in addition, such conditions promote improved competition inasmuch as it relates to factors other than prices. 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.

7. Any marketing system based upon the selection of outlets necessarily entails the obligation on wholesalers forming part of the network to supply only appointed resellers and, accordingly, the right of the relevant producer to check that that obligation is fulfilled. In so far as the obligations undertaken in connexion with verification are intended to ensure respect for the conditions of appointment regarding the criteria as to technical qualifications, they do not in themselves constitute a restriction on competition but are the corollary of the principal obligation and contribute to its fulfilment. However, in so far as they guarantee the fulfilment of more stringent obligations, they fall within the terms of the prohibition contained in Article 85 (1), unless they, together with the principal obligation to which they are related, are exempted, where appropriate, pursuant to Article 85 (3).

8. The separation of the functions of wholesaler and retailer whereby wholesalers are prohibited from supplying private customers, including large-scale consumers, is in principle in accordance with the requirement that competition shall not be distorted.

9. Since the function of a wholesaler is not to promote the products of a particular manufacturer but rather to provide for the retail trade supplies obtained on the basis of competition between manufacturers, obligations entered into by a wholesaler which limit his freedom in this respect constitute restrictions on competition falling within the ambit of Article 85 (1).

10. The obligation on non-specialist wholesalers to open a special department is designed to guarantee the sale of the products concerned under appropriate conditions and accordingly does not constitute a restriction on competition within the meaning of Article 85 (1).
On the other hand, the obligation to achieve a turnover comparable to that of a specialist wholesaler exceeds the strict requirements of the qualitative criteria inherent in a selective distribution system and it must accordingly be appraised in the light of Article 85 (3).

In Case 26/76

METRO SB-GROSSMÄRKTE GMBH & Co. KG, Schlüterstraße 3, Düsseldorf 4, represented by Mr von der Osten, of the Düsseldorf Bar, with an address for service in Luxembourg at the Chambers of Robert Elter, 11 Boulevard Royal,

applicant,

supported by:

VERBAND DES SB-GROSSHANDELS E.V., Theaterstraße 8, Hannover 3, represented by Mr Bartholatus, of the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Robert Elter, 11 Boulevard Royal,

intervener,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Dieter Oldekop, a member of its Legal Service, with an address for service in Luxembourg at the office of Mario Cervino, Bâtiment Jean Monnet, Kirchberg,

defendant,

supported by:

SABA (Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne), Villingen-Schwenningen, represented by Christian Hootz, of the Stuttgart Bar, with an address for service in Luxembourg at the Chambers of Georges Reuter, 12 Rue Notre Dame,

intervener,

APPLICATION for the annulment of the Decision of the Commission of the European Communities of 15 December 1975 relating to a procedure under Article 85 of the EEC Treaty (IV/847 — SABA, OJ L 28 of 3. 2. 1976, p. 19),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

The undertaking Schwarzwälder Apparate-Bau-Anstalt August Schwer und

Söhne (hereinafter referred to as 'SABA') whose head office is in Villingen-Schwenningen in the Federal Republic of Germany, manufactures electronic equipment for the leisure market (radios, televisions and tape recorders) and distributes it through a network of contracts and agreements between it and sole distributors, wholesalers and appointed retailers, all of which constitutes a selective distribution system. In the contested Decision of 15 December 1975 the Commission gave SABA negative clearance within the meaning of Article 2 of Regulation No 17 of the Council of 6 February 1962 (OJ, English Special Edition 1959-1962, p. 87) for certain specific features of that system and granted it exemption within the meaning of Article 85 (3) of the EEC Treaty, to run until 21 July 1980, subject to certain conditions regarding the remaining parts of the system in question.

After the distribution system had been altered, following the intervention of the Commission, it constitutes, according to the contested decision, a uniform distribution system for the entire territory of the Community and had the following salient features:

(1) cooperation between SABA and its sole distributors and wholesalers;
(2) restriction of the number of dealers; and
(3) the establishment by the manufacturer of distribution channels (contested decision, paragraph 3).

In the Federal Republic of Germany and West Berlin this represents a network of wholesalers and retailers, both categories being appointed and, in the other Member States except Ireland, sole distributors who appear in their turn to be connected with wholesalers and in any event with appointed retailers.

The contracts and agreements connecting SABA with the various distributors in its network may be described as follows:

(a) *German wholesalers* are appointed only if they agree to sign the three documents described beneath, and if they fulfil *in addition* the conditions set out under (4) below.

(1) *A so-called 'cooperation agreement'*, under which wholesalers undertake to conclude six-monthly supply contracts with SABA and to take delivery at the appropriate time of goods ordered, to stock the relevant products and to achieve a turnover considered by SABA to be adequate; SABA for its part is obliged to consult the wholesalers on the preparation of its production schedules (contested decision, paragraphs 14 and 40).

(2) *A Distribution Agreement for SABA Wholesalers* (Verpflichtungsschein Vertriebsbindung SABA-Großhändler) which is in two parts. By the *first part* wholesalers are obliged to restrict supplies within the territory of the Federal Republic of Germany and West Berlin to other wholesalers and retailers appointed by SABA, which implies that they fulfil a certain number of qualitative conditions and are prepared to undertake to supply the services which are a condition of appointment by SABA to the status of a specialized wholesaler or retailer. The obligations described in this first part correspond in essentials to those which SABA imposes through the document described below at (3) upon its wholesalers throughout the EEC.

The *second part* of this agreement contains additional obligations specifically relating to distribution on the German market which must be related to the concepts of German legislation and case-law on the separation of the functions of wholesalers and retailers. In accordance with these concepts German wholesalers are prohibited from selling to *private customers* in the Federal Republic of Germany and in West Berlin (contested decision, paragraph 34).

On the other hand, they are permitted to supply trade consumers, that is to say,

industrial or commercial undertakings which employ the products purchased from wholesalers only for such commercial purposes as will promote the efficiency of the business and which agree to give a written undertaking to that effect in terms of a document known as a 'SABA-Sonderverpflichtungsschein' (special undertaking). Provision is made for checks. However, wholesalers are prohibited from supplying institutional consumers (hospitals, schools and military establishments).

(3) *An agreement for SABA Wholesalers in the EEC* (EWG Verpflichtungsschein SABA-Großhändler), which covers the marketing operations of such wholesalers within the Common Market as a whole.

The agreement repeats for the Common Market as a whole the undertaking to supply only other wholesalers or retailers who fulfil the conditions prescribed by SABA for their appointment and the obligation to carry out or permit checks. In this respect the document repeats the essential points of the abovementioned obligations with regard to the Federal Republic of Germany contained in the first part of the document described above under (2).

(4) SABA has informed the Commission (decision, paragraph 9) that 'in principle it is willing to supply any wholesaler in the Federal Republic of Germany or West Berlin who:

(a) keeps a specialized shop, i.e. one where over 50 % of the turnover relates to the sale of radio, television, tape-recording or other electrical equipment, or
has set up a department specializing in the wholesale of radio, television and tape-recording equipment with a turnover comparable to that of a wholesaler specializing in electronic equipment for leisure purposes;

(b) participates in the creation and consolidation of the SABA sales network;

(c) participates in the service system'.

For its part, SABA gives an undertaking to each wholesaler that it will ensure that other wholesalers comply with its system of distribution (decision, paragraph 17). Furthermore, the system gives distributors freedom with regard to prices, freedom to undertake supplies throughout the Common Market as a whole and to undertake so-called 'cross' supplies (wholesaler to wholesaler, retailer to retailer) or 'return' supplies (retailer to wholesaler).

(b) SABA *sole distributors* have been set up in each of the Member States, with the exception of Ireland. In France, the United Kingdom and Italy these distributors are SABA subsidiaries. The sole distributors for Belgium, the Grand Duchy of Luxembourg, Denmark and the Netherlands have signed sole distributorship agreements (decision, paragraph 13), which include the essential features of the cooperation agreements and the distribution agreements and in particular incorporate the undertaking to supply only appointed wholesalers and retailers.

(c) *Retailers both in the Federal Republic of Germany and in the other Member States* must, in order to become appointed dealers, sign a document named an Agreement for SABA Specialist Retailers in the EEC (EWG-Verpflichtungsschein SABA-Facheinzelhändler). By that agreement specialist retailers bind themselves to achieve an adequate turnover in SABA products, to keep a corresponding stock and to display SABA products in a representative manner, to maintain retail premises which are suitable for advertising and displaying SABA products, to maintain appropriate servicing facilities for customers and to supply other SABA resellers (wholesale or retail) only if they are appointed SABA distributors. All supplies to other appointed resellers must be registered so as to permit a check to be carried out.

Inter alia, Article 2 of that agreement *also* shows clearly, albeit indirectly, that in order to be appointed a specialist SABA retailer it is necessary for retailers, in addition, (a) to run a specialized business, that is to say one in which over 50 % of the turnover relates to the sale of electronic products for leisure purposes or to the trade in other electronic articles or which has a special department for electronic leisure products; (b) to undertake that, if they are supplied directly by SABA (that is to say, without dealing through wholesalers), they will conclude long-term supply contracts covering the entire range of SABA products.

Like the wholesalers, retailers are free with regard to prices, they may sell throughout the whole Community and they are entitled to distribute the equipment of competitors of SABA.

The system of distribution maintained thus has four essential features (decision, paragraph 11):

(1) Distribution is effected through selected and appointed wholesalers and retailers, and sole distributors;

(2) Those resellers undertake to supply within the Common Market only other resellers who are appointed distributors, and agree to carry out or permit stringent checks in order to ensure that this undertaking is fulfilled; German wholesalers undertake not to supply private customers in the Federal Republic of Germany;

(3) Such wholesalers, retailers and dealers undertake not to export SABA equipment from the Community or to import it from third countries;

(4) Such wholesalers and retailers undertake to achieve an adequate turnover and to keep a stock of SABA equipment.

In the Decision of 15 December 1975 the Commission considered that:

(1) The limiting of distribution of products exclusively to appointed distributors has as its object and effect appreciably to restrict competition within the common market (decision, paragraph 24);

(2) It is clear from the objective nature of the qualitative criteria applied that, in so far as all distributors fulfilling such criteria are in fact appointed no further restriction of competition within the meaning of Article 85 (1) arises (decision, paragraphs 27 and 28);

(3) Such a restriction nevertheless obtains in so far as selection does not depend exclusively on qualitative criteria ensuring sales under adequate conditions to consumers but is also subject to further specific conditions which cannot be justified by the requirements of the sale under adequate conditions of the products concerned (adequate turnover, maintenance of corresponding stocks) (decision, paragraph 29);

(4) Furthermore, the obligations imposed upon distributors so that SABA can check that deliveries are not made to non-appointed dealers have as their object and effect the restriction and distortion of competition in that they are intended to ensure that distributors observe restrictions which are prohibited by Article 85 (1). Such obligations reduce the freedom of choice both of consumers and of traders who, although capable of marketing electronic equipment for leisure purposes, have not been appointed by SABA (decision, paragraph 30);

(5) Finally, the last restriction on competition referred to in Article 85 (1): the fact that SABA delivers only to national distributors, and the undertaking which sole distributors give in the sole distributorship agreement to respect each other's territories (decision, paragraph 32).

The contested decision adopts different procedures with regard to the various provisions which make up the said distribution system as a whole. Negative clearance was granted in respect of some

when it had been established that they did not infringe the prohibition contained in Article 85 (1), whilst in respect of others an exemption under Article 85 (3) was granted.

Negative clearance was granted in respect of the 'Conditions of Sale for the Domestic Market' (Article 1 of the decision). It appears that the clearance also relates to the provisions considered in paragraphs 34 (the prohibition imposed on SABA wholesalers in Germany preventing them from supplying private customers), 35 (the prohibition on exports from the Community) and 36 (the conditions of sale, covering most of the obligations undertaken by wholesalers and retailers in the so-called 'Distribution Agreements').

Exemption under Article 85 (3) is principally reserved for cooperation agreements and for *certain* parts of the 'Distribution Agreements', namely the retailers' obligations to offer as complete a range of SABA equipment as possible, to achieve an adequate turnover and to maintain corresponding stocks (decision, paragraph 29), together with the obligation undertaken by distributors, wholesalers and retailers to verify, before supplying a reseller, whether he has been appointed by SABA.

The applicant runs a self-service wholesale business on a cash and carry basis. By cutting out a certain number of services which in traditional trading benefit the purchaser (the grant of credit, delivery and advice to customers) general expenses are cut and more favourable prices obtained. Access to Metro's premises is granted only to retailers (resellers or trade consumers) and to institutions which, owing to their structure, have considerable commercial needs in connexion with their operation. The purchasers must hold a written licence to purchase. The general conditions of sale of the Metro undertaking bind customers *inter alia* to purchase goods from Metro only for the trade requirements of their business. However, an exception is made where commercial equipment intended specifically for an undertaking is subsequently used for private purposes.

Metro, to whom SABA refuses to supply products bearing its trade mark because Metro does not fulfil the conditions for appointment as a SABA wholesaler, lodged a complaint with the Commission by a Telex message of 7 November 1973 and a written statement of 9 November 1973, pursuant to Article 3 of Regulation No 17, claiming that the system of distribution agreements in force infringed Articles 85 and 86 of the EEC Treaty and requested that such infringement be terminated.

At first, Metro chiefly disputed the prohibition, which resulted *at that time* from SABA's distribution system, on 'direct supplies', that is to say, supplies to trade consumers in Germany.

Following an intervention by the Commission SABA, in the course of the administrative procedure, amended the clause prohibiting direct supplies so that German wholesalers could thereafter, on certain conditions, supply SABA products to trade consumers and only supplies to 'institutions' such as military establishments, churches, hospitals and schools remained prohibited.

At the Commission's instigation SABA in addition extended the definition of 'wholesaler' to the self-service wholesale trade, so that Metro may be admitted to SABA's network provided that it fulfils the conditions for access thereto which are applied to other wholesalers. Moreover, SABA stated that its distributors are free either to provide after-sales service themselves or to subcontract such service.

Despite those modifications Metro continued to maintain that discrimination against the self-service wholesale

trade still existed, in that various restrictions on competition were retained which were not necessary for the attainment of the objectives which justify an exemption under Article 85 (3), namely:

(1) The prohibition on supplies to trade consumers by wholesalers;
(2) The requirement that products purchased by trade consumers from wholesalers must be such as will promote the efficiency of the business;
(3) The obligation on trade consumers to sign an undertaking which cannot reasonably be required of them;
(4) The requirement that wholesalers with a special department must achieve a turnover comparable to that of a specialized wholesaler;
(5) The obligation to sign a cooperation agreement;
(6) The obligation on all wholesalers to participate in the consolidation of SABA's distribution network, which is unacceptable to a self-service wholesale trader.

Since the Commission considered that those objections were unfounded it adopted the contested decision on 15 December 1975 and notified it to the applicant by letter of 14 January 1976, at the same time dismissing its objections.

The application of 10 March 1976 was recorded at the Court Registry on 11 March 1976.

By an order of 5 May 1976 SABA was given leave to intervene in support of the conclusions of the defendant.

By an order of 23 July 1976 the Court dismissed an application lodged by Metro for the adoption of interim measures.

By an order of 30 November 1976 the Verband des SB-Großhandels e. V. (Association of Self-Service Wholesale Traders) was given leave to intervene in support of the conclusions of the applicant.

Having heard the report of the Judge Rapporteur and the views of the Advocate-General the Court decided that it was unnecessary to undertake a preparatory inquiry.

II — Conclusions of the parties

The applicant claims that the Court should:

'— Declare to be void and annul the Decision of the Commission of the European Communities of 15 December 1975, No K 75 1852, relating to a procedure under Article 85 of the EEC Treaty (IV/847 — SABA) and the dismissal by the defendant on 14 January 1976 of the objections submitted to it in the course of the abovementioned procedure.
— Order the defendant to bear the costs of the proceedings.'

The defendant contends that the Court should:

'— Dismiss that part of the application as unfounded which seeks the annulment of the Commission Decision of 15 December 1975.
— Dismiss the remainder of the application as inadmissible or alternatively as unfounded.
— Order the applicant to bear the costs.'

The intervener SABA supports the conclusions of the Commission.

The intervener Verband des SB-Großhandels e. V. supports the conclusions of the applicant.

III — Submissions and arguments of the parties

A — Admissibility of the application

Metro maintains that the application is admissible both with regard to the letter of 14 January 1976 which was addressed to it and with regard to the Decision of

15 December 1975 which concerns it directly and individually since, as a consequence of the decision, it cannot obtain supplies of SABA equipment and is thus prevented from dealing in a branded product which is popular with consumers.

The *Commission* maintains that the application is admissible in so far as it relates to the decision of 15 December 1975 but that it is inadmissible in so far as it relates to the letter of 14 January 1976 rejecting the complaint lodged on 17 November 1975. The situation of which the applicant complains was brought about solely by the decision, and the letter of 14 January 1976 has had no further effect upon the legal situation following therefrom and accordingly it does not constitute a decision within the meaning of Article 173.

The *intervener SABA* questions the admissibility of the application in so far as it is directed against the decision of 15 December 1975. That decision was neither of direct nor, in any case, of individual concern to the applicant because it relates to all traders in the common market who may be concerned in the marketing of SABA products.

The applicant replies that the fact that it participated in the administrative procedure shows that it was directly and individually concerned, as is shown above all by the fact that SABA founds on the contested decision in refusing to sell its product to it.

B — Substance

I — The *applicant* considers that the contested decision infringes Article 85 of the EEC Treaty, especially paragraph (3) thereof. As the Court of Justice has held (judgment of 13 July 1966 in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299) agreements restricting competition can be exempted from the prohibition in Article 85 (1) only if the four conditions set out in paragraph (3) are fulfilled, namely (1) that the agreement contributes to improving production or distribution or to promoting technical progress, (2) allows consumers a fair share of the resulting benefit, (3) does not impose restrictions on competition in excess of those which are indispensable to the attainment of those objectives and (4) does not afford the undertakings linked by the agreement or concerted practice the opportunity of eliminating competition in respect of a substantial part of the products in question. An exemption was granted in respect of SABA's distribution system although at all events it does not comply with the second, third and fourth conditions.

With regard to the second condition, Metro observes that consumers are chiefly interested in price competition, whilst the system at issue calcifies the price-structure at the retail level. The differences in price amongst SABA's specialist retailers comes within a bracket of one per cent. Furthermore, the obligation on wholesalers and retailers (systematically) to promote SABA products and their related obligation to attain sales quotas encourages distributors to influence their customers in favour of SABA products rather than giving them an objective choice.

With regard to the *third condition*, Metro observes that a number of restrictive clauses are neither indispensable nor indeed necessary for improving the distribution of SABA products. To meet the consumer's desire for impeccable service it would be sufficient for the system to make provision for sale only to distributors who could clearly provide technical service, either themselves or by subcontracting to a workshop. The system at issue far exceeds this need by imposing cooperation agreements, requiring a representative display, imposing checks at the wholesale stage and by forbidding supplies to institutional consumers.

With regard to the *fourth condition,* Metro claims that the system at issue excludes the self-service wholesale trade by the imposition, in particular through cooperation agreements and obligatory checks, of conditions incompatible with the nature of this new method of marketing. Furthermore, it excludes small retailers by imposing over-stringent conditions as to appointment (representative displays and maintenance of stocks). It is in fact the self-service wholesale trade and small retail businesses which provide the most significant form of competition, namely that on prices.

Metro further observes that the duty of distributors is not to favour manufacturers but to assist customers in making the best choice. Finally, it maintains that the system at issue is all the more improper in that SABA enjoys a dominant position.

II — In its *statement of defence* the Commission considers that despite the close links connecting producers to wholesalers and exclusive dealers, SABA's distribution system is an open one, to which in particular self-service wholesalers may have access, and that it can be exempted pursuant to Article 85 (3).

The clauses for which exemption could not be granted (partitioning of markets, prohibition on cross supplies or return supplies and the exclusion of large-scale businesses and discount stores) have been deleted. In particular, the prohibition on direct supplies, that is to say direct from wholesaler to private customers, which is the origin of the dispute between SABA and Metro, has been relaxed and is restricted to preventing wholesalers from supplying private customers, since trade consumers may now be supplied.

The Commission refers to its previous decisions in the sphere of selective distribution *(Kodak,* Decision of 30 June 1970, OJ L 147 of 7. 7. 1970, p. 24; *Omega,* Decision of 28 October 1970, OJ L 242 of 5. 11. 1970, p. 22 and *BMW,* Decision of 13 December 1974, OJ L 29 of 3. 2. 1975, p. 1).

Those decisions have already resolved two of the difficulties caused by systems of selective distribution. It is clear from them, on the one hand, that exemption cannot be granted for provisions which have as their object or effect the partitioning of national markets and, on the other hand, that the obligation to sell only through specialized traders (Fachhandelsbindung), which limits the number of distributors through the application of appropriate, non-discriminatory qualitative criteria, is not prohibited pursuant to Article 85 (1).

The difficulty with any application of Article 85 (3) arises in connexion with clauses which exceed the obligation to sell through specialized traders but which form a uniform system with that obligation: in the present case, such obligations are those imposed under the cooperation agreements and those conditioning admission to the status of a specialized retailer.

In this connexion, it is clear from the decisions of the Court (judgment of 13 July 1966 in Joined Cases 56 and 58/64, *Consten and Grundig* v *Commission* [1966] ECR 299) that the exercise of the powers of the Commission in this sphere necessarily involves complex economic evaluations and judicial review of such evaluations must take account of this factor by confining itself to an examination of the relevance of the facts and the legal consequences which the Commission deduces therefrom. The Commission also emphasizes that the exemption requested was granted only for a relatively short period (until 21 July 1980).

The Commission considers that the complaints submitted with regard to the Decision of 15 December 1975 are unfounded. SABA's distribution system

does not excessively reduce the number of distributors and does not rule out competition amongst appointed distributors. The criteria established for admission to the status of distributor are objective, so that SABA may not use the pretext of a distributor's competitive policy for refusing to supply him with products provided that he complies with the criteria for admission.

Furthermore, self-service wholesalers, such as the applicant, can fulfil the conditions laid down by SABA without having to give up their activities as wholesalers. Although the limitation on the number of appointed distributors in relation to the total number of distributors who are capable of marketing SABA products can lead to the view that the system falls under Article 85 (1) of the EEC Treaty, the beneficial effects which accompany this limitation on competition should not be disregarded.

The obligation imposed upon distributors to devote themselves especially to marketing SABA products means that competition between SABA's products and those of other manufacturers (inter-brand competition) is heightened, as is competition between SABA distributors (intra-brand competition). Whilst the Commission does not deny the importance of new methods of marketing, such as the self-service wholesale trade, it calls in question certain of the applicant's statements regarding the benefits which ensue for the consumer with regard to prices. Such savings in costs must be appraised in the light of the particular importance of consumer information in the field of electronic equipment for leisure purposes.

The Commission does not agree that SABA's distribution system brings about a paralysis in retail prices. In this matter it is impossible to draw conclusions, as the applicant does, from purely local comparisons in relation to an area which is extremely homogeneous in economic terms. The levelling of prices observed in such a case may in fact result from lively competition. The Commission produces tables which show that the difference between the highest and lowest prices at which a given product is offered to private customers throughout the entire territory of the Federal Republic of Germany varies from an average of 30 % up to 50 % or more.

In its consideration of the clauses in the cooperation agreements the Commission observes that the obligation to supply undertaken by wholesalers is for a fixed period of six months and that, contrary to the applicant's statement, it does not include an obligation on wholesalers to achieve a *preponderant* part, merely an adequate part, of their turnover in SABA products, having regard moreover to the criteria set out in paragraph 14 of the contested decision. Furthermore, that condition is directly applicable only to specialist wholesalers; self-service wholesalers with a specialized department must achieve a turnover comparable to that of a specialist wholesaler of electronic equipment for leisure purposes.

According to a survey carried out by the Commission amongst German SABA wholesalers such six-monthly supply contracts are highly attractive for those wholesalers because they fulfil their need to ensure in advance continuous supplies of products under contract. The applicant has never maintained that it was unable to give such an undertaking. Finally, the relatively short period to which the delivery obligation relates and the criteria employed in calculating the volume of goods to be delivered do not provide a basis for maintaining that the manufacturer no longer runs any risk in distributing his products and that he is relieved of the need to react flexibly to alterations in the competitive situation. The Commission considers that the cooperation between SABA and its wholesalers serves the interests of a production and distribution policy which

accords both with commercial sense and the wishes of consumers.

Concerning the prohibition on German wholesalers from delivering to institutional customers (hospitals, etc.) and the need to carry out checks, which are described by the applicant as 'a practical impossibility', the Commission points out that this prohibition does not oblige the wholesale trade to alter its economic structure and does not hamper one of its essential functions. With regard to checks, the applicant is already obliged, in order to fulfil the conditions required pursuant to German case-law for recognition of the status of wholesaler, to make provision for a system of checks sufficient, in its essentials, to exclude those institutions which are not authorized to receive supplies of SABA equipment.

The applicant has further considered that it is unlawful to require trade consumers wishing to purchase SABA products to sign certain declarations or undertake certain obligations relating to the use of the products purchased; this clause is, however, directly related to the legal rules governing the self-service wholesale trade in the Federal Republic of Germany, which, for reasons relating to competition, separate the functions of wholesalers and retailers and render the status of wholesaler and its concurrent benefits conditional upon selling essentially to resellers or to trade consumers to the exclusion of private customers.

Since the Commission recognized that sales to trade consumers are a typical function of wholesalers it required the abolition of the prohibition on such sales which SABA had imposed upon wholesalers. The prohibition on sales to private customers, on the other hand, conforms to the need to conserve the structure of competition at the retail level and was therefore retained.

With regard to the obligation on wholesalers to require trade consumers to sign a declaration to the effect that they will use SABA products only for such commercial purposes 'as will promote the efficiency of the business' this is intended to prevent trade consumers from obtaining supplies for their private requirements from wholesalers. This constitutes a very real risk in the case of self-service wholesalers and indeed German case-law requires that German wholesalers must ensure that this situation does not exceed certain tolerated limits.

The Commission does not see why the need to sign the abovementioned declaration should be misunderstood by customers who in fact intend to use equipment purchased for commercial purposes. The declaration is wholly appropriate and sufficiently concrete to be checked without great difficulty by self-service wholesalers.

The obligation on distributors to achieve an appropriate turnover was exempted because it entails a rationalization of distribution, a more intensive exploitation of the market and the promotion of sales. Figures for turnover are assessed in terms of each distributor's capabilities and by comparing SABA's approximate share of the market in the area concerned with the volume of sales of other manufacturers' products.

The increase required is also determined in accordance with objective and *acceptable* criteria. The effect of those obligations is to encourage equally all distributors to concentrate intensively on the distribution of SABA equipment within the limits of their marketing capabilities.

The obligation to provide a representative display of SABA products is intended to prevent SABA equipment from being surrounded by other products which might detract from them. It is possible even for small-scale distributors.

III — The *intervener SABA* observes, first of all, that the applicant cannot

claim the status of wholesaler. Despite what Metro states, it does not sell exclusively to traders nor, in any case, does it stock only products which are purchased for commercial purposes.

In the first place, the buyer's card for the foodstuffs department is issued to non-profit-making institutions which use it solely for private purposes. Further, although Metro does indeed supply traders, such traders approach Metro essentially as private customers, to obtain supplies principally in fields unconnected with their trade. Thus retailers specializing in the marketing of radios would not obtain supplies from Metro because its prices are too high and it provides no after-sales service.

Metro is furthermore infringing the conditions attached by German legislation to the status of wholesaler and endeavouring by this application to ward off threats to its system of marketing.

In considering whether the application is well founded the intervener notes that Metro's complaints relate only to two of the conditions placed upon exemption by Article 85 (3): it claims that consumers do not obtain a fair share of the benefit resulting from the distribution system and that that system affords the possibility of eliminating competition in respect of a substantial part of the products in question.

In connexion with those two points SABA states that it has appointed some hundred wholesalers and almost nine thousand retailers as SABA distributors in the territory of the Federal Republic of Gemany. To these must be added the numerous SABA distributors established in the other Member States of the common market who are in active competition. Finally, SABA has only a small share of the market in the Federal Republic of Germany and encounters competition from other producers in the same sector. Comparisons of prices covering the entire territory show how fierce the competition is between SABA distributors.

IV — In its *reply* the applicant Metro observes that its application is essentially based on two factors which it sets out as follows:

A — When the Commission, on the basis of the facts found by it in the contested decision, granted an exemption under Article 85 (3) it exercised its discretionary power in a manner incompatible with the intention of the legislature.

B — The Commission based its action on facts which it was not entitled to presume — although it did so — without definite proof.

A — The principle factors vitiating the exercise by the Commission of its discretionary power are as follows:

(1) The Commission fails to recognize that SABA's system of selective distribution, under the guise of qualitative criteria, in fact leads to a choice of distributors, both wholesalers and retailers, from whom appreciable competition on prices is no longer to be anticipated. This is brought about by excluding self-service wholesalers and those retailers who are most likely to sell at cut prices.

(2) The Commission is wrong in considering (at page 13 of its statement) that the reduction in competition on prices is offset by the fact that the competitive position of SABA distributors is strengthened in relation to (distributors of) other makes of product. The statement that a reduction in intra-brand competition encourages inter-brand competition is incorrect and in any event no benefit for the consumer is to be discerned.

(3) The Commission has failed to bear in mind the importance of the fact that SABA products are of very high quality. This means that consumers are reluctant to accept substitute products, which is why distributors are obliged to display a

complete range of brands, including particularly SABA products. This need was recognized by the Bundesgerichtshof in its judgment in the *Rossignol* case of 20 November 1975 *(Wirtschaft und Wettbewerb* 1976, p. 279).

(4) The Commission failed to take account of the fact that the marketing policy adopted by SABA is only one element of a system which is applied in a parallel fashion by the principal producers of electronic equipment for leisure purposes.

B — The Commission has failed to establish, or has insufficiently established, the facts on the basis of which it has proceeded.

(1) It is incorrect to maintain that 'institutional' private customers (schools, military establishments and hospitals) do not operate as commercial or industrial concerns. The applicant maintains that any activity on the market which is not intended to satisfy private requirements is occupational or profit-making.

(2) The Commission is wrong in believing (statement of defence, pp. 24-25) that the applicant, in checking the status of potential customers, merely requests from them a written statement confirming that the goods are purchased exclusively for the requirements of their undertaking. It carries out a certain number of checks but objects to the additional procedures required exclusively in connexion with SABA products, the sole aim of which, it maintains, is to exclude the self-service wholesale trade.

(3) Contrary to the view of the Commission, the self-service wholesale trade, by reason of economies in transport and credit costs, in fact constitutes a particularly advantageous source of supply for small traders who are able to effect multiple purchases at a reduced price, saving transport costs by the use of their own labour.

(4) The Commission is likewise in error in maintaining that 'in comparison with the prices prevailing in the traditional specialized wholesale trade, and taking account above all of the additional services which the latter provides', the prices charged by the applicant are not attractive to resellers (statement of defence, p. 14). According to the applicant it could not achieve a turnover of DM 100 000 000 per year in electronic equipment for leisure purposes if its prices were not attractive.

The publication *'Markt Intern'* which has been cited in particular by the intervener SABA in maintaining that Metro cannot describe itself as a wholesaler (annexes 2, 4, 6 to 13 and 15 to the intervener's statement) has on numerous occasions indicated the advantageous prices charged by the applicant.

The applicant maintains that those prices would be even more attractive if all large-scale manufacturers had not banded together to prohibit supplies to the applicant.

(5) It is untrue, or at any rate not completely true, to maintain, as does the Commission (defence, pp. 2 and 16), that SABA is competing with more than twenty other Geman manufacturers.

In fact only eight undertakings are important in the market in question (in order of importance: Grundig, Philips, Telefunken, Nordmende, SABA, Blaupunkt, Loewe-Opta and Schaub-Lorenz), all of whom maintain a distribution system directed against the self-service wholesale trade.

(6) The Commission is mistaken in deducing on the basis of documents produced by SABA *(SABA-Preisspiegel,* annex 7 to the defence) that there is competition with regard to prices between SABA retailers which leads to price differences in the region of 30 to 40 % or 50 %. The applicant disputes

the representative nature of the table of prices submitted by SABA in its own interest. In any event, the appropriate market for comparing prices is not the entire territory of the Federal Republic of Germany but rather the individual local markets, since a customer in Düsseldorf has no interest in the prices prevailing in Frankfurt or in Oberammergau. If the individual local markets are considered very slight differences in prices are found. This is principally because the criteria for qualitative selection under SABA's system enable it, having regard to storage capacity, representative character etc. ... to accept as SABA distributors only the principal local traders, that is to say those who have an interest in remaining aloof from competition on prices. The result is an oligopoly in each of the regional markets. The applicant requests the Court to order the intervener to submit a list of SABA specialist retailers with their exact addresses so that a comparative examination may be carried out.

(7) According to the applicant it cannot credibly be maintained, as the Commission suggests, that cooperation between the producer and the distributor benefits the consumer. Such cooperation produces effects as far as the retail trade, paralysing competition on prices and preventing the customer from obtaining from the distributor unbiased and objective information on the qualities of the products offered for sale.

The applicant then submits its observations on the statement of the intervener SABA. It describes the operation of its system of self-service distribution and explains the checks which it carries out on the trade status of purchasers. It raises objections in connexion with the various documents whereby the intervener SABA endeavours to prove that Metro is infringing the conditions placed by German law on the status of wholesaler.

V — In its *rejoinder* the Commission considers that the complaints voiced by the applicant are wrongly described by it as complaints regarding misuse of discretionary powers, since in fact they are complaints regarding infringement of the Treaty, which must be examined as such. It considers that these complaints may be summarized as follows:

The contested decision is said to infringe Article 85 (3) of the Treaty in that the selective nature of the distribution system, which the Commission has approved, has the effect of excluding the self-service wholesale trade and the retail trade and thus eliminates competition on prices.

With regard to the exclusion of self-service wholesalers and retailers the Commission again disputes the assertion that the contested decision can have this effect in view of the alterations which it has imposed.

The tests required to be carried out under the system are intended, on the one hand, to obtain signatures to certain declarations regarding the use of products by trade consumers (paragraph 15 of the contested decision) and, on the other, to ensure the exclusion of direct supplies by wholesalers to institutional consumers; they are not excessive and do not in fact result in the exclusion of undertakings such as the applicant. The declaration is drafted in such a way that all the applicant's customers could sign it without difficulty provided that the products purchased are in effect intended for use in their businesses. Moreover, it is wrong to claim that it is SABA's distribution system which obliges Metro to undertake a special check when goods are taken away. In addition to the checks which must be carried out by the cashier (verification of the prices, invoices and guarantee documents) a 'final check' has already been instituted by the applicant itself within the framework of the obligations imposed upon it under German legislation.

Likewise, the exclusion of supplies to 'institutional' purchasers need not entail

problems or prevent either SABA wholesalers' or the applicant's effectively carrying out an important function as wholesalers. Furthermore, institutions cannot be supplied by the applicant, which has itself adopted the style of 'suppliers to resellers and trade consumers', a status which the said institutions clearly do not possess. According to Directive No 64/223/EEC of 25 February 1964 (OJ, English Special Edition 1963-1964, p. 123) such institutions can be regarded as wholesaler customers only in so far as they can be considered to be 'large-scale consumers', which is not generally the case with regard to electronic products for leisure purposes.

There is likewise no justification for the criticisms directed in this connexion against the cooperation agreements and in particular the obligation which they contain to conclude six-monthly supply contracts with SABA.

The aim of the cooperation between SABA and its wholesalers is constantly to adapt the planning and structure of the manufacturing programme to the wishes of consumers in order to follow market developments more closely, thereby reducing the manufacturer's 'reaction-time' should any quantitative or qualitative discrepancies arise. This has not excessively restricted the freedom of wholesalers since the period of validity of the contract is relatively short and the conditions laid down therein are relatively flexible.

The Commission also disputes the argument that SABA's system of distribution excludes, at the retail level, small traders who guarantee active competition on prices. On the contrary, it is often large-scale retail undertakings which, owing to favourable conditions of purchase, their ability to rationalize distribution and after-sales services and to calculate an average profit-margin on the basis of several ranges of different products, can offer the most advantageous price to consumers.

With regard to the elimination of competition on prices amongst SABA distributors, the Commission maintains that there are no 'markets of local importance' where the level of prices is more or less uniform. The inquiry carried out by the applicant in Düsseldorf and produced during the procedure for an interim measure is not conclusive since the number of distributors covered is too restricted. Moreover, the fact that the prices charged by those distributors were very similar and sometimes even identical may be explained by the cost-structure of the distributors surveyed or, in particular, by the pressure of competition upon distributors in the same locality.

Whilst it is true that the self-service wholesale trade offers advantages with regard to competition, the Commission nevertheless observes that it is necessary to correct the applicant's allegations, which tend to create the impression that if it were appointed a SABA wholesaler this would be sufficient to revolutionize the entire structure of prices and distributon costs of SABA products.

In the highly coveted market for electronic leisure products the traditional wholesale trade is patterned upon certain techniques and advantages, which the applicant has commended (the absence of a lower limit on supplies and the opportunity for the customer of collecting the goods with his own transport). The applicant's reference to a turnover of DM 100 000 000 in electronic leisure products cannot prove that its prices are attractive so long as it is not clear what proportion of that figure relates to trade with 'genuine' resellers and private consumers, that is to say persons who were not obtaining supplies for personal purposes outside the relevant sector. In so far as that constitutes turnover obtained through supplying the private requirements of traders it provides no evidence as to the competitive value of the prices maintained by the applicant in relation

to the traditional wholesale trade, since traditional wholesalers can only obtain such supplies from retailers.

The competitive capacity of the applicant's system of distribution could be properly and realistically appraised only if it had the same outlets as the traditional wholesale trade in the relevant sphere; the advantages of the applicant's system of distribution could be assessed only if it were appointed a SABA wholesaler.

As long as the present dispute remains unsettled it is impossible to make such a comparison, since the applicant asserts that it cannot accept certain conditions of SABA's distribution system which have been exempted by the Commission.

With regard to the relationship between competition amongst distributors of one brand (intra-brand), on the one hand, and competition amongst such distributors and distributors of other brands (inter-brand), the Commission explains that in its view SABA's distribution system has a positive effect in that, *in addition* to maintaining competition amongst distributors of the same brand, it enhances competition with the products of other manufacturers.

The fact that large-scale distributors make intensive efforts to sell the products of one manufacturer does not preclude distributors either from displaying products of other producers or from properly advising their customers.

Despite what the applicant states, the Commission was fully aware that other manufacturers of electronic products for the leisure market maintain independent distribution systems incorporating conditions which the applicant claims that it cannot fulfil because of its particular form of organization. The Commission knew that its decision constituted a guide with regard to the distribution systems of other manufacturers. The aim of that decision was precisely to establish criteria for the assessment with regard to the Community rules on competition of distribution systems comparable to SABA's system.

VI — The intervener the Verband des SB-Großhandels (hereinafter referred to as 'the Verband') considers that if SABA's selective distribution system is viewed in relation with the factors which determine the market in the products in question it can be seen that it must inevitably result in the exclusion of the self-service wholesale trade. Furthermore, account should be taken of the fact that not only SABA but all the other important manufacturers of electronic equipment for leisure purposes exclude supplies to self-service wholesalers.

The Commission has failed to recognize that what is protected under Article 85 of the Treaty is freedom of competition for the benefit of the consumer, not the coincident interests of a manufacturer and a given group of traders who wish to secure selling prices which are considered to be satisfactory by the latter. The interest of consumers entails active competition on prices at the trade level as well.

The Verband makes the following points in particular:

(1) Self-service wholesalers cannot carry out the necessary checks inherent in SABA's system of distribution since they so complicate business procedures that the advantages obtained by rationalizing the sale of products by self-service are dissipated.

Despite what the Commission maintains, the use of the special undertaking *(Sonderverpflichtungsschein)* was too demanding for self-service wholesalers to consider applying it to their trade because of the information to be supplied by trade consumers (full details of the purpose for which the goods are to be used, declarations concerning resale

which must be made by the director in charge of the undertaking and prior transmission to SABA of all information and documents necessary to allow SABA to check on the use of the products).

The establishment of real price competition by the annulment of the decision conferring the exemption enjoyed by SABA's distribution system would not, as the Commission wrongly maintains, encourage specialist traders to dissociate themselves from SABA's products in favour of the products of competitors. A decision of annulment would in fact constitute a ruling against distribution systems identical to SABA's system which its competitors have set up. Equal conditions of competition would be ensured.

(2) With regard to the obligations relating to the 'cooperation agreement' the Verband considers that this kind of vertical cooperation necessarily brings about a restriction of competition. The function of traders is not to cooperate with manufacturers, but rather to secure supplies on the market under the most advantageous conditions to offer them to consumers.

Self-service wholesalers cannot concern themselves with the development of manufacturers' distribution networks. The obligation to accept delivery of probable requirements for six months tends to stifle competition, particularly if there is a fall in demand which prompts traders to promote SABA products especially. Moreover, maintaining a warehouse involves an important cost factor.

Where the selective distribution system is repeated it divides the market, ties traders with their respective brands and tends to dissipate competition by creating local monopolies.

(3) The Verband refers to American anti-trust law and cites, with regard to the importance of free competition at distribution level, the decision of the Supreme Court of 12 June 1976 *(US* v *Arnold Schwinn & Co,* 388 US, 365, especially p. 382).

(4) The Verband then states its views on a series of questions put by the Court to the parties to the dispute before it had sought leave to intervene (see below at point VIII).

VII — In reply to the observations of the Verband the Commission rejects the view that it disregarded the true object of the protection provided by Article 85, that is, the interests of the consumer, and that it is protecting the interests of a producer and of a given group of traders in obtaining a specific price-level.

As is clear from paragraphs 39 to 43 of the contested decision the Commission authorized the restrictions on competition pertaining to SABA's distribution system only because of the objective advantages which the system affords the consumer. The Commission devoted especial care to the question whether the distribution system under consideration guarantees active competition on prices (decision, paragraphs 43 and 53). Nevertheless, the price is only one element amongst others which benefit the consumer directly (improved service to customers, better adjustment to specific requirements, increase in the range of products offered) or indirectly (rationalization of distribution). In a competitive market which is not very transparent covering highly technical products which require long-term maintenance, price is not by any means the only decisive criterion for the consumer. With regard to the procedures required of wholesalers in order to prevent sales to individuals, and the appropriateness of such procedures, the Commission makes the following observations:

(1) The conduct of the applicant's business is complicated to a lesser degree by the checks required than the

intervener maintains. A form (SABA-Sonderverpflichtungsschein) must be completed only when a sale is made to a trade consumer. No particular formalities are required in the case of the sale of goods to a reseller.

(2) It is clear from a judgment of the Oberlandesgericht Hamburg of 16 December 1976 that the applicant, or one of its branches, recognized that, despite what it states in this case, it is possible for it to check whether goods purchased are intended for trade consumption.

(3) In response to a letter addressed by Metro to the Commission on 12 January 1977 (annex 2a to the statement of the Verband) the Commission requested SABA to alter the wording of the special undertaking, in particular so that wholesalers were not required to carry out a check after sale on the use to which products are put. Wholesalers are merely required to check whether the use stated by the purchaser falls within the specific business activity of the commercial undertaking in question, which can be done by means of the card which the purchaser must present.

(4) With regard to the cooperation agreements the Commission observes that SABA has recently modified their content so that now wholesalers are obliged to conclude supply contracts for only four months instead of six.

This new version was notified to the Commission by a letter of 25 January 1977 and is presently under consideration by the Commission.

(5) The requirements regarding purchasing and the maintenance of stocks are not so onerous that specialist traders are required to sacrifice sales of competing products, thereby creating 'local monopolies'. Although wholesalers have cooperated with SABA for more than ten years, in practice those wholesalers simultaneously distribute various brands, both German and foreign. The effect on consumers of the costs involved in the obligations to purchase and to maintain stocks is alleviated by the discounts which wholesalers grant in furtherance of inter-brand competition (that is to say, competition relating to products of different brands) to retailers who, for their part, are not bound to buy certain types of equipment.

(6) With regard to the reference to the judgment of the United States Supreme Court in the *Schwinn* case the Commission considers that both the facts and the legal appraisal display important differences which render impracticable any comparison with the present case.

The Commission doubts whether the Court of Justice can order an inquiry into the level of prices of SABA products, since such an inquiry could only relate to present prices. The subject-matter of the dispute is whether the Commission, in its decision of 15 December 1975, wrongly interpreted Article 85 (3) and in particular wrongly appraised the competition existing amongst SABA distributors at the time of that decision, that is to say in 1975.

VIII — Before the Verband submitted its application to intervene, the written procedure between the other parties having terminated, the Court of Justice asked those parties to reply to a number of questions, including a first question on the admissibility of the application, taking account of the second paragraph of Article 173 of the EEC Treaty and Article 3 (2) (b) of Regulation No 17.

The *applicant Metro* considers that its application is admissible because the decision of exemption adopted by the Commission is of direct and individual concern to it. The conditions laid down by Article 3 (2) (b) of Regulation No 17 are also fulfilled. Metro is directly concerned in so far as the decision of exemption entitles SABA to refuse to supply Metro. Furthermore, the contested

decision exposes Metro to legal proceedings before the German courts if it obtains supplies of SABA products. Metro is individually concerned because it lodged a complaint against the draft decision of exemption and because it took part in the administrative procedure in accordance with Article 19 (2) of Regulation No 17. The same grounds justify the admissibility of the application pursuant to Regulation No 17.

The *intervener the Verband* concurs.

The *Commission* also considers that the application is admissible.

Measures in connexion with which, in accordance with the case-law of the Court of Justice, applications for annulment have been declared inadmissible on the ground that such measures were not of individual concern to the applicants have all been in the nature of binding legislation, either of a direct nature, in the form of regulations of the Council or the Commission, or indirect, being decisions addressed to the Member States enabling or requiring them to enact legislation. On the other hand, the contested decision concerns a measure relating exclusively to private law, that is the determination of the sales policy of an undertaking in the form of standard agreements concluded with its trading partners. Decisions of this nature cannot be treated as equivalent to measures relating to the adoption of rules of public law and this difference should also be manifested in the extent of the protection which the courts will provide for the persons concerned. A decision of the Commission exempting a distribution system contains an important individual element with regard to the traders concerned in so far as the criteria for admission to the distribution system for which exemption has been granted constitute the subject-matter of agreements concluded between the manufacturer and traders, or permit the manufacturer to refuse to conclude such individual agreements with traders who do not fulfil such criteria.

The Commission observes finally that it would be impossible in practice for the Court of Justice to review decisions of exemption if third parties affected by them could not contest them, since persons to whom such decisions are addressed generally have no interest in contesting them. The Commission adds the further point that once a decision of exemption has been adopted third parties affected by it can no longer claim before the national courts that a restriction on competition is void, since the national courts are bound by the Commission's decisions of exemption. Accordingly, review by the Court of Justice could be envisaged only within the framework of a request for a preliminary ruling.

It is impossible to adopt the existence of the procedure laid down in Article 19 (2) and (3) of Regulation No 17 as a basis for denying that it is necessary to make separate provision for applications against the decision of exemption. That procedure merely relates to the right to submit observations and does not make provision for review of the decision.

In order to assess whether the application is admissible in the present case it must be established whether the decision of exemption is of direct and individual concern to the applicant, since that decision implies the partial rejection of the application which it submitted pursuant to Article 3 (2) (b) of Regulation No 17. The Court of Justice has in fact already dismissed as inadmissible applications submitted in cases where the Commission had refused to grant an application by the applicant: in such cases the determining factor with regard to admissibility resides in the legal nature of the measure which was requested but refused (judgment of the Court of Justice of 8 March 1972 in Case 42/71, *Nordgetreide* v *Commission* [1972] ECR 110; judgment of the Court of Justice of 1 March 1966 in Case 48/65, *Lütticke* [1966] ECR 19; judgment of the Court of Justice of 18 November 1970 in Case 15/70, *Chevalley* [1970] ECR 975).

In all those cases the application related to the adoption either of measures which were not binding or of legislation, that is to say to the adoption of measures which could not be contested so that the applications were of necessity considered inadmissible.

In the present case the situation is different. The applicant has submitted an application on the basis of Article 3 (2) (b) of Regulation No 17, which permits the submission of applications by persons who claim a legitimate interest in decisions of the Commission finding that there is an infringement or requiring the termination thereof. By submitting an application the applicant intervened in the procedure for authorization which was already under way. The procedure initiated by the complaint was pursued exhaustively. The two procedures were closed with regard to their substance by the contested decision of exemption in which the complaint was in part taken into consideration and in part dismissed.

The contested decision is of *individual* concern to the applicant by reason of certain circumstances in which the latter is differentiated from all other persons and thereby distinguishes it individually just as in the case of the person addressed. Since SABA has in fact begun to operate its distribution system in the form for which exemption was granted this suffices for Metro to be considered to be *directly* concerned.

The *intervener SABA* considers that Article 3 (2) (b) of Regulation No 17 cannot be relied upon to refute the inadmissibility of the application, since Metro is not 'concerned' by the contested decision.

IX — In reply to the question as to which parts of SABA's distribution system were granted negative clearance and which other parts were exempted under Article 85 (3), the Commission explains that the exemption pursuant to Article 85 (3) applies to all the agreements upon which SABA's distribution system is based. No particular provision in the agreements referred to was granted negative clearance or an exemption. Only the conditions of sale on the domestic market, which do not constitute part of SABA's distribution system properly so-called, were granted negative clearance.

X — The Court asked the Commission to state whether, when it agreed that SABA might retain in its distribution system the clause forbidding German wholesalers from supplying institutional consumers, it was motivated by a desire to respect German legislation on this point, or by some other reason. The defendant replies that its decision on this point was not based on a German provision since no provision of German law prohibits wholesalers from supplying institutional consumers. Although in this connexion the contested decision treats German wholesalers, to whom this prohibition applies, differently from SABA's foreign distributors, who are exempt from it, this is simply due to the fact that SABA had no reason to prohibit direct supplies to its foreign distributors.

XI — The Court asked the Commission to state its point of view on the effect on competition of the application by other producers in the same sector of distribution systems similar to that established by SABA.

The Commission considers that SABA's distribution system involves, first of all, the obligation to buy from specialist traders, which means that distributors must fulfil minimum requirements (technical skill, equipment of shops, service to customers and participation in the development of the SABA network). Those points recur in almost all distribution systems and do not infringe Article 85. However, specific obligations, going beyond a mere obligation to buy from specialized traders (for wholesalers: the requirement to conclude six-monthly supply contracts and to achieve an

adequate turnover; for retailers: the obligation to display as complete a range of SABA products as possible, to achieve an adequate turnover in SABA products and to maintain a stock of SABA products corresponding to that turnover), do not recur so often in other manufacturers' distribution systems. It is thus untrue to say that the other principal manufacturers of electronic products for the leisure market have established distribution systems similar to that maintained by SABA.

It cannot be denied that SABA's distribution system binds distributors very closely to the producer. This is in accordance with SABA's objective of ensuring that distributors participate actively in distributing its products. Nevertheless, the obligations which SABA imposes upon its distributors do not bind them to such an extent that they can no longer agree with other manufacturers to undertake similar obligations. In theory, it cannot be ruled out that a number of distribution systems as stringent as SABA's might conceivably result, for example, in an increase in specialization amongst distributors, by reducing the number of brands carried by them.

So far, in any event, the various manufacturers' distribution systems display considerable differences, being based on different positions on the market and different marketing strategies. It is not yet possible to say with certainty whether the different distribution systems will converge. However, even if this were to come about, and even if the result was a more intensive specialization amongst distributors, the Commission considers that this would not necessarily lead to a reduction in competition between products of different manufacturers at distribution level and indeed it might increase such competition, since distributors would at the same time have to intensify their efforts to market other brands.

XII — Finally, when the applicant was asked whether it accepted SABA's statement to the effect that in general — and in particular with regard to electronic equipment for leisure purposes — its prices are lower than those of specialist retailers but higher than those of specialist wholesalers, it rejected this allegation and stated that its selling prices are lower than those of specialist wholesale traders for its entire range of products, and that this also applies, in principle, to electronic equipment for leisure purposes.

The parties presented oral argument at the public hearing on 10 May 1977.

The Advocate-General delivered his opinion at the hearing on 9 June 1977.

Decision

1 The first head of the application lodged by the undertaking Metro SB-Großmärkte GmbH & Co. KG (hereinafter referred to as 'Metro'), which was received at the Court Registry on 11 March 1976, is for the annulment of the Commission Decision of 15 December 1975 (OJ L 28 of 3. 2. 1976, p. 19) relating to a proceeding under Article 85 of the Treaty with regard to the selective distribution system established by the undertaking Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne GmbH (hereinafter referred

to as 'SABA') for distributing its electronic equipment for the leisure market in the Common Market.

The second head of the application is for the annulment of the Commission's refusal, contained in its letter of 14 January 1976, to review its decision of 15 December 1975 in order to take account of the objections repeated by the applicant, albeit it had already taken the opportunity of making them known in the course of the hearing by the Commission of the parties and of third persons in accordance with Article 19 of Regulation No 17 of the Council of 6 February 1962 and of Regulation No 99/63 of the Commission of 25 July 1963, before the adoption of the contested decision.

In Article 1 of that decision it is recognized that the Conditions of Sale for the Domestic Market (May 1972 version) laid down by SABA do not fall within the prohibition contained in Article 85 (1) of the Treaty, whilst in Article 2 the Commission decides that the other provisions of the relevant distribution system qualify for an exemption under Article 85 (3).

2 Although the application is for the annulment of the contested decision in its entirety consideration of the submissions put forward indicates that the lawfulness of Article 2 alone of that decision is thereby called in question.

Admissibility

(a) The letter of 14 January 1976

3 The Commission has contested the admissibility of the application in so far as it is directed against the refusal contained in its letter of 14 January 1976.

4 That refusal is merely a confirmation of the decision of 15 December 1975 and annulment of the refusal would follow from annulment of the decision so that, in so far as this second head is concerned, the application must be considered as devoid of purpose and accordingly inadmissible.

(b) The decision of 15 December 1975

5 SABA, which has intervened in the dispute in support of the conclusions of the Commission, considers that the application is inadmissible since the decision contested by Metro is not of direct and individual concern to the latter.

6 The second paragraph of Article 173 of the Treaty states: 'Any natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'

Since the contested decision was not addressed to Metro it is necessary to consider whether it is of direct and individual concern to it.

7 Metro is a so-called self-service wholesale trading undertaking having some 30 establishments in the Federal Republic of Germany and in certain other Member States.

This form of distribution, which means that Metro competes in particular with specialist wholesalers, consists in obtaining from producers wholesale supplies of a wide range of foodstuffs (food department) and other products (non-food department) in order to resell them, principally to retailers, who will themselves resell the products, but also to commercial or industrial undertakings or small businesses which wish to apply the goods purchased for commercial purposes and, lastly, to private customers termed 'institutional consumers', although it should be noted that this latter practice forms the subject-matter of dispute between the parties.

Metro distributes these products through the so-called 'cash and carry' system whereby purchasers serve themselves in sales areas where the goods are stored in such a way that they may be removed easily by the customers themselves, are displayed simply and are paid for in cash, which results in lower prices and makes it possible to operate satisfactorily on lower profit margins than those of the traditional wholesale trade.

This form of marketing is thus characterized both by special sales methods and by the nature of the customers sought by the wholesaler.

8 When the applicant applied to SABA for recognition as a wholesaler for the distribution of electronic equipment for the leisure market SABA refused because the applicant would not agree to a number of conditions to which SABA subjects the grant of the status of a SABA wholesaler and which, the applicant maintains, are not compatible with the structure of the self-service wholesale trade as Metro engages in it.

Specific instances of this are the prohibition on SABA wholesalers regarding the supply of SABA equipment to trade consumers, that is to say to dealers or

small businesses outside the trade in electrical goods but using the equipment purchased for commercial purposes within their business, likewise the prohibition on supplies to 'institutional' consumers and the obligations imposed upon wholesalers under the cooperation agreements linking them with SABA.

The intervener SABA, on the other hand, maintains that those conditions are compatible with Metro's business activity and that its refusal to appoint the latter as wholesaler stems instead from Metro's sales policy, which is intended to combine in one unit the roles of wholesaler and retailer and to which SABA cannot agree in view of the structure of its distribution system whereby a clear distinction is maintained between those two operations in accordance, as SABA maintains, with the requirements of Federal German legislation.

9 Since the defendant refused to appoint the applicant, on 7 and 9 November 1973 the latter lodged with the Commission, in accordance with Article 3 (2) (b) of Regulation No 17, a request for a finding that the distribution system established by SABA was contrary to Articles 85 and 86 of the Treaty and that SABA should be required to terminate that system.

10 For its part, in order to obtain negative clearance within the meaning of Article 2 of Regulation No 17 or a declaration pursuant to Article 6 of Regulation No 17 and Article 85 (3) of the Treaty that Article 85 (1) was inapplicable, SABA notified to the Commission in 1962, 1963, 1969 and 1972 its conditions of sale for the domestic market, the sole distributorship agreements concluded with undertakings established in other Member States, the 'distribution agreements' which SABA distributors, wholesalers and retailers in the Federal Republic of Germany are required to sign and the agreements for SABA wholesalers in the EEC and for SABA specialist retailers.

On 22 July 1974, after Metro had submitted its complaint, SABA also notified the model cooperation agreement which it requires its appointed wholesalers to sign.

11 Since the Commission considered that Metro could claim a legitimate interest in a possible finding that an infringement had taken place it investigated the claims of both Metro and SABA.

Although it had earlier informed Metro that it considered that it could not find in favour of Metro's complaint, whilst inviting it in a Telex message of

6 December 1974 in accordance with Article 6 of Regulation No 99/63 to submit its comments, the Commission partially altered its attitude following the submission of those comments by the applicant and upon hearing the latter and required SABA to discontinue the undertakings whereby it obliged wholesalers *inter alia* to prohibit sales to trade consumers.

After SABA had agreed to this amendment amongst others the Commission adopted the contested decision, which nevertheless upholds a number of aspects of the distribution system which the applicant had criticized in the course of the administrative procedure.

12 Since Metro considered that the distribution system thereby approved retained features unlawfully preventing its appointment as a SABA wholesaler it lodged this application.

13 The abovementioned facts establish that the contested decision was adopted in particular as the result of a complaint submitted by Metro and that it relates to the provisions of SABA's distribution system, on which SABA relied and continues to rely as against Metro in order to justify its refusal to sell to the latter or to appoint it as a wholesaler, and which the applicant had for this reason impugned in its complaint.

It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3 (2) (b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests.

In those circumstances the applicant must be considered to be directly and individually concerned, within the meaning of the second paragraph of Article 173, by the contested decision and the application is accordingly admissible.

Substance

14 The applicant maintains that the adoption by the Commission of the contested decision infringed both Article 85 (3) of the Treaty, by declaring that the prohibition contained in Article 85 (1) was inapplicable when the conditions for that declaration were not fulfilled, and Article 86 of the Treaty, by authorizing an abuse of a dominant position.

15 Article 86 of the Treaty is applicable only if SABA occupies a dominant position and it must first of all be considered whether this is so.

I — The existence of a dominant position

16 In support of its claim that SABA occupies a dominant position on the market in electronic equipment for leisure purposes in the Federal Republic of Germany, the applicant maintains that there are ten undertakings actively engaged in the production of such electronic equipment in Germany, six of which, however, command shares which together constitute the major part of the market, among them being SABA which, with a daily production of 1 000 sets, has an above-average share of the market in colour televisions.

The applicant adds that although SABA equipment is expensive customers demand it because of its high quality so that all distributors must include SABA equipment in the range of products which they offer or suffer a disadvantage in competition.

17 The evidence produced by the Commission, which the applicant has not disputed, shows that there are 26 German producers in the market in electronic equipment for leisure purposes of which eight, including SABA, control some 90 % of the market, SABA's share being between 5 and 10 %.

With regard in particular to televisions and the daily production figure upon which the applicant relied in support of its claims the data supplied by the Commission for 1975 and accepted by the applicant as representative show that 91 % of the German market is held by eight producers, one of which has a share of more than 25 %, three have shares of more than 10 %, whilst four others, including SABA, have shares of 6 or 7 % of the market.

These figures show that even if — and this has not been maintained, much less proved — the relevant market is to be regarded as being the market in colour televisions rather than the general market in electronic equipment for leisure purposes, SABA's share of the market is relatively modest.

Whilst the share of the market occupied by an undertaking does not necessarily constitute the sole criterion for the existence of a dominant position it is however proper to conclude that in a market in highly technical products which nevertheless appear to the majority of consumers to be readily interchangeable, shares of the market as insignificant as that held by SABA rule out the existence of a dominant position unless exceptional circumstances obtain.

This view is strengthened by the fact that lively competition is acknowledged to prevail between the various producers.

The fact that the quality of the product in question should encourage distributors to include it in the range which they offer does not in itself constitute a factor capable of permitting the producer to operate to any great extent without having to take account of the attitude of his competitors and, consequently, to secure a dominant position; rather, it constitutes one means of competition amongst others.

This also applies to the fact upon which the applicant and the intervener, the Verband des Selbstbedienungs-Großhandels (hereinafter referred to as 'the SB-Verband'), rely, namely, that other producers of electronic equipment for the leisure market have adopted or are preparing to adopt selective distribution systems similar to that approved by the Commission in the contested decision.

That fact might well be taken into consideration in assessing whether the contested system is in accordance with Article 85 of the Treaty, but it cannot have the effect in the circumstances of the present case of transforming SABA's position on the relevant market into a dominant position.

18 Since SABA does not occupy a dominant position within the meaning of Article 86 of the EEC Treaty, that provision does not apply to it, so that in so far as the application is based upon infringement thereof it must be dismissed.

II — The application of Article 85

19 The applicant maintains that Article 2 of the contested decision is vitiated by misuse of powers inasmuch as the Commission has failed to recognize 'what is protected under Article 85 (namely) freedom of competition for the benefit of the consumer, not the coincident interests of a manufacturer and a given group of traders who wish to secure selling prices which are considered to be satisfactory by the latter'.

Furthermore, if it were to be considered that an exemption from the prohibition might be granted in respect of the distribution system in dispute pursuant to Article 85 (3), the applicant maintains that the Commission has misapplied that provision by granting an exemption in respect of restrictions on competition which are not indispensable to the attainment of the

objectives of improving production or distribution or promoting technical or economic progress and which lead to the elimination of competition from self-service wholesale traders.

A — Misuse of powers

20 The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.

In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.

In the sector covering the production of high quality and technically advanced consumer durables, where a relatively small number of large- and medium-scale producers offer a varied range of items which, or so consumers may consider, are readily interchangeable, 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.

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 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.

21 It is true that in such systems of distribution price competition is not generally emphasized either as an exclusive or indeed as a principal factor.

This is particularly so when, as in the present case, access to the distribution network is subject to conditions exceeding the requirements of an appropriate distribution of the products.

However, although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded.

The powers conferred upon the Commission under Article 85 (3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market.

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).

This argument is strengthened if, in addition, such conditions promote improved competition inasmuch as it relates to factors other than prices.

22 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.

In those circumstances the submission based on the existence of a misuse of powers must be rejected.

B — The application of Article 85 (3)

23 In this connexion the applicant's complaints are based in substance on four points, namely:

(a) The obligation imposed upon SABA distributors, both wholesalers and retailers, to ensure that resellers to whom they supply SABA equipment are appointed distributors and to carry out a certain number of checks in this connexion;

(b) The prohibition imposed upon SABA wholesalers in the Federal Republic of Germany on supplies to so-called 'institutional' consumers;

(c) The obligation on such wholesalers when supplying so-called 'trade' consumers to ensure that they apply the equipment purchased only for such purposes as will promote the efficiency of the business, to the exclusion of all private use;

(d) The obligation imposed upon wholesalers to participate in the development of the SABA network by agreeing with SABA on six-monthly supply estimates.

The applicant maintains that those factors constitute restrictions on competition in respect of which the Commission has granted the exemption referred to in Article 85 (3) although such restrictions are not indispensable to the attainment in the present case of the objectives of that provision and, furthermore, they jeopardize the existence of other distribution channels, such as the self-service wholesale trade, based on a different competitive policy.

24 Before commencing consideration of those complaints it should be observed that, according to the Commission, whilst the provisions of the selective distribution system referred to in Article 2 of the contested decision have as a whole been granted an exemption pursuant to Article 85 (3), it does not, however, follow that every element of that system is incompatible with the prohibition contained in Article 85 (1).

On the contrary, both the statement of reasons for the contested decision and the further information provided in the course of the oral procedure make it clear that only certain of those elements constitute restrictions on competition for which the grant of an exemption was necessary.

The defendant maintains that the following do not constitute restrictions on competition: (a) those conditions for appointment as a distributor which

relate to the technical qualifications of distributors, to the specialist knowledge of sales staff, to participation by SABA wholesalers in the creation of the distribution network and service system and the suitability of trading premises (paragraph 28 of the decision), and (b) the prohibition on supplies to so-called 'institutional' consumers (paragraph 34 of the decision).

On the other hand, the following elements are said to fall within the prohibition of Article 85 (1) but to qualify for an exemption: the obligation imposed upon distributors to check whether the resellers to whom they deliver supplies have been appointed by SABA, and the obligation to keep a register containing the serial numbers of articles sold and the names of purchasers (paragraphs 11 (b) and (c) and 29 of the decision), together with the obligations imposed under the cooperation agreement (paragraph 29 of the decision).

25 It must be considered whether all the elements contested by the applicant have been correctly classified by the Commission with regard to the applicability or otherwise of the prohibition under Article 85 (1) and, if they fall within the terms of that prohibition, whether the Commission's exemption of them pursuant to Article 85 (3) constitutes a proper application of that provision.

(1) The obligation imposed upon SABA distributors to supply for resale only to appointed wholesalers or retailers

26 The applicant claims that the obligation imposed upon wholesalers to check personally before delivering supplies to a reseller whether the latter has in fact been appointed a SABA dealer, in particular by recording in a register and strictly checking the numbers of all SABA articles supplied, together with the date of sale and the name of the purchaser, exceeds what is necessary to maintain a selective network and constitutes an obligation which is incompatible with the structure of the self-service wholesale trade.

27 To be effective, any marketing system based on the selection of outlets necessarily entails the obligation upon wholesalers forming part of the network to supply only appointed resellers and, accordingly, the right of the relevant producer to check that that obligation is fulfilled.

Provided that the obligations undertaken in connexion with such safeguards do not exceed the objective in view they do not in themselves constitute a

restriction on competition but are the corollary of the principal obligation and contribute to its fulfilment.

The Commission considered that the obligations imposed in this connexion under the agreement do not exceed what is necessary for an adequate control and constitute a normal duty for a wholesaler since, in the case of consumer durables, the identification of the retailers supplied and of the goods delivered constitutes a normal requirement in running a wholesale business.

Accordingly, since such obligations concerning verification do not exceed what is necessary for the attainment of their objective and in so far as they are designed to ensure respect for the conditions of appointment regarding the criteria as to technical qualifications, they fall outside the scope of Article 85 (1) whereas, in so far as they guarantee the fulfilment of more stringent obligations, they will fall within the terms of the prohibition contained in Article 85 (1), unless they together with the principal obligation to which they are related are exempted where appropriate pursuant to Article 85 (3).

Whether the abovementioned obligations are in accordance with the Treaty therefore depends upon the appraisal which must be made of the other elements which the applicant has criticized.

(2) The prohibition on direct supplies to institutional consumers

28 Whilst the Commission required SABA to refrain from imposing upon wholesalers the prohibition on supplies to trade consumers it permitted that undertaking to maintain the prohibition on supplies to private customers, including large-scale 'institutional' consumers such as schools, hospitals, military establishments, administrations and other customers of the same nature.

The Commission considers that, apart from the fact that this limitation on the activity of wholesalers is in accordance with the requirements of German legislation, it does not constitute a restriction on competition within the meaning of Article 85 (1) of the Treaty because it corresponds to the separation of the functions of wholesaler and retailer and because if such a separation did not obtain the former would enjoy an unjustified competitive advantage over the latter which, since it would not correspond to benefits supplied, would not be protected under Article 85.

29 It is established that various Member States have enacted legislation entailing obligations and charges, in particular in the field of social security and

taxation, which differ as between the retail and wholesale trades, so that competition would be distorted if wholesalers, whose costs are in general proportionally lighter precisely because of the marketing stage at which they operate, competed with retailers at the retail stage, in particular on supplies to private customers.

The Commission did not infringe Article 85 (1) in considering that this separation of functions is in principle in accordance with the requirement that competition shall not be distorted.

Furthermore, the applicant does not dispute this view and indeed states that the organization of its marketing system is such as to respect that distinction, whilst maintaining that the provision of direct supplies to large-scale, so-called 'institutional', consumers constitutes one of the functions of a wholesaler.

In this connexion it relies upon the wording of Article 2 (2) of the Council Directive of 25 February 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities in wholesale trade, according to which: 'For the purpose of this directive, "wholesale trade activities" means activities pursued by any natural person, or company or firm, who habitually and by way of trade buys goods in his own name and on his own account and resells such goods to other wholesale or retail traders, or to processors, or to professional, trade or large-scale users.'

30 That directive provides a definition of the function of wholesalers for the purposes of the application of the rules of the Treaty concerning freedom of establishment and freedom to provide services but it is not to be considered that its purpose is to solve the problems of competition referred to in Article 85.

Whilst it is indeed the case with numerous products, such as foodstuffs, that certain private customers, such as institutions, purchase in large quantities, their institutional nature does not imply that they have the status of large-scale customers for products of every kind.

When the Commission considered that with regard to the products manufactured by SABA it was unnecessary to distinguish between the different kinds of consumers other than trade or professional consumers the Commission did not exceed its power of appraisal in this sphere.

This finding is given added weight by the fact that it is for the applicant in any event to prove that in the market for electronic equipment for leisure

purposes it is or has been approached by institutional private customers, other than trade or professional consumers, with a view to large-scale deliveries, but that it has failed to produce any evidence thereof in support of its statements on this point.

(3) The obligation imposed upon wholesalers when they supply trade consumers to ensure that the SABA equipment purchased will be used for trade or professional purposes

31 Paragraph 15 of the contested decision reads: 'Under the Distribution Agreement for SABA Wholesalers (Clause 2 (2)), SABA wholesalers in the Federal Republic are also obliged to refrain from supplying SABA products to consumers in the Federal Republic, including West Berlin, except where the consumer

— can prove he is engaged in trade;

— uses the SABA products only for such commercial purposes as will promote the efficiency of the business; and

— signs a declaration drawn up by SABA designed to ensure that he does in fact so use the products and setting out the commercial purpose in such manner as can be objectively verified and prohibiting any other use or resale.'

32 It is clear from those considerations that in the course of the administrative stage of the dispute the Commission recognized, in accordance with Metro's argument, that the prohibition on sales by SABA wholesalers to retailers who do not deal in electronic equipment for the leisure market but who wish to buy SABA equipment in order to use it for trade or professional purposes in their business was not in accordance with Article 85 (1) and did not qualify for exemption pursuant to Article 85 (3).

This elimination of an improper restriction on competition must, however, be reconciled with compliance with the prohibition on the delivery by wholesalers of supplies for customers' private requirements.

Accordingly, the producer may properly check on the fulfilment of this obligation, which is necessary for the maintenance of the structure of his two-stage marketing system, as he would otherwise be unable to require appointed retailers to provide the services necessary to the efficient functioning of a selective distribution system.

The applicant makes the statement, without however adducing any convincing evidence therefor, that the obligations concerning checks which are required in this connexion under the cooperation agreements are incompatible with the requirements of the self-service wholesale trade and thus contribute to the elimination of that form of competition.

33 According to the information supplied by the applicant itself the self-service wholesale trade is in essence based upon the fact that access to the sales area is reserved exclusively to holders of a personal purchaser's card which makes it possible not only to establish the name of the customer but also to check whether the holder is a natural or legal person running a commercial, small craft or industrial undertaking.

Furthermore, in order to conform with German legislation, at any rate in the 'non-food' department, a check is made before the goods are removed in order to ascertain whether they have been bought for resale or for trade or commercial use in the purchaser's undertaking and not for his private requirements.

The check required under the cooperation agreement has substantially the same scope, except that that agreement obliges the wholesaler to require the purchaser to sign a declaration to the effect that the purchase was made for trade or professional purposes.

In those circumstances it does not appear that that extra requirement is unreasonable or that it constitutes a serious obstacle which is incompatible with the very nature of the self-service wholesale trade, when regard is had to the opportunities for abuse afforded merely by the extension of the opportunities of sale for purposes other than resale.

This finding is strengthened by the fact that the obligation imposed does not require a personal check to the effect that purchasers fulfil the obligations which they undertake.

(4) The obligation upon wholesalers to participate in the development of the SABA distribution network by signing cooperation agreements

34 According to paragraph 9 of the decision appointment as a SABA wholesaler in the Federal Republic of Germany or West Berlin is subject to the following conditions: 'SABA has informed the Commission that in principle it is

willing to supply any wholesaler in the Federal Republic of Germany or West Berlin who:

(a) Keeps a specialized shop, i.e. one where over 50 % of the turnover relates to the sale of radio, television, tape-recording or other electrical equipment, or

has set up a department specializing in the wholesale of radio, television and tape-recording equipment with a turnover comparable to that of a wholesaler specializing in electronic equipment for leisure purposes;

(b) Participates in the creation and consolidation of the SABA sales network;

(c) Participates in the SABA service system and has in particular a qualified staff to give proper advice and supply technical service to customers;

(d) Signs the SABA cooperation agreement;

(e) Signs the SABA agreements and complies with the provisions of the distribution agreement relevant for their area.'

35 The applicant maintains that the obligations mentioned at points (a) (relating to a specialized shop or department), (b) (consolidation of the SABA network) and (d) (cooperation agreements) constitute restrictions on competition which are prohibited pursuant to Article 85 (1) and that the Commission was not empowered to grant an exemption pursuant to Article 85 (3) since the conditions for such an exemption were not fulfilled.

(a) The obligation to set up a special department with a turnover comparable to that of a specialist wholesaler

36 Although this double condition is not expressly mentioned in the wording of the various undertakings placed before the Court (agreement for SABA wholesalers in the EEC [EWG-Verpflichtungsschein SABA-Großhändler]; distribution agreement for SABA wholesalers in Germany [Verpflichtungsschein Vertriebsbindung SABA-Großhändler Deutschland]; agreement for SABA specialist retailers in the EEC [EWG-Verpflichtungsschein SABA-Facheinzelhändler]; and the cooperation agreement [Kooperationsvertrag]) it is clear that it was formulated during the period when Metro's complaint was being investigated, in particular in a letter from SABA dated 20 February 1975 the contents of which were notified to the applicant on 5 March 1975.

It follows from this that it constitutes a condition placed upon appointment as SABA distributors in the case of wholesalers who are not specialized in the field of electronic equipment and forms part of the general distribution system approved by the Commission.

It is therefore necessary to examine the scope of that condition with regard both to paragraph (1) and to paragraph (3) of Article 85.

37 The obligation upon non-specialist wholesalers to open a special department for electronic equipment for the domestic leisure market is designed to guarantee the sale of the products concerned under appropriate conditions and accordingly does not constitute a restriction on competition within the meaning of Article 85 (1).

On the other hand, the requirement to achieve a turnover comparable to that of a specialist wholesaler exceeds the strict requirements of the qualitative criteria inherent in a selective distribution system and it must accordingly be appraised in the light of Article 85 (3).

38 Nevertheless, that obligation is linked in the present case to the obligation, repeated in the cooperation agreements, to achieve an adequate turnover, so that it must be considered in conjunction with the said agreements.

(b) The obligations mentioned at points (b) (to participate in the consolidation of the sales network) and (d) (to sign cooperation agreements)

39 The obligations mentioned at point (b), namely to participate in the creation and consolidation of the sales network, and at point (d), namely to sign cooperation agreements under which the wholesaler undertakes to achieve a turnover which SABA considers to be adequate and which involve six-monthly supply contracts and obligations relating to stocks, exceed both the normal obligations involved in running a wholesale business and the requirements of a selective distribution system based on qualitative criteria.

Those obligations bind appointed distributors closely to SABA and may entail the exclusion of undertakings which, although they fulfil the qualitative conditions for appointment, cannot or will not undertake such obligations, which thus indirectly bring about a limitation in the number and establishment of outlets.

Accordingly, they can be exempted from the prohibition contained in Article 85 (1) only if the conditions contained in Article 85 (3) are fulfilled.

40 However, the Commission maintains (paragraph 28 of the decision) that the obligation upon wholesalers to participate 'in the creation of a distribution network' does not constitute a restriction on competition coming within the ambit of Article 85 (1).

That appraisal does not take proper cognizance of the scope of that provision, since the function of a wholesaler is not to promote the products of a particular manufacturer but rather to provide for the retail trade supplies obtained on the basis of competition between manufacturers, so that obligations entered into by a wholesaler which limit his freedom in this respect constitute restrictions on competition.

Nevertheless, that erroneous appraisal does not vitiate the contested decision because it appears that the obligation to participate in the creation of the SABA distribution network is in fact connected with the obligations listed in the cooperation agreement which the Commission considered to constitute a restriction on competition permissible only under Article 85 (3).

It is accordingly necessary to consider whether those conditions have been fulfilled.

41 The 'cooperation agreement' to be concluded between SABA and the wholesaler stipulates:

(1) Obligations of a general nature to be discharged by SABA (discussions with groups of SABA wholesalers on points concerning bilateral commercial relations, technical information and financial cooperation),

(2) More specific services to be provided by SABA (cooperation over publicity, reimbursement of services relating to guarantees);

(3) Provisions setting out the obligations of the two parties in connexion with supply contracts.

The cooperation agreement also requires the SABA wholesaler to undertake to conclude supply contracts with SABA at least six months in advance for a volume of products taking such account of the probable growth of the domestic market in electronic equipment for leisure purposes as is

appropriate for both parties, as well as obligations regarding the maintenance of stocks.

Furthermore, the SABA wholesaler undertakes to achieve an 'adequate' turnover [ein angemessener Umsatz] in SABA products.

For its part, SABA undertakes to pay wholesalers an annual premium which is calculated on the net invoice value, the amount of which varies between 0 and 2 % depending on the extent to which the undertakings entered into under the supply contract are fulfilled.

The grant of this 'premium' is furthermore combined with that of an annual premium for orders placed, awarded for taking delivery of 100 %, or more than 95 %, of estimated supplies calculated in advance by SABA, on condition that the supply contact based on such estimates is executed.

42 Article 85 (3) renders exemption from the prohibition pursuant to Article 85 (1) subject to the following conditions: (i) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) it must allow consumers a fair share of the resulting benefit, (iii) it must not impose restrictions which are not indispensable to the attainment of these objectives and (iv) it must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

43 With regard to the first condition set out above, the conclusion of supply contracts for six months taking account of the probable growth of the market should make it possible to ensure both a certain stability in the supply of the relevant products, which should allow the requirements of persons obtaining supplies from the wholesaler to be more fully satisfied, and, since such supply contracts are of relatively short duration, a certain flexibility, enabling production to be adapted to the changing requirements of the market.

Thus a more regular distribution is ensured, to the benefit both of the producer, who takes his share of the planned expansion of the market in the relevant product, of the wholesaler, whose supplies are secured, and, finally, of the undertakings which obtain supplies from the wholesaler, in that the variety of available products is increased.

Another improvement in distribution is provided under the clause in the cooperation agreement obliging SABA to compensate wholesalers for service

performed under guarantee and to supply spare parts necessary for repairs under guarantee.

Furthermore, the establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article 85 (3).

44 Secondly, it must be considered whether the restrictions imposed on wholesalers under the cooperation agreement are indispensable to the attainment of the objectives in view.

45 If there were no undertakings covering a period of a given duration the relationship between the producer and appointed wholesalers could only take the form of occasional contact which would not make it possible to achieve the stability necessary to enable specialist wholesalers and producers to undertake the other obligations which guarantee improved supplies.

In considering that the cooperation agreement, by restricting the period covered by the supply contract to six months, remained within the limits of what is necessary the Commission clearly did not exceed the margin of discretion which it possesses in this sphere.

46 According to Article 85 (3) agreements restricting competition must, in order to qualify for exemption, not only improve the distribution of goods but also allow consumers a fair share of the resulting benefit.

47 According to the contested decision the conditions of supply for wholesalers under the cooperation agreement are such as to provide direct benefit for consumers in that they ensure continued supplies and the provision of a wider range of goods by retailers for private customers.

Furthermore, the lively competition existing on the market in electronic equipment for leisure purposes exercises sufficient pressure to induce SABA and the wholesalers to pass on to consumers the benefits arising from the rationalization of production and the distribution system based on the cooperation agreement.

48 In the circumstances of the present case regular supplies represent a sufficient advantage to consumers for them to be considered to constitute a fair share of the benefit resulting from the improvement brought about by the restriction on competition permitted by the Commission.

Even if it is doubtful whether the requirement in this connexion of Article 85 (3) can be said to be satisfied by the assumption that the pressure of competition will be sufficient to induce SABA and the wholesalers to pass on to consumers a part of the benefit derived from the rationalization of the distribution network, the grant of exemption may, however, in the present case be considered as sufficiently justified by the advantage which consumers obtain from an improvement in supplies.

49 Finally, it must be considered whether the obligations contained in the cooperation agreement do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

50 It is clear from the foregoing considerations that the conditions laid down by SABA for appointment as a wholesaler may largely be fulfilled without inconvenience by self-service wholesale undertakings.

Nevertheless, although the supply estimates which wholesalers are obliged to sign under the cooperation agreements in all probability constitute an element foreign to the methods appropriate to that distribution channel, it does not appear that, in weighing up, in the context of the electronic leisure equipment sector, the relative importance of the need for cooperation agreements, giving sufficient coherence to SABA's marketing network, especially with regard to specialist wholesalers, on the one hand, and the surmountable difficulties which that involves for self-service wholesale traders, on the other, and deciding in favour of the former, the Commission exceeded its discretionary power in this sphere.

The outcome could be different if, in particular as the result of an increase in selective distribution networks of a nature similar to SABA's, self-service wholesale traders were in fact eliminated as distributors on the market in electronic equipment for leisure purposes.

Nevertheless, it is clear from the foregoing considerations that this was not so when the contested decision was adopted.

Accordingly, that decision is not manifestly based on a mistaken appraisal of the economic factors conditioning competition in the sector in question.

51 The application must be dismissed.

Costs

52 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

Pursuant to the second subparagraph of that provision, where there are several unsuccessful parties the Court shall decide how the costs are to be shared.

Since the applicant has failed in its submissions it must be ordered to pay the costs and the intervener, the SB-Verband, must bear the costs occasioned by its intervention.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the intervener, the SB-Verband, to bear the costs occasioned by its intervention;**

3. **Orders the applicant to bear the remaining costs.**

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 25 October 1977.

A. Van Houtte — **Registrar**

H. Kutscher — **President**