

In Case 26/76

METRO SB-GROSSMARKTE GMBH & Co. KG, Schütterstraße 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,

v

COMMISSION OF THE EUROPEAN UNION, represented by Dieter Oldekop, a member of its Legal Service, with an address for service in Luxembourg at the office of Mario Cervino, Batiment 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 Union of 15 December 1975 relating to a procedure

under [Article 101 TFEU] (IV/847 - SABA, OJ L 28 of 3. 2. 1976, p. 19),

THE COURT

composed of: H. Kutscher, President, M. Sorensen 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**

**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 101 TFEU] 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 101(1) TFEU], whilst in Article 2 the Commission decides that the other provisions of the relevant distribution system qualify for an exemption under [Article 101(3) TFEU].

- 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 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 fourth paragraph of Article 263 TFEU] 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 SA.BA.

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 101 and 102 TFEU] 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 101(3) TFEU] that [Article 101(1) TFEU] 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 E[U] 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 101 and 102 TFEU] 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 101 and 102 TFEU] 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 fourth paragraph of Article 263 TFEU], 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 101(3) TFEU], by declaring that the prohibition contained in [Article 101(1) TFEU] was inapplicable when the conditions for that declaration were not fulfilled, and [Article 102 TFEU], by authorizing an abuse of a dominant position.

15 [Article 102 TFEU] 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 101 TFEU], 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 102 TFEU], 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 101 TFEU]*

- 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 101 TFEU] (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 101(3) TFEU] 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 TEU and 101 TFEU] 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 101(1) TFEU], 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 101(3) TFEU] 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 101(1) TFEU], and, if it does fall thereunder, either wholly or in part, coming within the framework of [Article 101(3) TFEU].

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 101(3) TFEU]**

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 101(3) TFEU] 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 101(3) TFEU], it does not, however, follow that every element of that system is incompatible with the prohibition contained in [Article 101(1) TFEU].

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 101(1) TFEU] 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 101(1) TFEU] and, if they fall within the terms of that prohibition, whether the Commission's exemption of them pursuant to [Article 101(3) TFEU]

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 101(1) TFEU] 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 101(1) TFEU], unless they together with the principal obligation to which they are related are exempted where appropriate pursuant to [Article 101(3) TFEU].

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 101(1) TFEU] 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 101 TFEU].

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 101(1) TFEU] 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 101 TFEU].

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-seal 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 101(1) TFEU] and did not qualify for exemption pursuant to [Article 101(3) TFEU].

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 101(1) TFEU] and that the Commission was not empowered to grant an exemption pursuant to [Article 101(3) TFEU] 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 E[U] [EWG-Verpflichtungsschein SABA-Großhändler]; distribution agreement for SABA wholesalers in Germany [Verpflichtungsschein Vertriebsbindung SABA-Großhändler Deutschland]; agreement for SABA specialist retailers in the E[U] [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 [Article 101(1) to (3) TFEU].

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 101(1) TFEU].

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 101(3) TFEU].

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 101(1) TFEU] only if the conditions contained in [Article 101(3) TFEU] 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 101(1) TFEU].

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 101(3) TFEU].

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 101(3) TFEU] renders exemption from the prohibition pursuant to [Article 101(1) TFEU] 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 101(3) TFEU].

- 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 101(3) TFEU] 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 101(3) TFEU] 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   Sorensen      Bosco      Donner      Mertens de Wilmars

Pescatore      Mackenzie Stuart      O'Keeffe      Touffait

Delivered in open court in Luxembourg on 25 October 1977.

A. Van Houtte

H. Kutscher

Registrar

President