ORDER OF THE PRESIDENT OF THE COURT OF 23 JULY 1976 [1]

Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities

Case 26/76 R

In Case 26/76 R

FIRMA METRO SB-GROSSMÄRKTE GMBH & CO. KG, represented by Horst von der Osten of the Düsseldorf Bar, with an address for service in Luxembourg at the Chambers of Robert Elter, 11, boulevard Royal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Dieter Oldekop, a member of the Legal Service of the Commission of the European Communities, with an address for service in Luxembourg at the Chambers of Mario Cervino, Bâtiment CFL, Place de la Gare,

defendant,

supported by:

FIRMA SABA SCHWARZWÄLDER APPARATE-BAU-ANSTALT AUGUST SCHWER SÖHNE, represented by Bodo Haggeney of the Stuttgart Bar, with an address for service in Luxembourg at the Chambers of Georges Reuter, 12 rue Notre Dame,

intervener,

J. MERTENS DE WILMARS, JUDGE AT THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES,

acting for the President of the Court pursuant to the second paragraph of Article 85, the second paragraph of Article 11 and Article 6 of the Rules of Procedure, makes the following

1 — Language of the Case: German.

ORDER

Facts

Firma Metro SB-Großmärkte GmbH & Co. KG lodged an application dated 10 March 1976 and registered at the Court of Justice on 11 March 1976 under No 26/76 for the annulment of Decision No 76/159/EEC of the Commission of 15 December 1975 (OJ L 28 of 3. 2. 1976, p. 19) relating to the conditions of sale and to the distribution system applied by SABA (Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne GmbH) with regard to the electronic equipment for the leisure market which the latter company places on the market.

By order of 5 May 1976, SABA was given leave to intervene in Case 26/76 in support of the conclusions of the defendant.

The Commission established by the contested decision that the prohibition contained in Article 85 (1) of the EEC Treaty does not concern conditions of sale for the domestic market and that the other agreements constituting the distribution system for SABA products were provisionally exempt under Article 85 (3) on condition that the SABA undertaking supplied the Commission with certain information.

The system thus permitted consists, in substance, in the establishment of a network of selected distributors — wholesalers, sole distributors and specialist retailers — who are subject to certain conditions concerning supply, after-sales service, suitable display of the goods, achievement of an adequate turnover and regard for the distribution channels on resale.

In particular, German wholesalers may only resell to appointed retailers and other wholesalers and, in the territory of the Federal Republic of Germany and in West Berlin, to trade consumers on condition however that SABA products are concerned which are used by those consumers for such commercial purposes as will promote the profitability of the business and that measures of control are laid down in this respect.

That decision was the subject-matter of Application No 26/76 by Metro which considers that the result thereof is that, as a wholesale supermarket, it is precluded from obtaining supplies of articles made under the trade name SABA although because of the particular structure and organization of its undertaking it would be able to resell those articles at an attractive price.

By a separate document of 8 July 1976, registered at the Court of Justice on 12 July 1976, *Metro* lodged an application for the adoption of interim measures requesting:

— the provisional suspension of the operation of the Decision of 15 December 1975 until the Court has given a final decision in this case;

and, in the alternative,

— the adoption of such temporary measures as the Court considers necessary in order to enable the applicant to obtain supplies of SABA equipment and resell them as a wholesale supermarket;
— in particular, a declaration that the restrictions placed on the supply to consumers (Distribution Agreement for SABA Wholesalers, clause 2 (2), which is at present in force) and to trade retailers (Distribution Agreement for SABA Wholesalers, clause 2 (1)) are inoperative.

According to Metro, the measures sought are urgent because, owing to the pressure brought to bear by the SABA undertaking and changes in the practice of other undertakings which are operating in the field of electronic equipment for leisure purposes, Metro is virtually unable to obtain SABA equipment any longer and the range of products which it can offer in that field is thus greatly restricted.

An order granting the measures sought should enable it to maintain the supply of one of the leading makes in the field of electronic equipment for leisure purposes and to remain competitive, without SABA suffering any damage on that account.

The *Commission* points out that the weakening of Metro's competitive position and the losses in turnover suffered by it because of the impossibility of obtaining supplies of SABA products are not recent phenomena since Metro has itself emphasized that those difficulties have existed since January 1976.

It is therefore doubtful whether there is any urgency and whether irreparable damage is caused in the absence of the measures requested since Metro's turnover in the field of electronic equipment for leisure purposes only represents a small proportion of its total turnover.

As regards the justification for the measures sought, the Commission points out that wholesale supermarkets have access to SABA's distribution system as accepted by the decision contested in the main action.

Assuming that the urgency of and the need for the measures to be taken are established, the Commission insists that they be restricted to the minimum.

It claims that the Court should:

— dismiss the applications for suspension of the operation of the decision of the Commission of 15 December 1975 and for the adoption of interim measures,

— alternatively, request SABA pending judgment on the substance of the case not to enforce against SABA distributors who are willing to supply the applicant with SABA products the contractual rights prohibiting those supplies to the said distributors.

SABA, the intervening party in the main action, claims that the application for suspension of the operation of the decision of exemption is inadmissible on the ground that Metro has no interest therein in so far as that application is for the suspension of the whole of the decision contested in the main action and claims that the alternative application is inadmissible because SABA does not in fact prevent wholesale supermarkets from obtaining supplies of its products and reselling them but refuses to deliver to Metro because that undertaking, whilst claiming to carry on wholesale trade, actually carries on a retail trade.

SABA refers to a decision of the Oberlandesgericht, Hamburg, of 11 December 1975 which it claims established that Metro does not fulfil the conditions required by German legislation for the definition 'wholesaler'.

Wholesale supermarkets may be appointed as SABA wholesalers but on condition that they are genuine wholesalers within the meaning of that legislation.

SABA also contests that the measures are urgent and that the damage which would be caused to Metro if the application of the latter were dismissed would be irreparable.

It claims that, according to Metro's own statements, Metro has been unable to obtain supplies of SABA equipment since January 1976 and that that fact has not perceptibly worsened a supply

situation which was already precarious, since Metro is no longer directly supplied by any of the leading manufacturers in the market in electronic equipment for leisure purposes.

Moreover, any damage suffered by Metro constitutes a failure to make a profit and is therefore easily assessable and can thus be the subject of financial compensation.

On the other hand, SABA would suffer irreparable damage if the measures requested were granted because SABA distributors would be placed in an uncertain position as regards the validity of their undertakings which could not fail to encourage them to abandon SABA products.

SABA claims that Metro's application should be dismissed.

The applicant, the defendant and the intervener presented oral argument at the hearing on 23 July 1976.

Law

1 The application for the adoption of interim measures is, first, for the suspension, until the decision of the Court giving judgment in the main action, of the operation of the Decision of the Commission of 15 December 1975 by which the latter declares that there are no grounds under Article 85 (1) of the EEC Treaty for action on its part in respect of the conditions of resale for the domestic market applied by SABA and declares moreover that, pursuant to Article 85 (3) of the same Treaty, Article 85 (1) is temporarily inapplicable to various agreements relating to the distribution of electronic equipment for leisure purposes by which that same undertaking binds the wholesalers, sole distributors and specialist retailers which it appoints for the sale or resale of its products. That application is, alternatively, for the adoption of measures to enable the applicant to obtain provisionally supplies of SABA equipment and to resell it in its capacity as a wholesale supermarket.

2 The decision, the suspension of the operation of which is requested, does not only concern the relationship of SABA to the applicant but that of SABA to all distributors of the equipment which it places on the Community market.

Since a measure, which would have the effect of suspending all those relationships, would be outside the scope of an urgent interim measure intended to safeguard temporarily the interests of the applicant the principal application should therefore be dismissed.

3 With regard to the alternative application, it has not been established that it would be impossible for the applicant to comply, even temporarily, with the

conditions imposed by SABA for the purposes of recognition as a SABA wholesaler or that compliance with those conditions until the decision of the Court giving judgment in the main action would cause it irreparable damage.

4 As soon as the applicant agreed to comply with those conditions, SABA would be in breach of its obligations under the decision of 15 December 1975 by refusing to deliver supplies or by prohibiting other distributors in its network from so doing and it would be for the Commission to take action, subject however, to Metro's having recourse, if necessary, to the legal remedies afforded by national legislations.

5 The application must therefore be dismissed.

6 In the circumstances, costs must be reserved.

On those grounds,

Having regard to the urgency,

THE PRESIDENT,

by way of an interim ruling,

hereby orders:

1. **The application for the adoption of interim measures is dismissed.**

2. **The costs are reserved.**

So done and ordered in Luxembourg on 23 July 1976.

H. J. Eversen
Deputy Registrar

J. Mertens de Wilmars
Judge