OPINION OF ADVOCATE GENERAL TESAURO
delivered on 27 February 1997 *

1. The question on which the Landgericht (Regional Court), Hamburg seeks a preliminary ruling in these proceedings draws the attention of the Court to the theory of 'imperviousness' developed in German case-law in relation to the effectiveness and enforceability against third parties of selective distribution systems.

In particular, the national court asks the Court of Justice to rule whether Community law precludes the application of a principle of national law concerning unfair competition according to which a selective distribution system is binding also on third parties only if both in theory and in practice it is 'impervious', in other words only if the products covered by the system can be sold and are in fact sold to final consumers exclusively by authorized resellers.

Factual and legislative background and the preliminary question

2. For a better understanding of the scope and sense of the question before the Court, it is appropriate first to set out briefly the events giving rise to the dispute in the main proceedings, the relevant legislation and case-law and the arguments put to the national court by the parties.

3. Volkswagen AG (hereinafter 'VW'), a German vehicle manufacturer, distributes its vehicles in the European Union exclusively through authorized concessionaires who deal directly with the final consumer. The distribution contracts signed with those concessionaires provide, *inter alia*, that the latter are prohibited from selling new vehicles to unauthorized resellers. The plaintiff in the main proceedings, VAG Händlerbeirat eV (hereinafter 'VAG'), is a German association of concessionaires authorized by VW.

The defendant, SYD-Consult, is an independent reseller of cars which markets, *inter alia*, new VW vehicles. It obtains supplies from a German importer who, in turn, buys the cars from an Italian reseller at lower

* Original language: Italian.

prices than those charged in Germany. [1] SYD-Consult is therefore able to offer to the public new cars in the VW range at more competitive prices than those charged by its authorized competitors.

4. Considering that such conduct amounted to unfair competition within the meaning of Paragraph 1 of the Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition) (UWG), [2] VAG brought proceedings for an injunction against SYD-Consult, accusing it of taking advantage of a breach, by the Italian reseller, of the contractual obligations imposed on it by the VW selective distribution system. Before the national court, VAG also emphasized that that system was compatible with Community competition law, enjoying the block exemption under Article 85(1) of the Treaty provided for by Regulation (EEC) No 123/85. [3]

1 — This case involves, essentially, a typical example of parallel imports of motor vehicles which exploit the price differences as between the various Member States and changes in the rates of exchange between the currencies of the Member States in which the vehicles are sold. In the past, particularly in the first half of the 1980s, exactly the reverse process occurred as a result of the differing price and exchange-rate conditions prevailing at that time, in that the Italian parallel traders bought vehicles from German VW concessionaires and marketed them in Italy at competitive prices.

2 — On the basis of that provision, third parties outside a distribution system are guilty of unfair competition in three cases: when they buy goods covered by the system by providing false information and under a false name; when they incite authorized distributors to breach their contractual obligations; and when they secure a competitive advantage through the breach of contractual obligations on the part of an authorized distributor.

3 — Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), now repealed and replaced by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

5. As is apparent from the order for reference, under the relevant German case-law infringement of the provisions on unfair competition by an independent reseller who markets products covered by a selective distribution system can be established only if a twofold condition is fulfilled: the system must be lawful and it must be impervious both in theory and in practice. That case-law is based on the assumption that the manufacturer is able to require the authorized reseller to fulfil its contractual obligations only if the system displays no defects since, otherwise, the authorized reseller would be exposed to unfair competition from independent resellers.

In other words, as made clear in the order for reference, under German law the selective distribution system is binding and may be enforced against third parties only if it is absolutely impervious; when the imperviousness of the system is guaranteed, it is presumed that if an independent reseller has contrived to obtain products outside the official distribution network he has done so by exploiting an infringement of contractual obligations by an authorized reseller.

6. Before the national court, SYD-Consult contended in its defence that the VW distribution system was not impervious and that, therefore, by virtue of the case-law just referred to, no unfair competition could be established.

VAG for its part claimed that the German case-law in question was incompatible with Community law, a fact established by the Court of Justice itself in *Cartier*. [4] According to VAG, therefore, having regard to that judgment and by virtue of the principle of the primacy of Community law over national law, the enforceability of a selective distribution system against third parties could no longer be made conditional upon the requirement of imperviousness.

7. Therefore, in order to obtain an interpretation of that judgment in relation to the present case, the Landgericht Hamburg decided to stay the proceedings pending a preliminary ruling from the Court of Justice on the following question:

'In the light of the judgment of the Court of Justice of 13 January 1994 in Case C-376/92 *Metro SB-Großmärkte* v *Cartier*, is it compatible with Community law, in particular with the principle of the unrestricted and uniform application of Community law, if German national law applies in such a way that proceedings for an injunction restraining the distribution of products covered by a selective distribution system exempted from application of Article 85(1) of the EEC Treaty by a block exemption of the EC Commission may be brought against outsiders who obtain those products outside such a selective distribution system only if — in addition to satisfying the further requirements of Paragraph 1 of the Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition, "UWG") — the selective distribution system is impervious ('lückenlos"), specific reference being made to the alternative of the selective distribution system being required to be impervious merely in theory, or impervious in theory *and* in practice?'

4 — Case C-376/92 [1994] ECR I-15.

The preliminary question

8. The answer sought from the Court in these proceedings thus depends primarily on the interpretation of the *Cartier* judgment which, I repeat, confirmed — in VAG's view — that the principle of imperviousness is incompatible with Community law, in particular as a precondition for the enforceability of a selective distribution system against third parties.

It is therefore necessary to review the essential terms of that judgment in which the Court, in response to a request for a preliminary ruling from the Oberlandesgericht (Higher Regional Court), Düsseldorf, gave its view on the principle of imperviousness in relation to Community competition law.

9. The dispute giving rise to the judgment in question was between Cartier, a world leader

for certain luxury products, and a company in the Metro group which was an independent wholesaler. Metro succeeded in obtaining Cartier products (lawfully) outside the selective distribution system set up by the latter for the marketing of its products (and expressly approved by the Commission), and sold them through its own sales outlets at lower prices than those charged by the official distributors.

For settlement of the dispute between the parties, which arose from Cartier's refusal to provide guarantees for clocks sold by Metro, the lack of imperviousness of the selective distribution system set up by Cartier assumed central importance. According to the national court, any incompatibility of that system (owing to its lack of imperviousness) with Article 85 of the Treaty would also render unlawful the limitation of the guarantee for products sold outside the official network. The national court therefore referred a question to the Court of Justice in order to ascertain whether the imperviousness of the system in question constituted a condition for its validity for the purposes of Article 85(1) and (2) of the Treaty.

10. By way of preliminary, the Court reviewed the practical implications, in German law, of the application of the principle at issue. [5] It noted that, as well as being important from the procedural point of view, in that, where the system is impervious, the burden of proof is reversed in favour of a manufacturer who takes action against a third party alleged to be engaging in unfair competition, the criterion of imperviousness takes effect substantively: if the system is impervious, the manufacturer can take action against an authorized distributor to compel him to comply with his contractual obligations, whereas if the system is defective, exposing the authorized distributor to competition from third parties, he is essentially released from compliance with those obligations. [6]

Going on to give a specific answer to the question from the national court, the Court of Justice stated that imperviousness does not constitute a condition for the validity of a selective distribution system under Community law. [7] It made clear in particular that the prohibition of agreements, decisions and concerted practices laid down in the Treaty cannot depend on a condition which is peculiar to a national system, such as the requirement of imperviousness, which has been developed by German law and 'does not exist in the law of most of the other Member States'. [8] The inapplicability of Article 85(1) and (2) of the Treaty to a selective distribution system cannot therefore be called in

5 — It is appropriate at this point to make it clear, as stated by the Court itself, that whilst theoretical imperviousness presupposes only that the manufacturer has concluded with selected distributors a series of contracts which guarantee that his products reach the final consumer only through authorized distributors, practical imperviousness implies that the manufacturer must also prove that he is ensuring compliance with the system by acting against contracting parties who digress or against third parties who obtain goods from distributors who breach their contactual obligations (*Cartier*, paragraph 21).

6 — *Cartier*, paragraphs 22 and 23.

7 — *Cartier*, paragraph 28.

8 — *Cartier*, paragraph 25.

question merely because the manufacturer is unable to guarantee its imperviousness. The Court went on to say that any other solution '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'; moreover, in any event, the Court made it clear that the manufacturer cannot be required to ensure that its distribution network is impervious everywhere, given that the legislation of certain Member States may hinder or even prevent the achievement of that objective. [9]

That simply means, in my view, that the requirement of imperviousness of a selective distribution system, to the existence of which national law attaches certain consequences of a procedural and substantive nature in the field of unfair competition, operates solely at national level and is therefore irrelevant, at least in principle, as regards the validity of that system (which is otherwise in conformity with Community law) under Article 85 of the Treaty. [10] On that point, the judgment adds nothing; to read it as a condemnation of the requirement of imperviousness, under Community law, therefore seems arbitrary. [11]

11. Contrary to VAG's contention (both before the national court and in its observations to the Court of Justice), I do not consider that the judgment in question held that the principle of imperviousness was incompatible with Community competition law. The Court merely stated, in response to a precise question from the national court, that the validity of a selective distribution system, for the purposes of Article 85 of the Treaty, cannot depend on its imperviousness.

12. I would add that, quite apart from the dicta in *Cartier*, I do not consider that the principle of imperviousness, as developed in German case-law, can be regarded as liable to conflict with Community competition law, as contended by VAG.

9 — *Cartier*, paragraphs 26, 27 and 29. Moreover, in the same judgment, after stating that the imperviousness of a distribution system is not a condition for its validity under the Treaty, in that to require the system to be impervious would be tantamount to preventing a reasonable and natural volume of parallel imports, the Court went on to uphold as lawful Cartier's refusal to provide a guarantee for products sold by Metro, thereby, from the commercial point of view, curtailing the market for parallel traders, but at the same time adversely affecting consumers in particular. For the sake of completeness, it should finally be noted that the Commission, in a press release shortly after the *Cartier* judgment, stated that it did not consider that the principle laid down by the Court was applicable to motor vehicle distribution agreements enjoying a block exemption under Regulation No 123/85; Article 5(1) of that regulation makes the exemption conditional upon the free assistance service being given to the final consumer in any event, regardless of whether he bought the vehicle from an authorized or an independent reseller (IP/94/488 of 6 July 1994).

10 — To that effect, see my Opinion in the *Cartier* case (Opinion of 27 October 1993, ECR I-17, paragraphs 11 to 23).

11 — Legal authors (see, however, Bechtold, 'Ende des Erfordernisses der Lückenlosigkeit', in *Neue Juristische Wochenschrift*, 1994, p. 3211 et seq., on which, by all appearances, the view advanced by VAG is largely based, together with the literature in German cited therein) also seem substantially to agree with this reading of the *Cartier* judgment. See, for example, Idot, 'Distribution Selective', in *Europe*, 1994, Act. N. 117, p. 10 et seq.; and Kovar, 'Le dernier métro — L'étanchéité des réseaux de distribution: un réseau peut être ouvert ou fermé', in *La Semaine Juridique — Édition Entreprise*, 1994, Suppl. No 4, p. 2 et seq., in which the author goes so far as to say: 'Par ailleurs, rien n'autorise à considérer que la Cour de Justice ait voulu interdire aux droits nationaux, le droit allemand en particulier, de tenir compte de l'étanchéité de la distribution selective pour régler les conditions dans lesquelles un fabricant peut agir en concurrence contre des tiers non autorisés qui commercialisent ses produits' (end of page 5).

VAG in fact considers that — if it is assumed that the VW distribution system, although not impervious, is fully valid under Community law — a principle of national law which, as in this case, makes the possibility of ensuring compliance with the system conditional upon imperviousness could not be regarded as anything other than incompatible with the principle of the primacy of Community law and in any event liable to deprive Article 85(3) of the Treaty of useful effect in relation to exemptions. In support of its position, VAG refers to the *Wilhelm and Others* case, [12] observing that the principle in question, found only in German law, would conflict with the requirement of the uniform application of Community competition law within the Community.

13. Let me first say that the Community measure exempting a distribution system from the application of Article 85(1) of the Treaty, whether an individual exemption as in Cartier's case or a block exemption as in this case, does no more than *allow* an exception to the general rule. The general rule is inspired by the criterion of a competition-based market and therefore not only tolerates but also treats as beneficial parallel imports, that is to say the *non-imperviousness* of distribution systems. The exemption, therefore, imposes nothing but merely, in derogation from the general competition rule, allows a manufacturer to enter into a contract with a distributor to the effect that the system is to be 'impervious', but that does not mean (at least not necessarily) that those 'gaps' in the distribution system are to be excluded: they are seen as ways of stimulating competition and are therefore tolerated and in certain cases even required by Community law. [13]

In those circumstances, it goes without saying that the application of a national principle which makes the success of an action to establish unfair competition, brought by the manufacturer (or by an authorized reseller) against an independent reseller (who has lawfully obtained goods covered by a selective distribution system), depend upon the capacity of the first (or the second) to prove that the system is impervious does not in fact conflict with the requirements and the imperatives of Community competition law and is not liable to negate the useful effect of Article 85(3) of the Treaty. It is, conversely, and much more simply, irrelevant: the principle at issue, as pointed out by the Court in *Cartier*, remains a principle of national law which operates in relation to unfair competition and has no direct bearing on Community competition law.

14. That said, it should nevertheless be borne in mind that Article 3(11) of Regu-

12 — Case 14/68 [1969] ECR 1.

13 — The Court has always looked favourably on the possibility of sales outside networks and therefore on parallel imports, which are considered beneficial and necessary to counter excessive inflexibility. See for example the judgment in Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 81 to 89. In *Cartier* as well, as already noted, the Court expressly emphasized its preference for distribution systems that are 'more flexible and more open to parallel transactions' (paragraph 26). With specific reference to car sales, see Case 154/85 *Commission* v *Italy* [1987] ECR 2717.

lation No 123/85, [14] on which is based the block exemption from the prohibition contained in Article 85(1) of the Treaty of the selective distribution system set up by VW, expressly makes the exemption subject to the condition that the system is to allow sales through intermediaries, and intermediaries means resellers operating outside the official system but in possession of prior written authority. [15] The exemption in the motor vehicle distribution system is therefore subject, *inter alia*, to the possibility of sales to agents of final consumers and therefore, of course, parallel imports which are the natural consequence of them.

It clearly follows that the imperviousness of a selective distribution system for vehicles — whatever theoretical and/or practical view may be taken of the concept of imperviousness in national law and regardless of the effects associated with it — cannot in any circumstances result in a prohibition of parallel imports by intermediaries who, although outside the distribution network, are in possession of written authority from final consumers.

15. Therefore, in the event of the principle of imperviousness being interpreted and applied so as to make the success of an action for unfair competition dependent on proof by the manufacturer or authorized distributor that the system is absolutely impervious, in the sense that it also prohibits (or in any event precludes) transactions by the intermediaries referred to in Article 3(11) of Regulation No 123/85, it would clearly follow that the system in question would be deprived of the benefit of the exemption because it would conflict with the regulation and also, *a fortiori*, with Article 85(1) of the Treaty.

In such circumstances, however, there should be no possibility of suing third parties for unfair competition, since the requirement of breach of contractual obligations by the authorized distributor would be lacking: that follows, of course, from the exemption regulation, which should provide the basis, from the standpoint at issue here, for the legitimacy of each distribution agreement. Moreover, there is nothing in the order for reference to support the view that the 'third parties' who are 'outside a selective distribution system' referred to by the national court include agents acting for final consumers.

In short, I consider that the condition of imperviousness, which is in principle irrelevant to the validity or otherwise of a selective distribution system under Article 85(1) of the Treaty, is not in any event incompatible with Community competition law.

14 — Cited in footnote 5.

15 — In that connection, see Cases C-226/94 and C-309/94 *Grand Garage Albigeois and Others* and *Nissan France and Others* [1996] ECR I-651 and I-677, and, most recently, Case C-128/95 *Fontaine* [1997] ECR I-967. In those judgments, the Court also made it clear that Regulation No 123/85, since it concerns only contractual relations between suppliers and official distributors in their networks, cannot in any circumstances be interpreted as prohibiting third parties who are not intermediaries with a written authority from carrying on the business of parallel imports of new vehicles of a make for which there is an official distribution network (paragraphs 16 to 20). Any action directed towards preventing the activities of third parties at issue here may therefore be based only on the applicable national law.

16. In the light of the foregoing considerations, I suggest that the Court give the following answer to the question referred to it by the Landgericht Hamburg:

Community law does not preclude the application of a principle of national law relating to unfair competition under which a selective distribution system is enforceable against third parties only if it is impervious.