the oral procedure, the criterion of imperviousness is not directly relevant under the German system either for the purposes of the application of national cartel law.

18. In any event, whatever the relevance of that criterion internally, the question to be answered is whether *at Community level* the selective distribution system is to be regarded as incompatible with Article 85(1) simply because it is not impervious.

19. In that regard, it has been pointed out that neither the Commission nor the Court have ever considered imperviousness to be one of the conditions for the legality of a selective distribution system. It is clear, however, that this observation is not decisive in itself. What matters, instead, is the consideration that the transposition of that criterion within the framework of Article 85 of the Treaty would not seem to be justified by any real requirement for safeguarding competition.

20. On that point, it is advisable in my view to start from a factual premiss. As Cartier has rightly emphasized, it is quite normal for distribution systems not to be impervious to a greater or lesser extent. It is sufficient to bear in mind that such systems are in practice established gradually: initially, they may cover certain geographical areas and only subsequently be extended to other areas. That may occur, in particular, on the European market: in that market, a producer may well succeed in setting up a selective distribution network only in certain countries, where his products are better known to and more highly regarded by consumers and where, consequently, it is easier to find dealers willing to assume the burdens and obligations of a selective distribution contract, while in other countries distribution is effected through independent dealers, at least for a time. In that situation, it is quite normal, provided the economic prerequisites are

satisfied, for independent dealers established in countries with a selective distribution network to obtain supplies also from independent dealers established in countries in which there is no selective sales network.

Furthermore, in general, the practice of sales outside the network is more difficult to avoid in the case of products marketed through a large number of resellers. Thus, while the possibility cannot be ruled out of controlling and ensuring the maintenance of a selective distribution system in the case of luxury products, which are usually distributed through a somewhat smaller network (although Metro's example would in fact seem to demonstrate the contrary), it is surely more difficult to prevent gaps from arising in the distribution structure for products that are widely sold, such as electronic products for enthusiasts or small electric household appliances, in respect of which recourse is had as a rule to marketing on a far larger scale.

21. Against that factual background, to make the legality of a selective distribution system conditional on its imperviousness on a European scale, or even on a global scale, might jeopardize rather than safeguard competition.

In the first place, to lay down as an essential requirement that the system must be impervious would ultimately restrict to a considerable extent the autonomy of the parties. The producer and his commercial partners would be placed before a drastic choice in many cases entirely divorced from economic reality: either to establish everywhere a system which is entirely impervious or abandon selective distribution altogether. In practice, that would be tantamount to introducing an element of rigidity in commercial relations, preventing the parties from determining freely, and in accordance with their own judgment, the optimum distribution structure. In so far as in some sectors — such as that at issue — it is precisely the integrated distribution structure which is an important tool for the promotion of the products in question, to prevent the producer from resorting to selective distribution solely on the ground that a certain volume of sales outside the network is unavoidable may unduly deprive him of an important advantage with regard to *inter-brand* competition.

Secondly, a point not to be overlooked is that in those sectors of the economy in which all major producers have recourse for marketing purposes to selective distribution systems, the possibility of sales outside the network may even be beneficial; that possibility acts as a safety valve, in so far as, without calling in question the legality of the selective networks, it serves in any event to temper excessive rigidity, especially as regards prices, by maintaining a narrow opening for some parallel transactions by dealers outside the official network.

22. So far as concerns the imbalance which sales outside the network can bring about in competitive relations between official dealers and independent dealers, it seems to me that, once again, the answer to those difficulties must be left to the parties concerned: namely, the producer and official dealers. They are best placed to establish whether the volume of sales outside the network is such as to call in question the cohesion of the selective distribution system. If so, it is in the interest of all concerned to review the marketing structure and switch over from specialized distribution to unrestricted distribution. In so

doing, the parties can obviously terminate the selective distribution contract by mutual agreement and, in the event of a conflict of interests, avail themselves of the other remedies available to them under national contract law.

If that approach is disregarded, the ensuing treatment might be worse than the disease itself, inasmuch as, in order to remedy the imbalances arising within the selective distribution system as a result of sales outside the network, the system as a whole would be declared void pursuant to Article 85(1) and (2), paradoxically even against the will of those — the producer and official dealers — who are adversely affected by sales outside the network.

Furthermore, it should also be pointed out for the sake of completeness that the application of the criterion of imperviousness could prove highly uncertain in practical terms. What is the volume of sales outside the network, and the length of time, which renders the selective distribution system incompatible with Article 85(1)? Should there be a single threshold for all sectors or different thresholds for different sectors? And in the latter case, on the basis of what criteria? Are the courts — including the Court of Justice — in a position to give an answer to those questions without running the risk of giving arbitrary decisions? Those doubts, it seems to me, confirm that any problems raised by the existence of sales outside the network should be resolved by the parties themselves and not through judicial intervention based on the application of Article 85(1) and (2).

23. I therefore propose that the Court answer the question by stating that, under a selective distribution system, the mere fact that the products covered by the contract are lawfully brought on to the same markets not only by the official licensees but also by dealers not forming part of the selective distribution network is not such as to render the system itself incompatible with Article 85(1) of the Treaty.

Restriction of the guarantee

24. Metro claims that the restriction of the guarantee solely to products sold by official dealers has an appreciable effect on sales by independent dealers. That restriction is not justified by requirements relating to the protection of the quality and reputation of the products. Metro lays emphasis on the fact that the services covered by the guarantee are provided by the producer, while the dealer confines himself to simple tasks which do not involve the use of specific skills or equipment.

25. Cartier, on the other hand, relies on considerations of a different order. It emphasizes, in particular, that only official dealers have the information, materials and instruments needed for the conservation of the products and for supplying them to the customer in perfect working order. That is a direct result of the specific contractual obligations which each member of the official

network assumes under the selective distribution contract. In addition, only products sold through the official network undergo the checks necessary to guarantee their authenticity. That is borne out by instances in which the products sold by Metro were counterfeit. Hence it is lawful for the producer to restrict the guarantee solely to products sold through the official network.

26. If we consider the matter, it is necessary first of all to assess the effects of the restriction of the guarantee on competitive relations. In general, dealers who are unable to supply the products with the guarantee normally provided by the manufacturer are at a serious disadvantage in commercial terms. Faced with the choice between a product which is guaranteed and one which is not, a consumer is bound to prefer the former, also because the absence of a guarantee may instil in the consumer doubts as to the quality (or even the authenticity) of the product offered for sale.

The Commission points out, however, that under (qualitative) *selective* distribution systems, the restriction of the guarantee produces effects other than those arising in cases of *exclusive* distribution.

In cases of exclusive distribution, a refusal to provide the guarantee in respect of products distributed by parallel importers undoubtedly places an exclusive licensee, within the area assigned to him, at an advantage in relation to parallel importers; since the latter are unable to provide services to their customers under the guarantee, they run the risk in substance of being 'excluded' from the market, with the result that the exclusive right already conferred by the producer on his licensee, which is merely relative to start with, tends to become virtually absolute.

In cases of (qualitative) selective distribution, all resellers who meet the requirements laid down have, in theory, the possibility of obtaining authorization and of marketing the products. It follows that, within a given area, there may be a variable and even substantial number of authorized resellers, none of whom has a territorially exclusive right conferred by contract. In cases of selective distribution, therefore, the refusal to grant the guarantee in respect of products sold outside the system does not strengthen a pre-existing territorial exclusivity, but is aimed merely at protecting authorized dealers against competition from unauthorized dealers.

In the light of those considerations, it might be tempting to conclude that in cases of (qualitative) selective distribution, the restriction of the guarantee has no restrictive effects on competition. To refuse to honour the guarantee in respect of products sold outside the network would have no effect other than to place at a disadvantage dealers — unauthorized dealers — who, in principle (that is to say if the system had functioned at optimum level) should not have marketed the products concerned in the first place.

27. I do not deny that there is something to be said for this approach. On closer scrutiny, however, it strikes me as superficial and wholly unfounded.

28. To begin with, let me point out, albeit in passing, that *qualitative* selection is a brilliant theoretical construction, though it is by no means certain of being strictly observed in practical terms. Notwithstanding all the precautions taken by the Commission — which, moreover, are wholly lacking in the case of the Cartier contract — it is possible that systems which are in theory qualitative, and are therefore open to any reseller who meets the conditions laid down, may subsequently prove, when tested against the facts, to be far more impenetrable, or in any event more inflexible, than they are stated to be. That could happen, in particular, in the case of products such as luxury products, a sector where distribution is in any event somewhat concentrated and where it is difficult to establish whether the system is not in fact based on *quantitative* selection.

So long as the Commission and the Court continue in principle to be opposed to any form of quantitative selection, it is possible to take the view that sales by dealers outside the network, provided they are lawful, constitute a kind of safety valve which deserves to be protected in terms of provision of the guarantee as well.

29. That, however, is not the main consideration. I consider that even if the distribution system were truly qualitative, the restriction of the guarantee solely to products sold by official licensees could also produce effects in restraint of competition under Article 85(1).

30. In that regard, it is necessary to start from the premiss, referred to earlier, that sales made outside the network by independent dealers such as Metro are lawful. If that were not the case, for instance if the products concerned were counterfeit, it is clear that the problem of the guarantee would not even arise, given that the producer could use other remedies, far more incisive than a refusal to honour the guarantee, in challenging unlawful sales of its products. Moreover, and in general terms, it is clear that the manufacturer's guarantee applies only to original products and certainly not to counterfeit products.

In this case, as pointed out earlier, Cartier does not dispute that the products sold by Metro, in respect of which no guarantee has been granted, were lawfully marketed, that is to say were not counterfeit.

31. Furthermore, all the parties — including Cartier itself — have laid emphasis on the fact that some sales outside the network are an entirely *normal* aspect of commercial reality, and are quite compatible with official distribution systems; indeed such sales have a *beneficial* effect on competition.

32. If that is so, however, it is hard to see why the producer should have the right to use the refusal to honour the guarantee as a tool, or as a weapon, to injure dealers who also carry on an activity which he himself acknowledges not only as lawful but indeed beneficial for competition.

Community cartel law recognizes and protects the producer's right to establish selective systems and to impose on his own licensees an obligation to sell the products covered by the contract only to other authorized dealers (as well as to final consumers). If, however, for whatever reason (a territorially-limited extension of the official network, other national laws which do not allow contractual clauses prohibiting sales to dealers outside the network, impossibility of ensuring that the system is watertight and so on), there is a *lawful* development of trade outside the network, it is difficult to see why that commercial activity should not be protected in the same way as any other, in terms of the guarantee as well.

33. That view, it seems to me, is also supported by considerations relating to *consumer protection*, which should not be unconnected with the interpretation of Article 85 of the Treaty. To permit a restriction on the guarantee means that consumers who have *lawfully* acquired *original* products from independent dealers are deprived, on that ground alone, of the producer's normal guarantee for manufacturing defects. That constitutes a wholly unjustified form of *discrimination*, at least in so far as the defects are attributable to the producer and not to the independent dealer who sold the product.

34. However, Cartier has argued that the restriction of the guarantee is justified by other considerations. In its view, marketing outside the network increases the risk factor inherent in any guarantee given by the manufacturer. Only specialized dealers are able to preserve the products in the most suitable conditions, reducing the risk of damage to a minimum. On the other hand, the obligation to guarantee products sold outside the network as well would lay the producer open to risks, and consequently burdens, which are unsustainable. Cartier has pointed out that the specific contribution made by authorized licensees for the optimal preservation of the products consists essentially in the prompt and timely replacement of the quartz components, in the use to that end of specific batteries and, in certain circumstances, in the replacement of the waterproof casing.

35. Personally, I believe there is a risk of overestimating the role of authorized licensees. Even dealers outside the official networks can be serious traders and possess the knowledge and the means needed to ensure a more than adequate conservation of the products in working order; I do not consider that an independent dealer is synonymous with a non-specialized dealer or, worse still, with an incompetent dealer.

So far as this case is concerned, it is worth bearing in mind that in its Decision of 20 December 1988 (paragraph (f) of the grounds), the Oberlandesgericht has already pointed out that 'the maintenance and guarantee services which the licensee himself is required to provide are to some extent essentially of a secondary nature..., whereas work on the "innards" of the watch is reserved to the manufacturer alone' and that, while there is no doubt that services which the licensee is competent to provide call for minimal technical equipment, there is some doubt as to whether such equipment requires 'technical or manual skills or financial means of a kind

that are not also available to a large number of other retailers of watches or specialized departments of large stores which employ appropriate staff'.

36. Having regard to those observations, it is questionable whether the sale of Cartier watches by Metro entails technical risks such as to jeopardize the operation of the guarantee system established by the manufacturer.

37. Even if we leave that aspect aside, however, there is another consideration which I consider to be fundamental. Let us acknowledge that authorized licensees provide sophisticated services which unauthorized dealers are unable to offer and that, in addition, such services are crucial for the prevention of *certain* technical problems and faults; that is a purely factual aspect which it is evidently for the national court to clarify.

In such a case, the producer can undoubtedly refuse to guarantee defects which are the *result* of an independent dealer's failure to provide the aforesaid services or to perform them correctly.

However, there is no justification whatever for the producer refusing to guarantee defects which are in no way connected with such services and which, in other words, could very well have arisen even if the product had been marketed by an authorized licensee.

38. That solution, in my view, is capable of reconciling the various interests at stake. On the one hand, the interest of the producer in not being held responsible for damage which could have been avoided if the product had been marketed through the official network. On the other, the interest of independent dealers and their customers in the absence, so far as the guarantee is concerned, of undue *discrimination* in relation to products sold outside the network: such discrimination would undoubtedly arise if the producer were able to refuse to honour the guarantee also in respect of defects for which an independent dealer absolutely cannot be held responsible.

Thus, in this case, Cartier — if its contentions were justified — could refuse to honour the guarantee in respect of damage connected with failure to replace (correctly) the batteries or waterproof casing, but could not refuse to guarantee damage arising, for instance, from a defect in the production materials.

That should be so particularly in the present case, inasmuch as the Cartier guarantee constitutes a guarantee in respect of 'manufacturing defects'; the undertaking given by the producer to the purchaser — as is clear from the appropriate 'guarantee declaration' provided with the watches sold — should not in any event cover damage for which independent dealers can be held responsible.

39. In my view, therefore, the producer's undertaking to guarantee manufacturing defects, set out in the 'guarantee declaration', is also valid in relation to consumers who

have obtained the product from unauthorized dealers, except as regards defects resulting from an unauthorized dealer's failure to provide, or correctly to perform, services which are normally carried out by authorized licensees.

40. That solution, of course, can be applied not only to the products in question but also, where appropriate, to other categories of products subject to selective distribution and covered by the manufacturer's guarantee.

Conclusion

41. In the light of those considerations, I propose that the Court rule as follows:

'1. Under a selective distribution system, the mere fact that the products covered by the contract are lawfully offered for sale on the same markets, not only by the official licensees but also by dealers not forming part of the selective distribution network, is not such as to render the system itself incompatible with Article 85(1) of the Treaty.

2. Article 85(1) of the Treaty precludes a producer, in the context of a selective distribution system, from refusing with the agreement of his authorized licensees to grant the guarantee for manufacturing defects in respect of products lawfully offered for sale by unauthorized dealers. That guarantee, however, may not be relied upon by the purchaser in relation to defects or damage to the product resulting from the failure of an unauthorized dealer to provide, or correctly to perform, services which are normally carried out by authorized licensees.'