OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT

delivered on 12 November 1985 *

Table of Contents

1. Introduction 3049
2. Submissions and arguments of the parties 3050
2.1. Admissibility 3050
2.2. First submission 3050
2.3. Second submission 3051
2.4. Third submission 3052
2.5. Fourth submission 3052
2.6. Fifth submission 3052
2.7. Sixth submission 3053
2.8. Summary 3054
3. Submissions of a procedural nature 3055
3.1. Preliminary remark 3055
3.2. Admissibility 3055
3.3. The applicant's sixth submission 3056
4. Assessment of the principal substantive submissions 3057
4.1. Preliminary remarks 3057
4.2. Relevant paragraphs of the judgment in the first *Metro* case 3058
4.3. The fourth submission (absence of any general investigation of the market) 3060
4.4. First submission (application of Article 85 (1)) 3062
4.5. Second submission (application of Article 85 (3)) 3065
4.6. The remaining substantive submissions 3070
5. Summary, final remarks and conclusion 3070
5.1. Summary 3070
5.2. Final remarks 3071
5.3. Conclusion 3072

* Translated from the Dutch.

Mr President,
Members of the Court,

1. Introduction

1.1. At first sight the second *Metro* case, which I am to consider today, seems unoriginal. It concerns an application brought by Metro requesting the Court to declare void the Commission's decision of 21 December 1983 (Official Journal 1983, L 376, p. 41), extending the decision of 15 December 1975 which was at issue in the first *Metro* case (Case 26/76 *Metro* v *Commission* [1977] ECR 1875). It is common ground between the parties that the distribution system at issue here is slightly less restrictive than the system accepted by the Commission in 1975. At first sight it would therefore appear that the Court may dismiss the application in this second case on grounds similar to those on which the first *Metro* case was dismissed.

1.2. That appearance is, however, deceptive. The main criticism levied against the Commission in this case is that it failed to take adequate account of a series of statements made by the Court in the first *Metro* case containing guidelines for the Commission's future policy. Those guidelines are all connected with the structure of the market in consumer electronic equipment in general. In particular, they seem to provide that a selective distribution system operated by an individual manufacturer will only be acceptable if different kinds of distribution channels are operated by other manufacturers and the market structure is prevented from becoming too rigid by the existence of a large number of selective distribution networks for the product concerned. On that point I refer to the third and fourth subparagraphs of paragraph 20, the fifth subparagraph of paragraph 21, the first three subparagraphs of paragraph 22 and the third subparagraph of paragraph 50 of the judgment. The fact that those parts of the Court's judgment are directed largely to the future policy of the Commission is made clear in the third subparagraph of paragraph 22 of the judgment. It seems to me, however, that that is apparent also from the fact that there is no indication, either in the opinion of Mr Advocate General Reischl or in any part of the judgment, that the parties to the first *Metro* case submitted to the Court any actual figures concerning the general market structure. Thus in that case the parties concentrated entirely on the contested distribution system, without referring to the general market structure.

In this case, however, the general market structure is a crucial factor in the assessment of the decision concerning the SABA distribution system. In its intervention in support of Metro, the United Kingdom in particular takes the view that this aspect of the case is of fundamental importance for the Commission's policy on selective distribution systems in general. It clarified its position on that point at the hearing, in particular, in answer to questions put by the Court.

1.3. As I wish to concentrate in my opinion on this, the only really new and moreover fundamental aspect of the case, I do not consider that any purpose would be served by my giving a complete summary of the facts concerning Metro's commercial activities, the SABA selective distribution system or the content of the contested decision. In that connection I would merely state that the summary of the facts in the published decision does not contain any information on the structure of the market (in particular, the number of selective distribution systems, their market shares and the evolution of

prices). In the grounds of its decision the Commission considers that aspect only when examining whether the SABA system fulfils the condition laid down in Article 85 (3) (b) and even then does so only very briefly, without providing any supporting figures. That provision states that the restrictions imposed must not afford the undertakings concerned the possibility of 'eliminating competition in respect of a substantial part of the products in question' (in that connection see Part II, B.4, fourth and fifth paragraphs of the decision). In my assessment of the substance of the case I shall examine in detail the abovementioned paragraphs of the judgment in the first *Metro* case and the Commission's decision in this case.

1.4. In my summary of the written submissions and arguments of the parties in *Section 2* of this Opinion, I shall for the same reason consider only the procedural submissions and arguments and the substantive submissions and arguments which are connected with the new and fundamental aspect of the case to which I have referred. I shall consider the applicant's submissions concerning the SABA system as such only in so far as is necessary at the end of my Opinion. Moreover, in Section 2 I shall give only a very brief summary of the submissions and arguments of the parties. I shall assume that the account of the facts and issues contained in the judgment of the Court will provide a more detailed summary of the facts and procedure and the written and oral submissions and arguments of the parties and that that part of the judgment will also be published — as is usual in competition cases. In my Opinion I shall therefore endeavour to avoid repeating those aspects of the case and thus making twice as much work for the language service and the printer. In my assessment of the case I will naturally, however, consider the arguments of the parties in greater detail.

1.5. In *Section 3* of my opinion I shall deal with the procedural submissions and in *Section 4* with the substantive submissions and arguments. At the same time I shall also consider the explanations provided by the parties at the hearing. In *Section 5* I shall then as usual — after summarizing my findings and making certain final remarks — set out my conclusion.

2. The written submissions and arguments of the parties

2.1. *The admissibility* of this action is expressly acknowledged by the Commission, and it is contested solely by SABA. SABA contends, first, that Metro has no interest in bringing proceedings because it does not carry on the business of a wholesaler but is engaged in the retail trade and does not fulfil the formal requirements for admission to the SABA distribution system. Secondly, it claims that Metro is not directly and individually concerned by the contested decision because the decision was not adopted upon application by Metro under Article 3 (2) (b) of Regulation No 17. It is not sufficient, SABA maintains, that Metro may be regarded as a party which is potentially interested in the purchase of SABA's products. I shall consider the arguments in favour of admissibility put forward in writing and at the hearing by the Commission in particular in Section 3 of this Opinion.

2.2. Metro's *first submission* is that the Commission misused its powers by failing to take into account in its application of Article 85 (1) the conditions laid down by the Court of Justice in the first *Metro* case.

In that regard, it refers in particular to paragraph 22 of the Court's judgment. In its reply, Metro states that even a 'simple' selective distribution system will only accord with Article 85 (1) where workable competition exists in the market place. The Commission in its view failed to apply the conditions laid down by the Court in that connection in the first *Metro* case, and it also failed to take into account the Court's judgments of 10 July 1980 in Case 99/79 *(SA Lancôme and Cosparfrance Nederland BV* v *Etos BV and Albert Heyn Supermart BV* [1980] ECR 2511) and of 11 December 1980 in Case 31/80 *(L'Oréal NV and L'Oréal SA* v *De Nieuwe AMCK PvBA* [1980] ECR 3775).

The *United Kingdom* also considers that the Commission did not take adequate account of the Court's judgments in the first *Metro* case and in *L'Oréal,* cited above.

In reply to the first submission, the *Commission* states in its rejoinder that, contrary to Metro's opinion, the compatibility of simple distribution systems with Article 85 (1) does not depend on the absence of any perceptible effect on competition. Consequently, a possible accumulation of such systems is of no relevance to their compatibility with Article 85 (1). The presence or absence of similar systems need only be considered when examining the applicability of Article 85 (3).

SABA also considers that for purposes of the applicability of Article 85 (1) it does not matter whether or not a 'simple' selective distribution system completely excludes self-service trade from distribution because the qualifying criteria are not fulfilled or because the market is highly concentrated or prices are rigid. SABA also takes the view that those factors are only relevant as regards the application of Article 85 (3).

The *German Government* observes in particular that despite the number of existing selective distribution systems the rigidity of the price structure has decreased since 1975 rather than increased, particularly under the pressure of competition from Japanese manufacturers.

I shall return to the additional arguments put forward by the parties in their observations and at the hearing when I set out my assessment of this submission.

2.3. In its *second submission,* Metro claims that the Commission misused its power to grant an exemption under Article 85 (3) of the Treaty. Referring to the Mackintosh Report submitted by the Commission, it argues in particular with regard to the chief problem which I have identified that selective distribution systems are in fact used to exclude outlets whose low-price marketing methods would in the manufacturers' view be likely to affect the 'brand image' of their product and that this is detrimental to the consumer. In this regard Metro also refers, in connection with the criterion of 'consumer benefit', to the representations of the Bureau européen des unions de consommateurs (BEUC) made on 25 June 1980 to the Commission under Article 3 of Regulation No 17, in which it expressed its concern about the grant of a new exemption to SABA and the proliferation of selective distribution systems in this sector. The other arguments in support of this submission relate to the SABA agreements in particular. The arguments put forward by the United Kingdom in its observations particularly concern the SABA distribution system, though it has also produced a report on the market structure. It does not consider the market structure in detail, however, until it deals with the fourth submission.

In their written observations on this submission, the Commission and SABA also

concentrate solely on the SABA distribution system and its market share. Apart from Metro, only the German Government considers the structure of the market in general in its observations. In its view, it should not be possible for a dealer to impose his marketing strategy on the manufacturer. The development of the various forms of distribution should depend solely on the consumer, whose freedom of choice is guaranteed by the multiplicity of European and Japanese suppliers operating different distribution systems and by a wide range of distribution forms. Moreover, the selective distribution systems in the Federal Republic of Germany do not generally prevent self-service wholesalers from dealing in the products in question. Indeed, the market share of self-service wholesalers is not insignificant, even on the German market.

2.4. In its *third submission* Metro contends that the Commission misused its power by failing to take account of the way in which the SABA agreements are actually implemented, and it gives details in support of that contention.

2.5. In its *fourth submission* Metro contends that the Commission misused its power by basing the contested decision on limited, incomplete and dated information. In support of that submission it denies that the Mackintosh Report can provide an appropriate basis for the contested decision on the ground that it was not completed until two months after the decision was adopted and does not deal with the matters relevant to this case. The report is nevertheless the only evidence which the Commission has put forward in order to justify its decision. A survey conducted by Metro in August 1984 on the profit margins of retailers on the colour television market in Germany and the United Kingdom gave entirely different results.

The *United Kingdom* also criticizes the Commission in this context because it did not re-examine all the relevant aspects of the case in the light of current market conditions. Consequently, the Commission's reasoning in the contested decision in support of its conclusion is in the United Kingdom's view patently inadequate and the conclusion itself is not justified by the evidence available. The Commission did not take sufficient account of the changes in the overall structure of distribution of the relevant products, the effects of those changes on competition or of the increased concentration of production in this sector. It refers in this connection to its own report drawn up by Dr R. M. Grant of the London Business School on the extent to which selective distribution systems exist and are operated in the United Kingdom.

The *Commission* states in reply that in the contested decision it dealt with the relevant aspects of the structure of the market throughout the Community. It denies that the structure of competition on the market has been appreciably affected by the recent increase in the degree of concentration on the relevant market and it refers in this regard to the findings in the Mackintosh Report drawn up in February 1984.

2.6. In its *fifth submission* Metro contends that by granting an exemption under Article 85 (3) for the SABA system the Commission has in fact authorized an abuse of a dominant position by SABA and the Thomson-Brandt group on the market in

consumer electronic products in general and colour television sets and video-recorders in particular. Following the acquisitions made by the Thomson-Brandt group, the undertakings in that group constitute a single economic unit which, in view of the criteria laid down by the Court in its judgments of 13 February 1979 in Case 85/76 (*Hoffmann-La Roche* v *Commission* [1979] ECR 461) and 14 July 1972 in Case 48/69 (*ICI* v *Commission* [1972] ECR 619) now occupies a dominant position on each of the separate markets of the market in durable consumer electronic goods. By setting up its anti-competitive system and in particular by refusing to supply Metro, SABA has abused that position in the way defined in the recent judgments of the Court (judgment of 21 February 1984 in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883 and of 14 February 1978 in Case 27/76 *United Brands* v *Commission* [1978] ECR 207).

The *Commission* replies that the various undertakings in the Thomson-Brandt group have remained independent of one another from the point of view of distribution and that the distribution systems which they use differ from one another in essential respects. It is therefore SABA's position on the market and not the position of the Thomson-Brandt group as a whole which must be considered in determining whether a dominant position exists. Metro has not succeeded in proving or even sought to argue that SABA's share of the relevant markets has increased from its 1977 level of between 5 to 10%. Even if Metro were entitled to have regard to the market shares of the undertakings in the Thomson-Brandt group as a whole, its own figures do not disclose the elements of a dominant position. That group certainly does not occupy a dominant position on the Community market in consumer electronics as a whole or on a substantial part of it, and it is therefore unnecessary to consider the question of the alleged abuse of such a position.

SABA maintains that the German undertakings in the Thomson-Brandt group do not occupy a dominant position on the market. If they did, the *Bundeskartellamt* would not have allowed the acquisitions of undertakings by Thomson-Brandt in Germany between 1979 and 1983.

The *German Government* also challenges Metro's contention that the Thomson-Brandt group or SABA occupy a dominant position. It also observes that even an undertaking in a dominant position is entitled to refuse to supply a distributor who does not fulfil the qualitative admission criteria. In particular, where the undertaking concerned has established a selective distribution system before acquiring a dominant position, there is no abuse of such a position.

2.7. In its *sixth submission* Metro contends that in view of the important amendments made by SABA to its original system the contested decision does not simply renew the original exemption but contains a fresh exemption. In the absence of a new formal notification of the amended SABA system pursuant to Article 4 (1) of Regulation No 17, the Commission had no power to grant it an exemption under Article 85 (3) of the EEC Treaty. In any event, the way in which the SABA system is actually being implemented differs significantly from the terms of the documents originally notified and from the terms of the new form agreements.

In its *reply* Metro argues that the Commission itself has drawn a distinction between the previous set of SABA agreements and the present set of agreements, since it stated in its decision that the agreements 'have undergone many changes'; it refers in this regard to the Court's judgment of 10 July 1980 in Case 30/78 *(Distillers* v *Commission* [1980] ECR 2229).

The *Commission* states in reply that under Regulation No 27 of the Commission of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 132) no fresh notification was necessary in this case since it concerned a renewal of an exemption under Article 85 (3) which had lapsed. The original notification of the SABA system covered the subsequent modifications and amendments which were duly communicated to the Commission. In such a case Article 8 (2) of Regulation No 17 merely requires an application to be made by the undertaking. Even if Metro's allegations proved to be correct, they could not detract from the competence of the Commission to exempt SABA's distribution system as notified but could only justify the revocation of the exemption granted to SABA, in accordance with Article 8 (3) of Regulation No 17.

In its *rejoinder* the Commission submits that notification under Regulation No 17 is simply the equivalent of a request for exemption and sets a time-limit beyond which retroactive exemption cannot normally extend. Once an agreement has been notified, the mere communication of subsequent amendments to the Commission is sufficient; formal notification is not needed inorder to satisfy the obligation to provide correct and complete information, breaches of which may be fined under Article 15 (1) of Regulation No 17.

SABA also takes the view that no formalities are required for an application for the extension or renewal of an exemption made under Article 8 (2) of Regulation No 17. The same applies for amendments to agreements which are notified to the Commission during the proceedings. A repetition of the notification using Form A/B each time the text was amended would be a pointless formality.

The *German Government* shares the views of the Commission and SABA on this point. It submits that the course suggested by Metro would not only make for unnecessary formalism but would also render the procedure impracticable.

2.8. *Summary*

The fundamental new question which I outlined at the beginning of my opinion, namely whether the Commission took adequate account — as required in particular by the Court's judgment in the first *Metro* case — of the general structure of the market in consumer electronic products, is dealt with particularly in the first submission (in connection with the application of Article 85 (1)), the second submission (in connection with the application of Article 85 (3)) and the fourth submission (the facts on which the decision is based). A more limited aspect of the main question (the alleged abuse of a dominant position) is considered in the fifth submission. The sixth submission is of a procedural nature and will therefore be considered in the following section of this Opinion, together with the question of admissibility.

3. The submissions of a procedural nature

3.1. *Preliminary remark*

The question of admissibility raised by SABA and Metro's sixth submission are clearly connected. SABA bases its contention that the application is inadmissible partly on the procedure adopted by the Commission in this case whereby it extended the exemption already granted (without applying Article 3 (2) (b) of Regulation No 17), a procedure which the applicant considers to be contrary to Regulation No 17. I shall therefore consider both of those procedural arguments in this part of my opinion.

3.2. *The admissibility of the application*

The clearest account of the Commission's position on admissibility was provided at the hearing. It explained its view that the application was admissible by reference to the wider context of actions by which third parties challenge exemptions granted under Article 85 (3) of the Treaty. The Commission considers that Metro fulfils the requirement that it should be directly and individually concerned by the decision at issue. The decision is of *direct* concern to the applicant because it declares the provisions of Article 85 (1) inapplicable to SABA's selective distribution system. Individual exemptions of this kind and decisions under Article 9 of Regulation No 17 favour one person and burden another person, as in the Commission's submission was correctly pointed out by Mr Advocate General Roemer in Case 25/62 *(Plaumann* v *Commission* [1963] ECR 110 at p. 113). The prejudicial effect in the case of such decisions is the direct result of the decision itself. No further implementing measure is required. Moreover, that effect relates not only to mere business opportunities or to expectations on the market, but also to legally protected rights of the undertakings concerned. The legal protection flows directly from the directly applicable prohibition laid down in Article 85 (1). The Court has not only expressly confirmed the direct applicability of Article 85 (1) in a long line of cases, but has also repeatedly held that that prohibition creates rights between individuals which may be enforced in the civil courts. In that connection the Commission refers to paragraph 16 of the judgment of the Court of 30 January 1974 in Case 127/73 (*BRT* v *Sabam* [1974] ECR 51).

If the prohibition contained in Article 85 (1) creates individual rights in favour of the persons who are concerned by the operation of a cartel, a decision which declares that prohibition inapplicable deprives the person concerned of those rights. The Commission illustrates the significance of that conclusion by reference to the present case. If the exemption had not been granted, SABA and its appointed dealers would not have been obliged, but would nevertheless have been free, to make supplies to any customer, whether appointed or not, and the applicant would normally have been able to obtain supplies of SABA products in some way or other. If the applicant had been refused supplies as a result of the coordination of the sale policies of SABA and its dealers, it would have been entitled to bring a civil action for an injunction or for damages.

The Commission considers that the contested decision is also of *individual* concern to the applicant. The Commission applies the requirements laid down in the judgments of the Court and states that the applicant can be distinguished from other undertakings, equally concerned by the contested decision, by the fact that it presented written comments to the Commission, both before and after the

latter's publication, pursuant to Article 19 (3) of Regulation No 17, of its intention to renew the exemption granted in respect of SABA's selective distribution system. It is the comments submitted by, amongst others, the applicant which are expressly referred to in Part I C of the decision and subsequently rejected in Part II. The Commission considers that the submission of such comments identifies the applicant as being individually concerned in the same way as the lodging of a complaint under Article 3 of Regulation No 17, as referred to in the Court's judgment in the first *Metro* case. It even regards a request to be heard or the submission of written comments following a notice pursuant to Article 19 (2) of the regulation as the normal way of expressing an objection to a possible exemption. On the basis of the information thus obtained the Commission may, where appropriate, refuse the exemption applied for. For the reasons stated above, there is no reason for undertakings concerned to take further action against the cartel in addition to submitting their comments. If an exemption is refused on the basis of those comments, it must be assumed from the fact that the undertakings concerned notified their agreements that they will abide by the rules of the Treaty and will no longer operate the cartel, even without being ordered to cease doing so. Lastly, the Commission states that it would be wrong to regard as admissible only those actions that are brought by undertakings which have established a particular relationship with the Commission. An undertaking may, for example, be regarded as sufficiently identified for the purposes of admissibility if it is a party to civil litigation commenced before a national court against one or more members of the cartel in question, provided that such litigation was pending at the time when the contested decision was adopted.

I shall confine myself to those parts of the Commission's argument which concern the admissibility of an action brought by third parties against a decision to grant an exemption. On this question I find the Commission's view convincing. I therefore agree that the present application is admissible on the ground that it fulfils the general requirements, which are well set out in the Commission's argument. The Commission clearly considered it important to set out its position in full so that it may also be applied in cases other than the present case. I have therefore taken the view that it will be useful for legal practitioners if I reproduce its entire arguments. As SABA's case for the inadmissibility of the action is implicitly refuted by the Commission's argument, I do not propose to consider that case separately.

3.3. *The applicant's sixth submission*

As I have already stated, the applicant considers that the contested decision is not simply a renewal of the original exemption but contains a fresh exemption. A fresh exemption should, according to the applicant, only have been given after a new formal notification of the amended SABA system in accordance with Article 4 (1) of Regulation No 17. For the reasons given by the Commission to which I have already referred, I nevertheless consider that this case concerned an application for the renewal of an exemption, for which Article 8 (2) of Regulation No 17 merely requires an application to be made by the undertaking, after it has simply communicated any amendments made to the system. As SABA and the German Government have also argued, to repeat the notification using Form A/B each time the text was amended would be a pointless formality. The applicant's sixth submission must therefore in my view be rejected.

4. Assessment of the principal substantive submissions

4.1. Preliminary remarks

(a) At the hearing the Commission once again expressed its view that the relevant geographical market for purposes of this case is the EEC market as a whole.

It is true that SABA's selective distribution system operates throughout the EEC. However, that does not rule out the possibility that the German market must *also* be regarded as *a* relevant geographical market in this case. As I have already stated in my Opinion of 21 June 1983 in Case 322/81 (*Nederlandsche Banden-Industrie-Michelin NV* v *Commission* [1983] ECR 3529 at p. 3534), 'an undertaking may well operate on the world market without having a dominant position on that market and yet still have a dominant position on the common market or on the national market of one or more Member States'. The same applies *mutatis mutandis* to a cartel agreement in general or a selective distribution system in particular, which may restrict competition on a particular national market more than on other national markets or on the common market as a whole. That may be the result of the market share held or the general structure of the national market in question. In the case of selective distribution systems, it is in particular relevant to consider whether there is coordinated or uncoordinated parallel action on the part of other producers.

There are two further reasons — one general and one special — why the German market must *also* be regarded as a relevant market for purposes of the assessment of the SABA system.

The general reason is that the common market is still far from complete. That is strikingly illustrated in the Commission's recent white paper on the subject. The free movement of goods, in particular, is still subject to countless restrictions of a technical, administrative and fiscal nature, including of course the restrictions in the field of road haulage. The Commission estimates the total annual costs of such trade and transport restrictions at approximately HFL 125 thousand million; moreover, the technical and fiscal restrictions, as well as transport costs, also apply to colour televisions, should Metro wish to obtain them from other Member States. The Mackintosh Report, which was drawn up at the request of the Commission, states that technical restrictions exist in this sector in the Federal Republic of Germany in particular. So long as such restrictions on trade subsist, the national markets of the Member States should also be regarded as relevant markets for purposes of the application of Articles 85 and 86 of the EEC Treaty. In the opinion which I delivered on 19 June 1985 in Case 161/84 (*Pronuptia* v *Commission* [1985] ECR 335) I have already stated that for that reason conclusions drawn from American case-law on vertical trade agreements cannot automatically be applied to competition cases in the EEC.

So far as selective distribution systems in the Federal Republic of Germany are concerned, there is a further, special reason for regarding the German market as a relevant market. It has been established in the course of the proceedings that under German law such selective distribution systems may be regarded as lawful (in actions for unfair competition) only if they are 'lückenlos' [comprehensive]. For that reason, manufacturers wishing to operate such a system in Germany are in practice obliged to prevent goods from being imported or re-imported through distri-

bution channels other than the selective distribution system. In other words, SABA's EEC-wide system is in fact partly intended to prevent parallel imports through distribution channels other than foreign-appointed SABA dealers.

(b) As I have already stated, the applicant's chief complaint against the Commission is that it took insufficient account in its decision of the requirement laid down in the first *Metro* case that the general structure of the market for the products concerned must be examined. As I have stated, in the application that complaint is set out in detail with respect to the application of both Article 85 (1) and Article 85 (3) and is further explained in a more general way in the fourth submission.

For that reason I shall now analyse first the relevant paragraphs of the judgment in the first *Metro* case (Section 4.2.). I shall then consider the applicant's fourth submission, in which the complaint is stated in its most general form (Section 4.3.). Thereafter I shall consider (in Section 4.4.) the applicant's first submission (in which the complaint is considered with particular reference to Article 85 (1), (in Section 4.5.) the applicant's second submission (concerning the application of Article 85 (3) and (in Section 4.6.) its fifth submission (concerning failure to apply Article 86). Finally, I shall summarize my findings with regard to the applicant's most important submissions on the substance of the case.

4.2. *The relevant paragraphs of the judgment in the first* Metro *case*

The importance attributed by the Court in the first *Metro* case to the general structure of the market, for purposes of assessing the applicability of Article 85 to selective distribution systems, is clear *first* from the third subparagraph of paragraph 20 of that judgment. The Court states that for high-quality and technically-advanced consumer durables, such as those concerned here, 'the structure of the market does not preclude the existence of a *variety of channels of distribution* adapted to the peculiar characteristics of the various producers *and to the requirements of the various categories of consumers*' (emphasis added). In the fourth subparagraph the Court concludes from that that 'on this view the Commission was justified in recognizing that selective distribution systems constituted, *together with others*, an aspect of competition which accords with Article 85 (1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature . . .'. In referring here to other aspects of competition, the Court in my view clearly means distribution channels of other kinds as mentioned in the preceding subparagraph.

In the fifth subparagraph of paragraph 21, the Court states as follows:

'For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution *in conjunction with new methods of distribution* based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in Article 85 (1), and, if it does fall thereunder, either wholly or in part, coming within the framework of Article 85 (3).'

Those statements are then summarized and amplified in the first, second and third subparagraphs of paragraph 22, which read as follows:

'Although the figures submitted by both sides concerning the existence of price competition amongst SABA distributors ultimately indicate that the price structure is somewhat rigid, they do not, especially in view of the existence at the same time of competition between products of the same brand (intra-brand competition) and the

existence of effective competition between different brands, permit the conclusion that competition has been restricted or eliminated on the market in electronic equipment for leisure purposes. Nevertheless, the Commission must ensure that this structural rigidity is not reinforced, as might happen if there were an increase in the number of selective distribution networks for marketing the same product. Since the Commission granted the desired exemption only for a period expiring on 21 July 1980 it retains the possibility of reconsidering within a reasonable time the consequences of this aspect of its decision.'

From my earlier statement that the Commission confined its investigation in the first SABA decision to the system operated by SABA — as indeed it did in all but one part of the second SABA decision, at issue here — I infer that in the paragraphs cited above the Court was stating its view that, for purposes of the assessment of an individual selective distribution system such as that concerned here, on the basis of Article 85 (1) and (3), it is of decisive importance whether, in addition to the distribution system at issue, there are adequate alternative 'channels of distribution' (paragraph 20) or 'new methods of distribution' (for example, supermarkets and discount stores) available (paragraph 21) in order to provide for the 'requirements of the various categories of consumers' (paragraph 20). That accords with the previous judgments of the Court, in particular the judgment in Case 23/67 (*Brasserie de Haecht* v *Wilkin* [1967] ECR 407) which has also been cited in these proceedings; in that judgment the Court stated at page 415, with regard to the brewery agreement at issue in that case, that:

'In order to examine whether it is caught by Article 85 (1) an agreement cannot be examined in isolation from the above context, that is, from the factual or legal circumstances causing it to prevent, restrict or distort competition. The existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade.'

As I have already remarked in Section 3.3. of my Opinion of 19 June 1985 in Case 161/84 (*Pronuptia*) it is clear from paragraph 5 of the judgment of the Court in Case 43/69 (*Bilger* v *Jehle* [1970] ECR 127) that the Court was referring, *inter alia*, to distribution systems operated by other producers which had the same effect of excluding third parties (in that case, other producers).

For the purposes of this case, it is important to note that it is clear from those two judgments that account must be taken of the parallel restrictions on competition resulting from several exclusive distribution systems (in those cases, brewery contracts and in this case, selective distribution systems) not only in applying Article 85 (3) but also in applying Article 85 (1).

Moreover, as I pointed out in my Opinion in *Pronuptia*, since the 1977 *Sylvania* judgment on vertical restrictions of competition (exclusivity rules) with regard to trade, the American courts have also generally considered it necessary to examine whether or not there is effective competition with other products. In that connection account will obviously also have to be taken of the existence of different kinds of distribution systems. As I also stated in that Opinion, at the time of the *Sylvania*

judgment no distinction was drawn in American law between the different types of exclusive distribution systems, such as sole distributor agreements, selective distribution systems and franchise agreements. It is clear from the academic writings to which I referred in that Opinion that such a distinction was not drawn until later. In any event, the principle set out in *Sylvania* and the corresponding principle which was laid down in the judgments of this Court in *Haecht, Bilger* v *Jehle* and the first *Metro* case are in my view consistent with the requirement that there should be an economically realistic conception of the effective competition to be maintained through competition policy. It is not realistic to take account solely of the effects of one distribution system or one vertical agreement, without considering the parallel effects of other distribution systems or vertical agreements. As I further stated in my opinion in *Pronuptia*, individual vertical price maintenance is another clear example that the restrictive effect which vertical agreements have on competition frequently results not from each individual agreement but primarily from the combined effect of similar distribution practices adopted by a number of producers.

With regard to selective distribution systems in particular, it seems to me clear that in assessing an individual system it is sufficient to require, in accordance with the fourth subparagraph of paragraph 20 of the judgment in the first *Metro* case, that 'resellers are chosen 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' and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion'. Provided that there is a sufficient number of other manufacturers and a sufficient variety of distribution systems, as assured in the previous subparagraph, competition with other distribution systems (including the 'new methods of distribution' referred to in paragraph 21) will ensure that the 'objective criteria of a qualitative nature' are not fixed at too high a level. That safeguard ceases to operate, however, if the major competitors apply a similar system whereby certain sales methods (such as 'cash-and-carry' stores which have no trained staff and to which the related obligation to provide pre-sales and after-sales service does not apply) are excluded. The history of the development of the Netherlands legislation on the establishment of retail businesses, which dates from the 1930's (but continued to be applied for many years after the war) and which applied exclusively 'objective criteria of a qualitative nature' is a clear example of the way in which such objective criteria of a qualitative nature can restrict competition if they are of general application. Such restrictions on access to the market by the application of strict requirements of a qualitative nature were originally expressly intended and the fact that they were effective (as evidenced by the regular reduction in the number of retailers), was initially, even after the war, regarded as proof of the legislation's success. At a later stage, however, the legislation was completely re-drafted as a result of the restrictive effects which it had on 'new methods of distribution' and in particular as regards retailers not specializing in particular products, in order to provide for such new methods of distribution.

4.3. *The fourth submission*

As I have already stated, in this submission Metro argues that the Commission misused

its power by basing the contested decision on limited, incomplete and dated information.

Both the applicant and the United Kingdom consider in particular that the Commission did not base its decision on a general investigation of the market, as referred to in the judgment in the first *Metro* case.

I consider that submission well founded. It is clear from a reading of the contested decision that neither the account of the facts nor the legal assessment therein contains any information on the general structure of the market. That omission must be regarded as particularly serious since Part I C of the decision expressly refers to the following objection raised by third parties to the exemption of SABA's distribution system: 'Its effects would be all the more damaging in view of the precedent which exemption of the SABA system would set for the similar distribution arrangements established by many other manufacturers in this business.'

It is true that in the legal assessment of the SABA system with regard to Article 85 (3) (b), the decision states as follows: 'Nor has the Commission found that as a result of the spread of selective distribution systems . . . particular types of outlet such as "cash-and-carry" stores or self-service wholesale and retail supermarkets are systematically excluded from selling such products.' As I have stated, however, there is no indication in the decision that that important conclusion was based on any factual investigation. As regards the Mackintosh Report, to which the Commission has referred in the course of the proceedings before the Court, the Commission itself admitted at the hearing that that report was not drawn up until two months after the decision was adopted. This confirms that the decision was not based on any general investigation of the market and makes the Commission's statement ('Nor has the Commission found that . . .') appear somewhat odd. I shall return to other objections to that statement when I consider the applicant's second submission. What it is in fact saying is that if 'new methods of distribution' are prepared to concede competitive advantages which enable prices to be lowered, there is nothing to prevent their being authorized.

At the hearing the United Kingdom in particular gave a clear statement, in answer to a question asked by the Judge-Rapporteur, of the sort of information concerning the market structure which ought to have been regarded as important in this connection but which the Commission does not consider in its decision:

(a) The spread of selective distribution systems (whether or not they have been notified, whether or not they are restricted to the imposition of objective criteria as referred to in the first *Metro* case and whether or not they contain excessive additional obligations in relation to trade such as are contained in the SABA system);

(b) The true economic significance of the fact that SABA belongs to the Thomson-Brandt group;

(c) The practical effects of selective distribution in the relevant market: for example, it is important to ascertain how far the stocking and purchasing obligations have the effect of tying a distributor to a particular producer; in addition, the effects which the costs arising out of these and other requirements (for example, free servicing) have on trading margins and prices (the effects on the rigidity of the price structure); the extent to which existing distribution systems are

responsible for differences in price levels in the various Member States; and the question of how far admission conditions for retail distribution should also be applied to wholesale distribution;

(d) The question whether the dealer qualifications required by a number of producers are in fact justified with regard to *all* the products concerned.

On those questions, which I also consider relevant, I would merely note that both the Commission's decision and the subsequent Mackintosh Report fail to provide any clear answers to those questions. In fact the Mackintosh Report contains only three pages and three tables on distribution structure and provides only very general information therein.

4.4. *The first submission*

As I have already stated, Metro's first submission is that the Commission misused its power by applying Article 85 (1) without taking into account the conditions laid down by the Court in the first *Metro* case. For an analysis of those conditions I refer to Section 4.2. of this Opinion.

I regard that submission as well founded for the same reasons as I gave in relation to the more general fourth submission. However, as regards the importance of the aforesaid lacuna in the decision for purposes of the application of Article 85 (1), I wish to add the following remarks.

It is clear from my analysis of the cases decided by the Court that, in assessing the compatibility with Article 85 (1) of a distribution system laid down by a number of agreements account must be taken of whether or not there are other distribution systems which also exclude certain groups of suppliers or customers. That is particularly important if excluded undertakings complain to the Commission during the administrative procedure about the proliferation of similar systems. As I have already noted, the decision itself states that such complaints were received in this instance. In the case of a distribution system which, by the application of a collection of selective criteria and the imposition of various requirements, provides that only specialized dealers or dealers with special departments may be supplied, it is in my view necessary to take account of all other distribution systems which also exclude the non-specialized trade. It is in my view irrelevant, for purposes of the applicability of Article 85 (1), whether the distribution system provides solely for the application of simple objective criteria of a qualitative nature concerning the expertise of the staff or whether there are also requirements in relation to equipment, stocking and purchasing obligations, turnover requirements with respect to the products concerned and requirements to provide pre-sales and after-sales service. Where there is a large number of 'simple' selective distribution systems existing side by side which together dominate the market, such a collection of 'simple' systems may also lead to the exclusion of, for example, discount houses and supermarkets without specialized departments, and may thus exclude certain types of dealer from competition. Therefore for purposes of the application of Article 85 (1), account must also be taken of the existence of 'simple' selective distribution systems of that kind. However, it is in fact clear from Part II A of the decision that, in determining whether Article 85 (1) was applicable, the Commission did not take account of the existence of other 'more sophisticated' selective distribution systems, or other 'simple' selective distribution systems. So far as other 'simple' systems are concerned, that is clear in particular from Part II A (6) of

the decision. The Commission also stated at the hearing that simple selective distribution systems can never, even if they are of general application, be considered to restrict competition within the meaning of Article 85 (1). It considers that there is no obligation to notify simple systems of this kind, and from that it must be concluded that at the date of the decision the Commission did not even have at its disposal a complete picture of such systems.

As I have already stated, the view expressed by the Commission at the hearing that paragraphs 22 and 50 of the judgment in the first *Metro* case are relevant only in relation to the application of Article 85 (3) (b) also seems to me, on the basis of my analysis of the cases decided by this Court, incorrect. As I pointed out, the Commission also wrongly rested its argument on paragraph 21 of the aforesaid judgment.

At the end of the hearing, the Commission's representative added, in answer to questions which I asked on this aspect of the case, that the Commission's position on simple selective distribution systems means that it gives preference to the interests of manufacturers, who are in its view free to organize the distribution of their products as they want it organized and in so doing may disregard the interests of non-specialized dealers. The Commission stated that the interests of such dealers are not disregarded because they cannot successfully sell the products in question, but because the manufacturer does not wish to leave it to the dealer to decide whether or not to render services to customers and whether or not to maintain quality standards. The Commission concedes that a manufacturer's decision might be influenced by the existence of a large number of simple selective distribution systems. The manufacturer might then be forced, owing to the unwillingness of the specialized trade to buy his products on any other basis, himself to operate a selective distribution system. The Commission does not regard the interests of unqualified dealers (that is to say, dealers who cannot or will not meet the requirements laid down) as an object of protection (under Article 85). The primary object of protection is in its view the consumer. As long as manufacturers are anxious to maximize profits through selective distribution and as long as workable competition prevails, the interests of consumers seem to be sufficiently safeguarded. If consumers do not wish to take advantage of such selective distribution systems, they are free to move their custom to unqualified dealers and will thereby eventually force manufacturers to abandon selective distribution. Consequently, as long as the majority of consumers are satisfied with selective distribution, the Commission will have no reason to depart from the first *Metro* case. The Commission's answer to my questions serves to illuminate its position in various respects.

First of all, the complete text of the Commission's reply confirms that the Commission bases its policy in this area solely on Article 85 (3). In its opinion, no account need be taken, for purposes of the application of Article 85 (1), of the existence of a large number of selective distribution systems. As I have already pointed out, I do not consider that position to be compatible with the judgments of the Court. Before considering the positive effects which selective distribution systems may have, on the basis of Article 85 (3), it is necessary first to determine whether they restrict competition under Article 85 (1). In that connection, account must be taken of the parallel effects of parallel systems such

as I have defined above. For purposes of the application of the first requirement laid down in Article 85 (3), an 'economic balance' must be drawn between restrictions on competition and the positive effects of such restrictions.

Secondly, it is clear from my detailed summary of the Commission's reply to my questions that the Commission recognizes that where specialized dealers have a large share of the market manufacturers may be forced to operate a selective distribution system, since otherwise they would be threatened with a boycott by such dealers. In reality there is then no freedom of choice on the part of the manufacturer, as postulated by the Commission, nor under those circumstances does the consumer have the ultimate casting vote. On the contrary, it is the specialized dealers who will ultimately determine what form of distribution system is to be operated. In another part of its argument the Commission acknowledges that specialized dealers have a very large share of the German market. According to the Mackintosh Report, discount houses and supermarkets in the Federal Republic of Germany have only 5% of the market (compared with 15% in France and 16% in the United Kingdom). On the other hand, according to the Mackintosh Report, independent specialist dealers have a market share of 55%, specialist rental firms a market share of 4% and 'multiples' and department stores a combined share of 27%. It may be assumed that at least some of the two last-mentioned groups also have specialized departments, but the report does not contain any further information on that important point. The Commission stated at the hearing that the largest German mail-order house (which belongs to the residuary group with a market share of 9%) meets the requirements of SABA's system. Thus in Germany at least there seems to be a very real danger of a threatened boycott on the part of specialized dealers.

Lastly I must consider the Commission's express statement that it does not regard the interests of non-specialized dealers as worthy of protection. France (with its long-established prohibition of refusals to sell) and the Netherlands (as appears from the amendments of the legislation on the establishment of businesses, referred to above, and the repeated action taken by means of competition law against the boycott, by manufacturers of brand goods, of new distribution systems such as those referred to in the first *Metro* case even if that boycott was the result of pressure exerted by specialized dealers), as well as the United Kingdom, clearly take a different view on that point, and one which seems to me to be more correct as far as competition policy and in particular the interpretation of Article 85 are concerned. There are various arguments in favour of such a different view. It is fundamental to Netherlands policy that the boycott of particular types of business constitutes a breach of the principle of freedom to set up and operate a business. Perhaps, however, the age-old Netherlands concern for efficient trade as a source of prosperity has also played a part here. The Commission in its reply to my questions and also the German Government in its intervention seem entirely to overlook the fact that the independent role played by trade and a multiplicity of independent forms of distribution are important elements in competition. Indeed, the organization of distribution is in principle regarded as the manufacturers' responsibility. In France, apart from the prohibition on 'refus de vente', it is certainly relevant that in the 1950's the post-war legislation on competition — regarded as part of legislation on

prices — was regarded at first as an instrument to counteract price rises in the context of the fight against inflation and to promote lower prices (*inter alia* by means of new and cheaper methods of distribution). The United Kingdom's views on competition policy seem to be influenced more by pragmatic considerations, detailed analyses of the market and perhaps by the English and American academic writings on 'workable competition', in which free access to a market is regarded as a very important, if not the most important, requirement for workable competition. That requirement does not permit a collective boycott of certain forms of business, whether or not it is deliberately coordinated. I can find no clear explanation for the position adopted by Germany in its intervention in support of the Commission in the present case, since Germany is in general known to have a more rigorous competition policy than the other three Member States referred to above. Perhaps historical traditions, dating back to before the last World War, are also relevant here. The long-standing prohibition in Germany on the integration of wholesalers and retailers could point in that direction. In many other countries such a prohibition is regarded as an undesirable impediment to the reduction of costs. With regard to the application of Article 85 (1), however, I would repeat that it seems to me clear — also on the basis of the judgments of the Court — that the position put forward by the Commission is untenable. Indeed, it seems to be clear from the wording of Article 85 (1) that the exclusion of particular forms of business (in this case, non-specialized dealers who offer no pre-sales or after-sales service but instead charge lower prices) in principle constitutes a restriction of competition. There is nothing in the text of that provision to indicate that Article 85 only safeguards competition between manufacturers and not competition between dealers. On the basis of the 'rule of reason' developed by the Court in the first *Metro* case and in previous cases, that in any event applies where either the producer concerned alone, or a large number of the producers concerned (even without any concerted action) together, operate such an exclusion policy and those producers together (and indeed some individually) have a market share which far exceeds the limit applied by the Commission as regards agreements of minor importance and accepted in principle in the judgments of the Court. At least for the purposes of Article 85 (1), the interests of new forms of business in trade must therefore certainly be regarded as worthy of protection. How far that also applies to Article 85 (3) I shall now consider.

4.5. *The second submission*

(a) As I have already stated, in its second submission the applicant claims that the Commission misused its power to grant an exemption under Article 85 (3). As regards the chief problem which I have outlined above, it argues in particular that the selective distribution systems in the sector at issue are in fact used to exclude outlets whose low-price marketing methods would in the manufacturers' view be likely to affect the 'brand image' of their product and states that this is detrimental to the consumer. In this regard Metro refers in particular, in connection with the criterion of 'consumer benefit', to the representations made by the Bureau européen des unions de consommateurs (BEUC) to the Commission on 25 June 1980 under Article 3 of Regulation No 27, in which it expressed its concern about the grant of a new exemption to SABA and about the proliferation of selective distribution systems in this sector.

(b) As regards this submission I wish to note first that my conclusion concerning the validity of the applicant's fourth submission is also relevant for the purposes of of Article 85 (3). It is clear from the text of the decision that the Commission did not, in assessing the amended SABA system in the light of the first three conditions laid down in Article 85 (3), take any account of the parallel effects of other selective distribution systems. Only in assessing that system against the fourth condition in Article 85 (3) does the Commission appear on the face of it to take account of the existence of other selective distribution systems. As I have already stated in relation to the fourth submission, however, the Commission's conclusion concerning that condition is not based on an investigation of the market (that — in the form of the Mackintosh Report — was not available until two months after the decision was adopted, and that report does not in any event clarify the points rightly identified as being relevant by the United Kingdom).

(c) The examination of SABA's system in the light of the *first condition* laid down in Article 85 (3) is thus confined in the decision to the effects of that system, viewed in isolation. Consequently, the question of an economic balance between all the restrictions on competition and the objective advantages of SABA's system is not considered. Thus it is stated, for example, in the third paragraph of Part II B 1, that 'the obligation upon wholesalers supplied direct to agree annual and four-monthly sales contracts specifying types of products and numbers of units . . . allows detailed production and sales planning and so makes for continuity of supplies, as well as rationalizing production and distribution'. It is not clear from this or the following paragraphs that the Commission considered whether the very fact that such 'detailed production and sales planning' was possible did not indicate a fundamental absence of workable competition in this sector. Such detailed planning is indeed impossible where workable competition exists.

In the fourth paragraph of Part II B 1 of the decision, the Commission states: 'By comparison with these advantages, it is only a minor disadvantage that during the period of their sales contracts wholesalers are unable to allocate any of SABA's share of their overall sales targets to other manufacturers.' It is thus acknowledged in that statement and the subsequent explanation thereof that the system may deprive customers of SABA wholesalers (and consequently also customers of SABA retailers) of the opportunity of obtaining from them the competing brands, which is important for purposes of the assessment of the system in the light of the second condition laid down in Article 85 (3). Moreover, the Commission's subsequent statement that wholesalers 'have freely selected which of the many makes of equipment they are going to sell' seems inconsistent with the extent of their purchasing commitments towards SABA, as set out in the facts of the decision and summarized in the fifth paragraph of Part II B 1 of the decision.

As Part II B 1 of the decision is not based on any investigation of the market, there is no foundation for the last sentence thereof, which states as follows: 'They' (that is to say, the abovementioned commitments to promote the sale of SABA products) 'therefore encourage competition between SABA and other brands, without impairing

competition between individual SABA dealers'. In an oligopolistic market — and it is clear from the second subparagraph of paragraph 17 of the judgment in the first *Metro* case that the market in question, on which eight manufacturers then had a combined market share of 91%, could be defined as such even then — such a system, if operated by the majority of manufacturers, may well result in the freezing of the relevant market shares and thus give rise to an appreciable restriction of inter-brand competition. I have already remarked that the feasibility of sales and production planning clearly points in that direction. The Commission therefore ought not to have drawn the conclusion which it did without a reliable preliminary investigation of the market. The grounds of the decision which I have examined here thus confirm that the fourth submission, which I have already held to be well founded, is also relevant for the purposes of Article 85 (3).

(d) In its second submission, however, the applicant complains in particular that the Commission wrongly applied the *second condition* for an exemption, namely the requirement that consumers should be allowed 'a fair share of the resulting benefit' (in this case, improvements in production and distribution). It is already clear from a comparison of Part II B 2 of the decision with the conflicting opinion of the BEUC that in this respect the Commission has, in a somewhat paternalistic manner, exercised its own judgment rather than inquiring into the opinion of consumers themselves. Moreover, its own judgment is not based on any investigation of the market but on a theoretical hypothesis. In the second paragraph of Section II B 2 of the decision, the Commission states as follows: 'The benefits SABA receives in terms of rationalization of its production and sales are *likely* to be passed on, in view of the *fierce competition* in the consumer electronics business and the fact that all its wholesalers and retailers *can sell competing goods*' (emphasis added).

I wish to make the following comments on this and the following paragraph (of the same import).

The first word which I have emphasized confirms that the appraisal of the SABA system in the light of the second condition in Article 85 (3) is again not based on any investigation of the market but, as the Commission acknowledged at the hearing, on an assumption.

As the decision is not based on any investigation of the market, the second passage which I have emphasized (the finding that there is fierce competition on this market) is entirely without factual foundation.

The statement in the third passage which I have emphasized, to the effect that wholesalers and retailers can sell competing goods, is inconsistent with the previous admission that during the term of the sales contracts wholesalers can no longer deal with other manufacturers.

Moreover, as I have already stated, the Commission recognized in reply to a question which I asked at the hearing that consumers must be free to transfer their custom to unqualified dealers (in so far as they value the lower prices offered by those dealers more than the obligations on qualified dealers to maintain certain stocks and provide specific services, with the resultant higher prices). The Commission also acknowledged, however, that a proliferation of selective distribution systems (such as might result from pressure from the specialized trade) can effectively deprive the consumer of that freedom. The

Commission's conclusion — in its reply to my question — that 'there is no reason to depart from *Metro No 1* as long as the majority of consumers is satisfied with selective distribution', obviously has no foundation in fact in a situation of that kind. The consumer is then entirely *unable* to register any preference for supermarkets or self-service stores which stock a wide variety of goods and charge lower prices but do not provide any of the services offered by the specialized trade. Furthermore, I regard the interpretation of the first *Metro* case implicit in that conclusion as incompatible with the text of the judgment in that case.

Lastly, I would note that I consider it unacceptable in this case for the Commission, without undertaking any investigation of the market, to substitute its own opinion on the question of consumer benefit, based on a theoretical assumption (see the second paragraph of Part II B 2 of the decision), for the opinion of the BEUC. Indeed, the BEUC considered that in the sector in question the 'fierce competition' on which that assumption was based did not exist, owing to the proliferation of selective distribution systems. Here I can detect the influence of the 'reasonable consumer' theory, which though attracting considerable support in the Federal Republic of Germany is nevertheless not universally accepted even there. According to that theory, the judgment of an administrative or judicial authority concerning the interests of consumers is substituted for the consumers' own views as to what those interests are. I have already rejected this theory of the 'reasonable consumer' in another connection, in Part 2.1 of my Opinion of 21 June 1983 in *Michelin*, cited above; moreover, in doing so I concurred with the view expressed by the Commission.

(e) Part II B 3 of the decision concerns the requirement that the restrictions imposed should be indispensable. On that point I merely wish to state that once again account is taken solely of the SABA system, viewed in isolation, without any consideration of the parallel effects of similar systems. Here again, I consider that unacceptable for the reasons which I have already given in relation to the fourth submission.

(f) I do, however, consider it desirable to comment separately on the Commission's conclusions (in Part II B 4 of the decision) concerning the fulfilment of the fourth condition in Article 85 (3).

The fourth paragraph of Part II B 4 states that 'the consumer electronics market is intensely competitive, largely due to the large number of manufacturers, the fast pace of technological advance and the varied distribution structure'. That statement is first of all once again vitiated by the decision's general defect, namely that it is not based on any investigation (since the report referred to by the Commission before the Court was not available until two months later). Thus there is no clear factual foundation for the second sentence in that paragraph, which states that although a number of other major consumer electronics manufacturers also have EEC-wide systems of dealership agreements, some of which, however, only involve simple selective distribution, the Commission was unable to find any evidence that the widespread use of such systems leads to rigidity in the price structure. Without any investigation of the market it is obvious that the Commission would be unable to find any evidence of such effects. Moreover, in that sentence the EEC as a whole is regarded as the only relevant market, whereas I have already stated that the Commission ought also to have investigated the German market as a separate relevant market. Lastly, that sentence overlooks the fact that 'rigidity in the price structure' can also be manifested by a uniform rise in prices, resulting from

obligations imposed on traders in relation to stocking, sales, equipment, staff and the provision of services. Since allowance must be made for the resultant distribution costs, such rigidity of prices can be compensated for only to a limited extent by price competition at the expense of trading margins. It is also precisely this rigidity in prices which may induce the consumer to opt for other, less expensive forms of distribution. However, where there is a proliferation of selective distribution systems (including 'simple' selective distribution systems), such consumer preference cannot be expressed, or can be expressed only to a limited extent. As the Court rightly observed in the first *Metro* case, the effects on prices are not the only effects which should be considered in assessing selective distribution systems. The availability of alternative channels of distribution is also relevant here. At the hearing the Commission did not dispute Metro's assertion that none of the large manufacturers which it mentioned, who together have a market share of 82% in the Federal Republic of Germany, is prepared to supply it. Moreover, as is clear from the information supplied by the Commission itself, to that market share must be added the market share of the Japanese manufacturer, Sony, which also operates a selective distribution system. The manufacturers referred to by Metro are Grundig, Philips, the three undertakings in the Thomson-Brandt group, ITT, Blaupunkt and Loewe-Opta. Metro can obtain certain products manufactured by Philips, but can only obtain them indirectly from Italy and under a different brand name. As the Commission's general view is that 'simple' selective systems need not be notified, it was unable, since no report on the market was available to it when it adopted the decision, to ascertain how many such 'simple' systems are operated on the German market or to what extent manufacturers, under pressure from specialized dealers — as it considers possible according to its reply to my question — will supply exclusively to the specialized trade. Furthermore, the Mackintosh Report, which the Commission subsequently received, contains no information on that point. I have already observed that according to that report the specialized trade in the Federal Republic of Germany (unlike that in France and the United Kingdom) has a market share of 55%, to which must be added the market shares of other distribution outlets with specialized departments.

Lastly, the fifth paragraph of Part II B 4 of the decision contains a statement characteristic of the Commission's view that dealers not subject to any requirements to provide services or other requirements imposed by the manufacturers, such as 'cash-and-carry' stores or self-service wholesale and retail supermarkets (which have a market share of 5% in the Federal Republic of Germany), do not merit protection. That paragraph states as follows: 'Nor has the Commission found that as a result of the spread of selective distribution systems' those types of outlet 'are systematically excluded from selling such products. The selection criteria for SABA dealerships are not such as to be incapable in principle of fulfilment by such types of outlet, although this might involve some changes in their selling methods'. As the applicant rightly remarked at the hearing, that statement confirms that the Commission does not consider it necessary to protect the competition provided by the types of outlet referred to in that paragraph unless those outlets first abandon their specific advantages as regards costs. Only on that basis was the Commission able to confine itself to a finding that those outlets were not excluded from selling SABA products in principle without also considering whether

that was the case in practice. I consider that such a position, on the basis of which (in spite of the ultimate right referred to by the Commission at the hearing of groups of consumers to opt for distribution outlets with lower costs and prices) even the complete elimination of non-specialized dealers might be justified, is not compatible with the wording and purpose of Article 85.

For the foregoing reasons I consider that the applicant's second submission is also well founded.

4.6. *The other submissions on the substance*

As sufficient grounds for declaring the contested decision void are in my view furnished by the applicant's first, second and fourth submissions, which I have stated to be well founded, I do not consider it necessary to look in detail at the remaining third and fifth submissions of the applicant.

In its *third submission*, the applicant claims that the Commission misused its power by failing to take account of the way in which the SABA agreements are actually implemented. Since I have found the applicant's central complaint, as elaborated in the first, second and fourth submissions, to be justified, I regard it as superfluous to go into the complicated questions of fact which would have to be considered in an examination of the third submission. The relevance and also the complexity of the questions raised by that submission are illustrated by the Court's other judgments on selective distribution systems (see for example Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151).

The applicant's *fifth submission* displays some connection with the central complaint levelled against the Commission. In it the applicant complains that the Commission, by granting an exemption in respect of the SABA system under Article 85 (3), permitted SABA and the Thomson-Brandt group to abuse a dominant position on the consumer electronics market in general and the market in colour televisions in particular. In support of its contention it refers to the judgments which I have already cited in my summary of the submissions.

On the basis of the Court's definition of a 'dominant position' in paragraphs 26 and 30 of its judgment of 11 December 1980 in Case 31/80 *(L'Oréal)*, where the Court repeated the definition which it gave earlier in *Hoffmann-La Roche*, I consider it possible that SABA or the Thomson-Brandt group, in spite of having a limited share of the market, should be regarded as occupying a dominant position within the meaning of Article 86. In particular SABA's apparent ability to plan its production and sales for four months and a year respectively might, in my view, indicate that it enjoys the power 'to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'. Manufacturers with a comparable system might then also be in a dominant position. Indeed, under Netherlands competition policy action has repeatedly been taken against parallel dominant positions of that kind where manufacturers abuse their position by boycotting certain forms of distribution. However, I do not consider it possible to reach a definitive conclusion on that submission on the basis of the arguments which have been put forward in these proceedings, and in any event that is unnecessary for the reasons which I have already stated.

5. Summary, final remarks and conclusion

5.1. *Summary.* In my foregoing analysis I have reached the following conclusions:

(a) The applicant's action is admissible on the grounds put forward by the Commission at the hearing.

(b) The applicant's sixth submission, on the administrative procedure followed by the Commission, is unfounded and must therefore be rejected.

(c) The applicant's fourth submission, in which it complains in particular that the Commission did not base its decision on an investigation of the general structure of the market, in accordance with the guidelines laid down in the first *Metro* case, is well founded.

(d) The applicant's first and second submissions, in which it states that the Commission wrongly applied Article 85 (1) and (3), are — in particular in the light of my finding that the fourth submission is well founded — also well founded.

(e) The defects in the contested decision which are apparent from my examination of the fourth, first and second submissions are so serious that the decision must be declared void on those grounds.

(f) In view of that conclusion, it is unnecessary to examine the remaining submissions put forward by the applicant on the substance.

5.2. *Final remarks*

(a) I hope that I have made it clear in the foregoing analysis that the present case is not as straightforward as at first appears. That is not altered by the fact that, in my view, the solution to the dispute which I have proposed directly follows from the guidelines laid down in the first *Metro* case concerning the policy to be adopted by the Commission. Although that aspect is not in itself relevant to the assessment of the case, the importance of the case is emphasized by the fact that it follows from the judgment of the Court of 13 February 1969 in Case 14/68 (*Walt Wilhelm* v *Bundeskartelamt* [1969] ECR 1) that, if the policy contained in the present Commission decision were accepted, the competition authorities of three Member States (France, the Netherlands and the United Kingdom) would be unable to pursue unaltered their different policy as regards the boycotting of certain forms of distribution.

(b) As the decision must be examined on its own merits and in the light of the explanations supplied in the course of the proceedings, and as it has become apparent that the decision took no account, or scarcely any account, of the guidelines supplied in the first *Metro* case concerning the requisite market investigation, I consider that it would be improper to consider in detail in my opinion the conclusions of an investigation which was not available to the Commission until two months after the decision was adopted. From the text of the decision it is clear that the Commission considered that general information of that kind on the structure of the market was irrelevant for purposes of its decision and that is, rightly, the chief complaint raised by the applicant. Moreover, there can be no question of retrospectively reconstructing the way in which the Commission's decision would have read if it had taken account of the facts referred to. In proceedings before the Court, the grounds of a decision cannot be replaced by entirely different grounds, in which a fundamental defect of the decision is remedied. Furthermore, I have already noted that the Mackintosh Report remedies that defect only very inadequately.

(c) Apart from the exception with regard to the fourth condition for exemption laid down in Article 85 (3), which I have already

dealt with, the Commission's decision is, for the reasons which I have stated and as is apparent from its clear text, based solely on an examination of the SABA system, viewed without regard to the structure of the market in which it operates. I have indicated the conclusions to which the working method chosen by the Commission has led, conclusions which are unacceptable or are at least based on pure hypotheses or unsubstantiated opinions. As a result of my examination of the applicant's chief complaint and the consequences thereof as regards the application of Article 85 (1) and (3), I have taken the view that a separate investigation by the Court of the arguments concerning the SABA system as such would be superfluous.

(d) Just as I have not taken account of the Mackintosh Report, I have also, for the same reasons as those set out in paragraph (b) above, disregarded the information provided by the Commission after the hearing, in reply to a question asked by the Judge-Rapporteur. The information on the facts known to the Commission itself and not regarded as confidential concerning the spread of selective distribution systems in the sector in question is, however, of limited value because the Commission, as I have already stated, does not consider that simple selective distribution systems have to be notified; on the other hand, it is not clear how far the research institute concerned (Gesellschaft für Konsumforschung, Nuremberg) has at its disposal information on unnotified selective distribution systems. The value of that information (published in 'Neue Medien' No 5 of May 1985) and of the other information submitted must, in my view, be cast into doubt as a result of the comments subsequently received from the applicant. In a detailed survey set out in those comments, the applicant reaches the conclusion that eight television manufacturers operating formal selective distribution or similar systems have a 58% share of the German market and nine other manufacturers operating informal selective distribution systems with similar effects have a market share of 33%. Thus the brands to which Metro and similar dealers have normal access have a total market share of only 9%. The facts to which Metro refers in support of those figures are certainly more detailed than those on which the Commission's calculations are based. I have already stated, however, that primarily for other reasons I do not consider that those facts, produced by the Commission and Metro after the hearing in answer to questions asked by the Court, are ultimately of decisive importance. Should the Court decide otherwise, it would in my view be necessary to re-open the procedure, in view of the fact that the important figures produced by Metro, which are duly justified by supporting evidence, do not correspond to those produced by the Commission.

5.3. *Conclusion*

In conclusion, I propose that the Court should:

(1) Declare the application admissible;

(2) Declare the first, second and fourth submissions of the applicant well founded;

(3) Declare void the Commission decision of 21 December 1983 concerning a proceeding under Article 85 of the EEC Treaty relating to SABA's EEC distribution system (Decision No 83/672/EEC, Official Journal 1983, L 376, p. 41) on the grounds which I have stated;

(4) Order the Commission to pay the costs, except for those of the interveners, who have not asked for costs and must therefore bear their own costs.