The President and Members of the Swiss Competition Commission COMCO
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5 October 2018
By Fax and Post

An Open Letter regarding the
Secretariat's decision not to investigate the Watch Spare Parts and After Sales markets

Dear President and Members,

May we start by thanking the Secretariat for conducting its preliminary investigation into this issue. Obviously the decision not to conduct a full investigation is disappointing for our Company which is suffering greatly from what we consider to be an unjustified cessation of supplies of spare parts for watches to wholesalers.

Having read the material published by COMCO so far, we believe that there are two areas that are worthy of further consideration before the final report is issued.

Firstly, COMCO has placed much emphasis on the output from the EU Commission and EU General Court in the matter of the CEAHR complaint, however we believe COMCO has not correctly interpreted these findings. We would like to bring this to your attention, and demonstrate why the findings make it essential that COMCO does investigate this issue fully.

Secondly, Cousins Material House has been active in the Swiss watch parts and repair supplies market for many years, and as you are aware, we have been engaged in an ongoing legal dispute with Swatch in the Bern Commercial Court for over two years now on precisely this subject. As a consequence, we have a thorough understanding of the relevant Laws, the history of this matter, and hold a great deal of relevant evidence and analysis. Cousins are the foremost repository of material that counterbalances the submissions of the Watch Brands, and it is regrettable that COMCO did not contact us as part of its preliminary work. We believe that we would have been in a much better position to provide the Secretariat with highly relevant material than anyone else, and we would still be pleased to provide you with access to this material which, in our view, would have had great bearing on the outcome of an investigation or your possible reconsideration respectively.

With regard to the CEAHR complaint to the EU and the subsequent investigations and appeals, we provide below what Cousins maintains is the correct analysis of the output.

Your recent press release contained the following paragraph:-

"For the assessment of the present case under antitrust law, it was of central importance that concurrent proceedings were pending in the EU in which the same questions arose with regard to the same watch manufacturer. The EU Commission did not regard the SAV systems as inadmissible agreements or abuses of market dominance because they are based on qualitative criteria that are objective, proportionate, uniform and applied indiscriminately. It could not be ruled out that the refusal to supply spare parts to independent repairers could be objectively justified. The appeal lodged against the decision of the EU Commission by CEAHR (Confédération européenne des Associations d'Horlogers-Réparateurs) was rejected in its entirety by the Court of the European Union (EC)."

We would respectfully suggest that this is a superficial view of the output of a 14 year process, and does not properly reflect the true nature of the findings, or consider correctly the reasons for them. We elaborate on this point as follows:-

In brief, the EU Commission decision was that it was closing its second investigation without reaching a decision on whether or not the SAV systems were legal or otherwise. Its reasons were that it had spent enough time and resources on this issue (it first picked up the complaint in 2004), that the Commission alone was responsible for deciding what investigations it undertook, and that based on the evidence it had seen, it was not likely to conclude that the SAV systems were in breach of the law.

The obvious questions that such a decision should provoke are "Why didn't the EU Commission just find the SAV systems to be legal?" and "Why leave the matter open and undecided?". The EU Commission had already been through more than 7 years of investigation and 3 years in Court. It could be in no doubt that whatever decision it made, there was bound to be another appeal, so if it was satisfied that the SAV schemes were legal, why not say so and end the matter once and for all?

Clearly the EU Commission felt such a conclusion was not safe, and the reasons for this can be found by simply understanding who the competing parties were, and by an open reading of the subsequent appeal verdict.

On one side of the dispute are the Swiss watch manufacturers with billions of Euros in revenue each year, thousands of employees, and access to any legal counsel they wish to pay for. On the other side was a tiny pressure group set up by a Belgian watch repairer. It had funding of around 10,000 Euros a year, no staff, and relied on the pro bono services of one elderly lawyer who passed away in the middle of the appeal process.

CEAHR did not have the resources to gather the evidence needed to persuade the EU Commission. Its lawyer instead relied on arguing that it was the EU Commission's responsibility to find that evidence as part of its investigation process.

CEAHR appealed to the EU General Court against the Commission decision to close the investigation without reaching a final decision. The verdict on that appeal clearly reveals the strategy that CEAHR's lawyer was following, and why it ultimately failed. Paragraphs 39 and 40 of the General Court ruling show this quite plainly:-

39 In addition, it is an inherent feature of the complaints procedure that the burden of proving the allegation rests on the complainant. Similarly, in the context of an action seeking the annulment of the Commission's decision rejecting a complaint, it is for the applicant to present to the Courts of the European Union arguments and evidence capable of demonstrating the unlawfulness of that decision (judgment of 19 September 2013, EFIM v Commission, C-56/12 P, not published, EU:C:2013:575, paragraphs 72 and 73).

40 It is clear from that case-law that it is not for the General Court to criticise parts of the decision which have not been effectively challenged by the applicant nor to accept arguments which the applicant puts forward without adducing evidence.

In the same document, there are numerous other references to CEAHR's failure to provide counter evidence:-

"although the applicant asserts that the mechanisms of the watches are not complex, it advances no specific argument or evidence in support of that assertion which is capable of calling into question the Commission's finding in that respect"

"the applicant's unsupported assertions are likewise not capable of calling into question the Commission's finding. That is also the case as regards the applicant's submissions concerning the dedication of independent repairers and their opposition to counterfeiting."

"The applicant has not advanced any arguments or evidence capable of demonstrating that there is no risk of counterfeiting and that controlling the supply of spare parts is not a means of limiting the counterfeiting of those parts."

"Consequently, the applicant's unsupported allegations do not demonstrate that the Commission overstepped the limits of its discretion"

And just to reaffirm the point that an EU investigation is not required to look beyond the evidence that is handed to it (or not, as in this case), paragraph 61 of the verdict includes the following:-

"it suffices to note that if the Commission is under no obligation to rule on the existence or non-existence of an infringement, it cannot be compelled to carry out an investigation, because such an investigation could have no purpose other than to seek evidence of the existence or non-existence of an infringement which it is not required to establish"

It is clear that the EU Commission were not given any evidence to counter that provided by the Watch Brands, nor could they agree to the concept that they were required to find the evidence for themselves when a complaint was made. Such a concept would set a precedent that would result in future administrative chaos and unlimited expense for them. However, the EU Commission clearly wasn't content to give the SAV schemes an unequivocal approval, so it did the only thing it could, and ended the investigation without giving a ruling. This left the door open for anyone wishing to bring the relevant evidence to a different forum.

In a situation where an investigation by another regulatory body has been terminated because a complainant has not had the resources to provide the counter evidence, we would respectfully suggest that COMCO should not place emphasis on that ruling as a reason for declining to investigate. Indeed the reverse action is more appropriate, especially as COMCO is the regulator of the largest watch manufacturing industry in the world.

There is a further valid reasons why COMCO should not be looking at the EU outcome as justification for declining to investigate the matter in Switzerland.

The only regulatory body in recent time that has conducted a full investigation on this matter is the Spanish CNC. In 2011 they found that a refusal to supply watch spare parts openly was an abuse of market dominance under both Spanish and EU law. The CNC were only prevented from imposing penalties on the watch brands because the commencement of the second EU Commission investigation removed their ability to do so, but the conclusions of the Spanish investigation are indisputable nonetheless.

Separate to the issue of the investigations and legal actions in the EU is the matter of how Cousins would have been able to assist COMCO with the preliminary investigation.

Switzerland is the only country where there is a current legal dispute on this subject that has now been running for over two years (Swatch v. Cousins). Clearly, no company engages in such action without being confident of its case and the evidence that underpins it. Cousins first introduced itself to COMCO over 16 months ago, and whilst it seems that COMCO has taken input from Swatch, it seems to us to that the opportunity was not taken to balance that input with a submission from ourselves. Cousins view is relevant to COMCO because we buy from, and sell to clients in the Swiss spare parts and repair markets. Can we assure you that we remain at your disposal should you wish meet with us at any time.

The independent repair sector in Switzerland unquestionably contains the largest proportion of highly qualified watchmakers when compared to any other national market. These individuals have been providing a quality service to consumers for hundreds of years, and in doing so have provided the competitive counterbalance that has prevented the watch brands from abusing the consumer. It seems counter intuitive to consider that anything has changed in recent times which would classify the independent sector as no longer competent, and therefore justify placing them under the effective control of the super dominant manufacturers. I am sure you would agree with us that the entire essence of Anti-Trust legislation is that it exists to prevent this scenario from occurring.

In conclusion we urge you to reconsider your decision, suspend publication of your final report, look again at the EU judgement, and meet with us to examine the evidence and arguments that Cousins would very much like to present to you.

Yours sincerely,

Anthony Cousins
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Cousins Material House Ltd.

cc: Prof. Patrik Ducrey