OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 9 JUNE 1977 [1]

Mr President,
Members of the Court,

The subject-Matter of the proceedings concerning which I am giving my opinion today is a decision adopted by the Commission pursuant to Article 85 of the EEC Treaty. It applies to a distribution system which the Schwarzwälder Apparate-Bau-Anstalt August Schwer Söhne GmbH (hereinafter referred to as 'SABA'), which manufactures chiefly television, radio and tape-recording equipment in the Federal Republic of Germany, has established for the sale of its products.

This system includes a series of agreements which apply or are intended to apply in the various marketing areas.

In the Federal Republic of Germany and West Berlin the products are sold through specialist wholesalers and retailers. The Conditions of Sale for the Domestic Market, the Agreement for SABA Wholesalers in the EEC, the Distribution Agreement for SABA Wholesalers, the standard Cooperation Agreement, the Agreement for SABA Specialist Retailers in the EEC and the Distribution Agreement for SABA Specialist Retailers are applicable to them.

In other EEC States the products are sold through sole distributors. The standard Sole Distributorship Agreement is applicable to them.

Reference should be made to the Commissions's decision with regard to the contents of these agreements. In this opinion I would merely like to make briefly the following comments in so far as they are of interest to the present proceedings:

The most important document is the Distribution Agreement applicable to wholesalers, sole distributors and specialist retailers. By virtue of this agreement they undertake to supply goods for resale within the common market only to SABA dealers.

Any person who runs a specialized concern, participates in the creation and consolidation of the SABA sales network, participates in the SABA service system and signs a Cooperation Agreement with SABA may be appointed a wholesaler. Under the Cooperation Agreement wholesalers are obliged in particular to achieve an adequate turnover in SABA products and to conclude supply contracts for six months in advance; the latter obligation was amended during the proceedings before the Court (and I shall return to this point again) to the effect that special supply contracts need be concluded for only four months in advance and that in the last quarter of each year an annual turnover agreement must be concluded for the following year. Moreover, German wholesalers are prohibited from supplying consumers in the Federal Republic of Germany and West Berlin. There is an exception which applies only to the delivery of supplies to traders, and in this connexion certain requirements, which were likewise amended during the proceedings before the Court, must be observed.

Any person who runs a specialized concern, trades from retail premises which are suitable for advertising and displaying and has qualified staff may be appointed a retailer. SABA specialist

1 — Translated from the German.

retailers must stock the SABA range as fully as possible, achieve an adequate turnover in SABA products, keep a corresponding stock, display the equipment to its best advantage and provide customers with technical service and guarantees.

In order to obtain exemption for its distribution system under Article 85 (3) of the EEC Treaty, SABA undertook notification to the Commission from 1962 to 1974 in accordance with Regulation No 17 (OJ, English Special Edition 1959 to 1962, p. 87). During the administrative procedure the original rules were partially amended.

In November 1973 the applicant in the present proceedings also intervened in that procedure with an application under Article 3 of Regulation No 17. It raised objections to the distribution system on the ground that its form is such that self-service wholesale traders, such as the applicant, are excluded. The effect of its intervention was that the prohibition on direct supplies applicable to German wholesalers was modified so that supplies to trade consumers were not included.

The Commission, in its final assessment of the distribution system, reached the conclusion that some aspects of it were not covered by Article 85 (1) of the EEC Treaty. This is the case with regard to the Conditions of Sale for the Domestic Market, to the requirement as to the technical standards which SABA dealers must reach, to the obligation to participate in the development of the sales network and in the maintenance service and to the prohibition applicable to German wholesalers on the delivery of supplies to private consumers in the Federal Republic of Germany and West Berlin.

It was decided that other aspects came within Article 85 (1), in other words they had as their effect a restriction on competition and they affected trade between Member States. The Commission stated that such was the case with regard to the Cooperation Agreement to be concluded with wholesalers and with regard to the obligation imposed on retailers to stock the SABA range as fully as possible, to achieve an adequate turnover in SABA products and to keep a corresponding stock. In the opinion of the Commission this also applies to the agreement whereby SABA does not supply dealers outside the distribution system and whereby SABA dealers may not supply dealers who have not been appointed SABA dealers.

However, in so far as Article 75 (1) applies, the Commission considered that an exemption under Article 85 (3) was appropriate. It reached this finding because it held that there are improvements within the meaning of Article 85 (3) which benefit consumers, because it could see no restrictions which were not indispensable to the attainment of the benefits mentioned above and because in its opinion the distribution system does not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

The final Commission Decision adopted on 15 December 1975 was phrased accordingly. Article 1 thereof contains a negative clearance in respect of the Conditions of Sale for the Domestic Market. Article 2 states that in accordance with Article 85 (3), Article 85 (1) is inapplicable to the Agreement for SABA Wholesalers in the EEC (version of 1 July 1974), to the Standard Sole Distributorship Agreement (version of 1966/67), to the Distribution Agreement for SABA Wholesalers (version of 1 July 1974), to the standard Co-operation Agreement (version of 2 January 1974), to the Agreement for SABA Specialist Retailers in the EEC (version of 1 July 1974) and to the Distribution Agreement for SABA Specialist Retailers (version of 1 July 1974). Moreover, the decision also provides that SABA must submit annual

reports to the Commission concerning certain matters and that the decision is to apply until 21 July 1980.

Metro SB-Großmärkte GmbH & Co. KG, the applicant, was informed of the outcome of the proceedings by letter of 14 January 1976 to which the Commission Decision was annexed.

Metro was not satisfied with this result. It was convinced that the Commission had not applied Article 85 of the EEC Treaty correctly and brought the matter before the Court of Justice by an application of 10 March 1976. Its application seeks the annulment of both the Commission Decision of 15 December 1975 and the rejection of the applicant's complaint which the applicant sees in the letter of 14 January 1976.

Before I deal with these claims, I should mention in addition that SABA, which supports the Commission's viewpoint, and the Verband des Selbstbedienungsgroßhandels (Association of Self-Service Wholesale Traders), which considers that the applicant's view is correct, have intervened in the proceedings.

I — Admissibility of the application

At the beginning of my observations on this case I must make a few observations on the admissibility of the application.

The intervener SABA contests its admissibility. In its opinion, it cannot be said that the applicant is *individually* concerned by the contested decision. It is in fact only concerned in the same way as all traders are who have an interest in the distribution of SABA products and do not wish to fulfil the conditions of the distribution system. However, there are thousands of such persons in the common market, in other words, according to the case-law of the Court of Justice, what we have here is a category viewed merely in the abstract.

In addition, the Commission has also raised objections as to admissibility. However, they only affect that part of the application which concerns the rejection of the applicant's complaint by the letter of 14 January 1975. The Commission has claimed in this respect that the applicant's complaint was dealt with in the decision of exemption and was partially taken into consideration. The legal situation at issue was established by that decision; the letter of 14 January 1976 constitutes, on the other hand, only an explanation of the decision and has no independent legal significance.

1. I shall deal first with the second of these objections, because it seems to me to be the simpler. I must say immediately that it is justified.

As I have already stated, the complaints put forward by Metro in the administrative proceedings concerning the Distribution Agreement were taken into consideration and they led to a certain modification of the system. In so far as they were disregarded, it must be said that they had already been rejected by implication by the decision of exemption. That decision therefore produced the relevant legal effects in relation to the applicant. On the other hand, the letter of 14 January 1976 contains in fact only an explanation of the decision and the reasons why it was impossible to regard any more extensive complaints by the applicant as being well founded. The legal situation created by the decision of exemption was accordingly not further affected by that letter.

The second conclusion which, incidentally, was put forward only as a precaution, because the applicant was no doubt not completely clear as to the legal appraisal, must therefore be held to be inadmissible in view of the legal nature of the measure to which it refers.

2. With regard to the other objection, the question arises whether the applicant, as a third party not involved in the distribution system, to whom the

decision was, moreover, not addressed, as is clear from its contents, being in fact merely informed of it, fulfils the conditions laid down in Article 173 of the EEC Treaty for lodging an application against the decision of exemption, in other words, whether the latter is of individual and direct concern to the applicant.

(a) There is very little to say with regard to the requirement of 'direct ... concern', which was not in fact at issue.

Although what is involved is only the exemption of a distribution system, that is, permission to put it into practice in the sense of an authorization, there is not the least doubt that SABA's system is applied. This was shown in the proceedings by the reference to the fact that SABA insists upon declarations from unauthorized persons that they will refrain from distributing SABA products and that it threatens and has even instituted legal proceedings. In my opinion it may therefore be acknowledged that the decision of exemption has direct effects, in the sense that they are direct in practice, on the legal position of the applicant, and that it is therefore of direct concern to the latter.

(b) The question whether it is also possible to accept that the decision is of individual concern to the applicant is more difficult.

Doubts might arise if one bears in mind the decisions of the Court on similar facts arising from the area to which the EEC Treaty applies; the relevant decisions based on the EEC Treaty must be disregarded because the system of legal protection laid down in the ECSC Treaty is of a different nature and contains no mention of individual concern. In fact, it is necessary to remember that the result of exemption is that any person who is eligible to participate in the distribution of SABA products by virtue of his business activities, but who does not fulfil the requirements of the system, is excluded therefrom. It may therefore be said that such persons, who are not involved in the system, constitute, within the meaning of the case-law of the Court of Justice, only a category viewed in the abstract and that it is impossible to determine the members of that category exhaustively.

However, like the Commission, I doubt whether this view appears conclusive and whether it must in fact result in the inadmissibility of the application.

In the first place, it must be granted that there is without doubt a difference between the facts involved in the above-mentioned decided cases and the facts in this case: those decisions were always related to measures which were directed to Member States and which were aimed at the adoption of national legislative measures, while in this case we are concerned with the approval of a distribution system governed by private law. The field of application of the measures which were at issue in the decided cases is therefore entirely different from that which must be assumed in the present case and the adoption of different criteria for the appraisal of the admissibility of the application might therefore be justified. In the present case it might be regarded as sufficient that the contested decision displays strong individual features in so far as it approves criteria for a distribution system which are made the subject-matter of individual agreements or which exclude such agreements.

Moreover, it must not be overlooked that Article 85 of the EEC Treaty is also intended to protect competition in relation to third parties who are not involved in an agreement. If their right to bring proceedings is not acknowledged, legal review in such cases is in practice excluded since the parties to the agreement will in general not bring proceedings if the agreement is

exempted. On the other hand, it is not possible to point to the procedure under Article 177 and the possibilities of legal review which exist thereunder, or at least not with the same justification as in factual situations involving national sovereign implementing provisions. In competition law factors prompting recourse to national procedures in cases such as this are not in fact equally apparent and in this field the delay caused by the circuitous route by way of national procedures with questions being referred to the Court of Justice for a preliminary ruling under Article 177 must give cause for serious concern.

Therefore I consider it justifiable in competition cases of this nature to put aside the doubts which one may certainly have as to the admissibility of the application and, bearing in mind the principle that Article 173 should not be restrictively construed, which has been repeatedly emphasized in the case-law of the Court, acknowledge that any person who by virtue of his occupation may qualify for a distributorship but is excluded therefrom by the approved system is entitled to bring proceedings. This incontestably applies to the applicant, who runs a special department for electronic equipment for the leisure market.

Even if one does not wish to go so far, it is possible to consider taking into account with regard to the question of individual concern the fact that the applicant lodged a complaint with the Commission against the distribution system pursuant to Article 3 of Regulation No 17, which as we know requires a legitimate interest, that it took part in the proceedings with written and oral argument and that it was specially informed of the decision of exemption; we may therefore say that the applicant was informed of the reasons for the rejection of the application within the meaning of Article 6 of Regulation No 99/63 (OJ. English Special Edition 1963 to 1964, p. 47). Even though the abovementioned Article 3, to which SABA has referred, only permits applications for a declaration that there have been infringements of the provisions relating to competition, in other words not applications relating to exemptions or the grant of negative clearances, the lodging of an application links the applicant so closely with the case that it is possible to say that the applicant is also particularly, that is, *individually,* concerned by the decision which forms the outcome of the proceedings, because the proceedings for a declaration that there has been such an infringement and for the grant of an exemption formed a single entity.

I am therefore of the opinion that the plea of inadmissibility put forward by SABA should not be accepted and that consequently there is no obstacle to an examination as to whether the principal claim is well founded.

II — The substance of the case

The applicant criticizes various aspects of the Commission's appraisal of the SABA distribution system. It claims, first, and I shall now leave aside the details, that SABA occupies a dominant position. This is apparently intended to indicate that the decision should have been based not only on Article 85 of the EEC Treaty but that Article 86 should also have been taken into consideration.

Objection is further made to the fact that wholesalers are subject to a prohibition on direct supplies to institutional bulk purchasers such as churches, schools and so forth and may supply trade consumers only under very restrictive conditions. Moreover, it criticizes the Cooperation Agreement applicable to wholesalers which it claims is unacceptable for the self-service wholesale trade and the fact that smaller dealers are excluded by the system, that is, by the obligation to achieve a certain turnover and by the obligation to display equipment to its best advantage. In addition, the applicant

considers that it is impossible to say that the system leads to an improvement in distribution; in fact it is unfavourable to consumers and in particular precludes price competition, which is of prime interest to consumers. Finally, the applicant is also of the opinion that the exemption period has been in any case calculated too liberally.

1. Before I deal with these points in detail, I whould like to consider two comments which the Commission has made, in my opinion correctly.

First, it should not be forgotten that the assessment of a system such as this involves difficult economic judgments. In particular, the question whether the restriction on competition which is linked thereto is counterbalanced by certain advantages calls for complex assessments. This necessarily means that the Commission has a margin of discretion in this respect and this means at the same time that there is a corresponding restriction on judicial review. Reference has already been made to this in the decided cases on competition law under the ECSC Treaty (Joined Cases 36, 37, 38 and 40/59, *Präsident Ruhrkohlen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG* v *High Authority of the European Coal and Steel Community*, judgment of 15 July 1960 Rec. Vol. VI, p. 922). This notion was also said to be correct with regard to competition law under the EEC Treaty in the judgment in Joined Cases 56 and 58/64 *(Consten and Grundig* v *Commission of the EEC* judgment of 13 July 1966, [1966] ECR 299). According to those judgments, the Court of Justice cannot examine all the details of an evaluation: basically, it has only to determine whether the decision of the Commission resulting therefrom was justifiable as a whole or whether serious objections may be raised against it.

Secondly, it should not be overlooked that the points of importance with regard to the decision of the Commission are the appraisal which it was possible to make at the date of its adoption and the evaluation of the further developments, which could be foreseen at that date on the basis of the facts known at the time. Findings which are possible today, in other words a year and half later, must therefore be taken into consideration with caution. This applied for example to the assessment of price competition as it has developed since the system was established, and this also applies to the fact that other manufacturers are increasingly introducing identical or similar distribution systems. I shall come back to these questions in a later connexion.

2. In examining the applicant's criticismus I shall first deal with the statement that SABA occupies a dominant position with regard to certain electronic products on the leisure market, a statement which, as I have said, no doubt conceals the complaint that the distribution system should have been evaluated in accordance with Article 86.

The Commission countered this by referring to the facts that there are on the market in question also large numbers of small and medium-sized manufacturers, that some large suppliers — unlike SABA — have a wide selection of other products which the trade cannot do without, and that there are many imported brands on the market from various other countries. It appears that SABA's share of the market in 1974 amounted to 5 to 10 % in the Federal Republic of Germany for individual pieces of equipment but less than 1 % in other Member States. With reference to colour televisions alone, which account for 60 % of SABA's turnover, SABA's share of the market comes to approximately 7 %, since there are seven other manufacturers on the market. There can thus be no question of a dominant position; on the contrary, there

is keen competition between the various manufacturers.

The applicant was unable to counter this with any substantial argument. It did no more than state that not all the manufacturers named by the Commission are competitors of SABA. It referred to the special reputation of the SABA trade-mark and claimed without further details that SABA's shares of the market are higher than calculated by the Commission.

Accordingly it is necessary to ask whether the allegation of a disregard of Article 86 of the EEC Treaty, if the applicant's submission should in fact be understood to that effect, was still maintained at all later on. According to the facts of which we have become aware it is possible to say in any case that there is no reason to suppose that SABA occupies a dominant position on the market; its conduct must therefore not be judged on the basis of Article 86.

3. With regard to the evaluation of the distribution system in the light of Article 85, to which the Commission restricted itself, we should first consider those features which in the opinion of the Commission are in no way covered by Article 85 (1).

This is the case with regard to the requirement that dealers to whom supplies may be delivered must fulfil certain technical conditions. This also applies to the prohibition imposed on wholesalers on supplying private consumers, making it impossible to supply institutional bulk purchasers such as old people's homes, hospitals, the Red Cross, religious establishments and so forth, whereby supplies to trade consumers are permitted only if it is guaranteed that the products will be used for commercial purposes.

No criticism was made concerning the first point, that is delivery of supplies only to dealers who fulfil particular technical conditions. It is also clear that any such criticism would not be justified. In fact the Commission is right when it states that there are no objections in this respect on the basis of competition law because these conditions are relatively easy to fulfil and because no quantitative restriction is linked thereto; what is concerned here is in fact an open system to which any person who fulfils the conditions is admitted.

The applicant has, rather, criticized both other aspects. It objects that these restrictions required checks to be made on delivery. Such checks are however impossible on account of the structure of the self-service wholesale trade and that trade is therefore excluded from competition with regard to SABA products. It further claims that, so far as supplies to institutional bulk purchasers are concerned, there is an impermissible restriction on normal wholesale activities. In so far as the delivery of supplies to trade consumers is subject to restrictive conditions, the applicant is moreover of the opinion that the latter are unreasonable both in their original version and in the less onerous form to which they were modified during the proceedings, not only with regard to wholesalers but also to trade consumers.

(a) If we first ask ourselves in this connexion whether the restrictive conditions applicable to wholesalers must in fact lead to the exclusion of the self-service wholesale trade because it is allegedly impossible, on account of its structure, for the necessary checks to be made when the goods leave the premises and to have agreements signed, the answer to that question can only be in the negative. In my opinion the applicant has not showed convincingly that the self-service wholesale trade, in its present structure or as the result of small and unimportant changes, is not in a position to fulfil the conditions applicable under the distribution system and thus to take part in competition in SABA products.

It is important to remember that the self-service wholesale trade must in any case restrict the category of buyers, in other words it must exclude private consumers. This is necessary in view of several provisions of German law (the Law against unfair competition), the Law on trade discounts, the Law regulating the opening hours of shops and the Regulation on the display of prices). In the case of the applicant, only a person who possesses a purchasing card may obtain access to self-service wholesalers, and in this connexion a check is made as to whether a business activity is carried on by means of the presentation of official certificates and through the presence of the applicant's own inspectors on the premises. Inspections are however necessary in addition in order to keep abuses, in other words the supply of private needs, within limits, those abuses being especially serious when institutional bulk purchasers and trade consumers are admitted. Such inspections can only usefully be carried out *after* purchase. Accordingly, the applicant explained at the hearing granted by the Commission that in the case of purchases by traders the goods are further inspected and it also claimed before the Oberlandesgericht Hamburg, as appears from the judgment delivered on 16 December 1976, that spot checks are frequently carried out before arrival at the cash desk in order to ascertain whether the purchase is in fact intended to cover commercial needs. If it is borne in mind in addition that it is also necessary, where appropriate, to issue guarantee cards when goods leave the premises and that inspections must be carried out when goods are purchased by agents – the latter must sign special declarations as they leave because such purchases are permissible only to a limited degree under the applicant's conditions of business – it is hard to see why it should not be possible to incorporate into this system immediately the inspections which prove necessary under SABA's distribution system. In fact, in relation to the exclusion of institutional bulk purchasers, this only requires a simple note on the purchasing card and an inspection of the goods when they leave the premises. Trade consumers need only sign an undertaking; in their case it is necessary to check in addition whether the purchase is for commercial purposes and in this connexion a check as to the commercial activity is not necessary; an inspection of the purchasing card should be sufficient.

It is accordingly impossible to state that the abovementioned characteristics of the SABA distribution system necessarily exclude the self-service wholesale trade and there can therefore be no question of an appreciable restriction of competition from this viewpoint.

(b) Moreover, with regard to the appraisal from the point of view of competition law of the exclusion of institutional bulk purchasers from obtaining supplies from wholesalers and to the restrictions which apply to the delivery of supplies to trade consumers, the following observations must be made:

(aa) As to the first point, I have the impression that the reference by the applicant to German patent and tax law, according to which the delivery of supplies to institutional bulk purchasers who are regarded as trade purchasers is deemed to be a normal wholesale activity, is as irrelevant as the reference to 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. As the Commission, in my opinion correctly, stated with regard particularly to the directive, according to which wholesale trade activities also include the delivery of supplies to large-scale consumers, its purpose is solely to abolish discriminatory practices and not to create more extensive rights for wholesalers.

However, in the final analysis this question may be left open. In fact the

decisive factor is the finding reached during the proceedings that the exclusion of institutional bulk purchasers from obtaining supplies from wholesalers has no appreciable effects on the market with which we are concerned in the present case. In fact institutions can hardly come into consideration as bulk purchasers in the field of electronic equipment for the leisure market and it is obvious that where this is the case they, like for example the German army, purchase directly from the manufacturer. The applicant was accordingly unable to contradict the statement that such sales form only a small proportion of its turnover.

Thus it may correctly be stated that this aspect of the distribution system does not noticeably affect competitive relationships and that therefore, since, according to the statement of the Commission, it is likewise impossible to discern a perceptible effect on trade between Member States, it was decided with good reason that Article 85 (1) of the EEC Treaty does not apply in this connexion.

(bb) The restriction of the possibility of supplying trade consumers applied under SABA's distribution system must first be seen against the background of the abovementioned provisions of German law (the Law against unfair competition, the Law regulating the opening hours of shops and the Regulation on the display of prices).

They are based on a separation of roles between wholesalers and retailers in the interest of fair competition and the protection of the consumer. It is true that problems of detail in this connexion still have to be settled. It seems however that especially in the decided cases there is a marked trend with regard to the concept of the 'final consumer', who must obtain supplies from retailers; increasingly, traders who buy for their own private needs or needs unconnected with the business are placed in that category. In this connexion I would refer the Court to the judgment of the Oberlandesgericht Hamburg of 16 December 1976 which was produced during the proceedings. I would also refer to a reply by the Government of the Federal Republic of Germany to a parliamentary question which was likewise produced before this Court, and finally, to the article 'Cash-and-Carry-Betriebe zwischen Groß- und Einzelhandel' which was published in 'Wettbewerb in Recht und Praxis' 1977, p. 69 *et seq.* According to these sources, it is necessary to ensure that wholesalers principally supply retailers and trade consumers in the above-mentioned sense. In other words, under German law strict criteria apply in order to exclude the supply by the self-service wholesale trade to what are really final consumers, that danger being particularly great where trade consumers are widely admitted.

On the other hand, it is relevant and in fact even more important that the distribution system established by SABA is based on a clear separation between the roles of wholesalers and retailers. Wholesalers must perform special services relating to sales promotion and participate in the development of the sales network. They are supposed to concentrate on this and in this connexion an excessive number of business relations with partners other than persons who are definitely retailers would be a hindrance. In view of these special services wholesalers are also granted larger profit margins. In my opinion it is necessary to accept immediately that disregard of the demarcation line between wholesalers and retailers, would lead to discrimination between consumers and to distortions of competition to the disadvantage of retailers. If wholesalers came into competition with retailers in this way their interest in the sale of SABA products would diminish and a deterioration in service to customers would result. Therefore it is understandable that a strict watch is kept

that wholesalers do not engage in what are in fact retail transactions, which also explains why supplies to trade consumers by wholesalers are subject to the condition that the purchased goods are intended for business purposes. I cannot see how objections could be raised against this from the point of view of competition law.

If this viewpoint is adopted it is likewise impossible to raise any objections against the obligations placed upon suppliers and purchasers in this connexion for the purpose of safeguarding the demarcation line which they have established.

Thus provision is made, as the Court is aware, for traders to make a declaration, originally made by the manager of the undertaking but since the beginning of 1977 also by an agent, setting out the intended use, declaring that the goods are exclusively intended for the specific commercial requirements of the undertaking and stating that it is prohibited to pass on the goods to a third person for a period of two years. Wholesalers must check the existence of a commercial undertaking and the particulars of the intended use. Under the original version of the Distribution Agreement for SABA Wholesalers, they had to ensure that SABA products were used only for such commercial purposes as would promote the efficiency of the business; under the latest version they only have to confirm, taking the care expected of a reasonable man of business, that the goods are used for the commercial purposes of the undertaking. On a sensible interpretation, this amounts to no more than ascertaining that there is a factual connexion with a business undertaking and that the statements of the trade consumer appear to be plausible. This should in fact bear an appropriate relationship to the aim pursued, which is unobjectionable from the point of view of competition law.

If, however, the view is taken that the version of the undertaking initially applicable was too strict and could have stood in the way of business transactions, the view could accordingly be taken that this is immaterial with regard to competition law since on account of its scope its effects could scarcely be appreciable.

With regard to the aspects of the distribution system which in the Commission's view did not come under Article 85 (1) of the EEC Treaty, all these considerations lead me to the conclusion that the Commission's assessment cannot with justification be contested.

4. We must accordingly deal in a further section with those elements which the Commissions considers to come under Article 85 (1) of the EEC Treaty but which qualify for exemption under Article 85 (3).

I stated at the beginning what is concerned in this connexion. It is the obligation upon wholesalers to achieve a certain turnover in SABA products, to conclude long-term supply contracts and to engage in the consolidation of the sales network. On the other hand, it is the obligation upon specialist retailers to effect certain turnovers, to stock the SABA range as fully as possible and to display SABA products to their best advantage.

In this respect the applicant is of the opinion that in fact the conditions for exemption laid down in Article 85 (3) do not obtain: there is said to be no improvement in the production or distribution of goods, no advantages for consumers and in particular, price competition with regard to SABA products is excluded. It has stated in particular that the conditions of the Cooperation Agreement are unacceptable to the self-service wholesale trade. The latter is therefore excluded from the distribution network and this is a disadvantage to the consumer. The exclusion through the distribution system of smaller dealers who could

obtain supplies precisely from the self-service wholesale trade has the same effect. The applicant further considers that the effect of the system is to concentrate dealers on *one* brand; consumers, and this is also a disadvantage, therefore lack the desired choice and are not given impartial advice. Moreover, the Commission did not, or did not sufficiently, take into consideration the fact that such distribution systems are increasingly being introduced by manufacturers of electronic equipment for the leisure market, which strengthens the abovementioned repercussions on the market; it is also said to have disregarded the fact that under the antitrust laws of the United States such selective distribution systems are judged very strictly.

The following observations on these issues are, in my opinion, appropriate.

(a) Some explanation is necessary at the outset to enable the evaluation of the restrictions on competition and of the advantages connected with the distribution system to be undertaken on a proper basis. In fact, it appears that the requirements of the system are not as strict as the applicant portrays them to be.

— Neither wholesalers nor retailers are required to achieve a preponderant proportion of their turnover in SABA equipment; what is involved is rather an adequate turnover. The latter is determined in accordance with SABA's share of the market in the relevant area; in addition, economic growth must be taken into consideration. It is obvious that likewise in this respect rigid rules are not applied; to a certain extent the necessary values are, on the contrary, negotiated by the parties concerned.

— With regard to the long-term supply contracts which wholesalers must conclude, *under the approved version* of the distribution system advance orders have to be placed for a six month period only. This is decisive; therefore the new stricter rules which are not the subject-matter of the proceedings, according to which, apart from supply contracts for four months, an annual turnover contract must be concluded in each case, must be disregarded.

In my opinion it must also be acknowledged that a relatively short period is involved which readily permits adjustments to be made in view of the changing situation on the market. In addition, we were assured, and the applicant could not deny this, that the system is applied flexibly, in other words that variations are permitted and adjustments accepted. The Court heard during the oral procedure that in 30 to 40 % of all cases the SABA supply schedule is altered following talks with the wholesalers; the reason for this is that SABA expressly undertakes to supply marketable goods, in other words to take into consideration the wishes and interests of consumers.

— It is also important that, in general, the clause according to which the SABA range must be stocked as fully as possible is evidently given a liberal interpretation. This has been shown by market research to which I shall return later on.

(b) Accordingly, because the requirement regarding the maintenance of premises allowing equipment to be displayed to its best advantage is relatively easy to fulfil, substantial doubts are justified as to the argument that the distribution system excludes many small dealers from the sale of SABA goods. At any rate, according to the information given during the procedure, there are approximately 9 000 SABA specialist retailers in the Federal Republic of Germany and in West Berlin.

Moreover, it seems to me doubtful whether the conditions laid down in the Cooperation Agreement are unacceptable to the self-service wholesale trade. With

regard at least to long-term advance orders, it must be acknowledged that clearly they are to all intents and purposes completely normal and in the interests of wholesalers themselves for the purpose of ensuring punctual delivery.

If, however, the self-service wholesale trade were in fact unable to participate in the distribution system, because in its case the flexible formation of stock is very important and the sales promotion required by SABA is not feasible, in any case the fact remains that the effects on the competitive situation thus caused remain within limits. It is possible to say this because there are nevertheless approximately 100 SABA wholesalers in the Federal Republic of Germany, according to the figures put before the Court, and because the applicant was in addition unable to show that its turnover in electronic equipment for the leisure market is based substantially on sales to resellers.

(c) Emphasis must also be given in this connexion to the convincing nature of the view that agreements with regard to cooperation and sales promotion such as those concerned in the present case are very valuable precisely for smaller manufacturers who specialize intensively. According to the statements made to the Court during the hearing concerning shares of the market and the structure of production, this should apply to SABA. Thus a sympathetic examination of the Cooperation Agreements which must be concluded with wholesalers is appropriate at the outset.

(d) With regard to the requirement as to improvement in manufacture and distribution, to which Article 85 (3) attaches great importance, it is impossible seriously to doubt in view of all the facts which have come to light during the proceedings that these effects are linked to the distribution system, in particular with the Cooperation Agreement, and that they are to the advantage of consumers.

The long-term supply contracts provided for and the close consultation maintained with wholesalers permit appropriate production planning, in other words, cost-effective production and swift adjustment to consumer demand. The intensive competition which exists between the individual brands certainly ensures that the resultant rationalization is in fact passed on to consumers.

We may speak of an improvement in distribution because the system aims at a rationalization of the business, continuous supply and faultless service to customers. It cannot be denied that the Distribution Agreement leads to a reduction in the number of dealers selling SABA products, but the sales network is nevertheless sufficiently dense and therefore compared with the visible advantage it is impossible to speak of a significant disadvantage. In particular, it is important in this connexion that the special efforts of a dealer in respect of a specific brand have the result that consumers always have at their disposal a satisfactory range in accordance with the most recent stage of development. In this respect the necessity of keeping a considerable stock may, in the case of the existing strong competition between brands, ensure that consumers obtain the benefit of reductions in price. On the other hand, this does not necessarily exclude other brands, which would lead to one-sided formation of supply and the lack of impartial advice. In fact, there is no clause in the agreements which necessarily has this effect and it is also, as everyone knows, quite customary and necessary for specialist dealers to keep a range of brands. Thus specialist wholesalers, as was explained during the proceedings, generally stock from seven to ten German brands, as well as imported brands.

(e) In connexion with Article 85 (3) the applicant attached particular importance to its allegation that the Commission did not have sufficient regard to the negative effects on the competitive situation, in

other words, that it did not sufficiently consider whether 'the possibility of eliminating competition in respect of a substantial part of the products in question' was afforded. In this connexion it is said to be important that comparable distribution systems are increasingly being introduced by manufacturers of electronic equipment for the leisure market, and that there is no price competition between SABA products.

First, with regard to the view that the Commission disregarded the fact that all SABA's competitors have introduced or wish to introduce distribution systems of this type and that it did not take into consideration the effect which the combination of numerous selective distribution systems has on the self-service wholesale trade in particular, I have the impression that criticism on this point is not well founded.

It is perfectly possible to accept that the Commission took this fact into account in so far as distribution systems already existed at the date when the decision was adopted — there were indeed already exemptions for some of them. During the proceedings the Commission emphasized in this respect that because sales strategy varies quite different arrangements are involved. Not all contain such extensive obligations as the SABA distribution system. In particular, obligations concerning sales promotion do not exist everywhere to this degree.

Further, the Commission correctly stated that it was possible to consider the situation described as relatively unobjectionable because a large number of distribution systems necessarily leads to an increase in inter-brand competition. Finally, it was able to point out that it is continuing to follow developments attentively and that if the market situation should change in a way incompatible with Article 85 (1), in other words if a large number of systems of this type with very severe requirements should arise, it is able to review its assessment and if necessary take quick action in addition.

The Commission in my opinion correctly claimed that where Article 85 (3) states that no possibility of eliminating competition must be afforded in respect of a substantial part of the products in question, what is involved in this context is simply competition between electronic products for the leisure market, that is so-called inter-brand competition. This is true at least with regard to the market situation which applies in the present case, that is, where a manufacturer has only a relatively small share of the market. It is in my opinion obvious that such competition is not affected by a selective distribution system. In fact it may be said that the intensity of competition increases if dealers concentrate on one or more brands and pay special attention to sales thereof. In addition, it was impossible to show any indications that this competition has decreased on account of the distribution system.

If, however, intra-brand competition were important in the present case, the Court would further have to agree with the Commission that the assumption is immediately obvious that such competition takes place in a distribution system such as that with which we are concerned. It is possible to say this because the system does not provide for any measures relating to price and because it is an open system with a large number of dealers including in addition competitors such as department stores. In any case, no evidence was adduced to show that only dealers who are not in competition with each other are appointed to the distribution system and it is also certain that the Commission could take proceedings in that event on the basis of the instructions contained in its decision.

Moreover it is necessary to state that the applicant has also not succeeded in producing sufficiently weighty evidence

to support a different appraisal. It is true that it has instigated price studies, according to which price differentials amount to 1 % at the most in the case of SABA dealers. These investigations, which were restricted to a few cities, a small number of dealers and a handful of products are however based too narrowly. Moreover, the tests which SABA requested of the Institute for Market Psychology, which involved a considerable number of dealers in several conurbations in the Ruhr area, give a different picture. According to those tests there exist in fact in some cases considerable price differentials between individual dealers. They cannot be refuted completely by reference to certain discrepancies which the applicant was able to point out. In my opinion it is wrong to draw from this the conclusion that SABA had an influence on the determination of prices, because the dealers who were interviewed were, according to the letter of instruction submitted to this Court, guaranteed anonymity and because the report on the investigation also expressly states that the Institute's employees had themselves noted down the prices on the basis of the price labels on the equipment.

In my opinion it is therefore impossible to contest the decision of exemption on the ground that it disregarded the elimination of competition within the meaning of Article 85 (3).

(f) I consider that it is therefore established that the contested decision is valid in the light of Article 85. Nor may this assessment be altered by the reference made by the applicant to the antitrust case-law of the United States according to which, and this is supposed to follow from the *Schwinn* case, the obligation upon wholesalers to supply only certain dealers is *per se* not permissible. In my opinion, and I am now ignoring details, the Commission has convincingly shown that it is impossible to derive from that judgment anything of relevance with regard to the present case. In fact we are concerned with a legal situation of an entirely different nature and the facts also display considerable differences, not to mention that the abovementioned judgment and its interpretation is evidently contested even in the USA.

5. There still remains one last point of criticism, namely the view that the period of exemption was too liberally calculated. Only brief comments are necessary, particularly because the statements of the applicant relating thereto are highly succinct.

It is true, on the one hand, that the market situation can change quickly and that therefore findings on questions of competition law may often be made only with regard to a limited period. On the other hand, the Commission correctly pointed out that this case involves a difficult assessment of the economic consequences of a complex system in relation to which there was no question of considering too short a period. There is no doubt that in this connexion the Commission enjoys a considerable measure of discretion. I do not see any indication that that discretion has been exercised improperly.

In addition, there is the fact that SABA was placed under certain obligations by the decision. The annual report required thereunder permits the Commission to examine the practice regarding appointment and if necessary to take action.

For all these reasons likewise no objection can be made to the period of validity of the decision of exemption.

III – Finally, I can therefore only suggest that the application lodged by Metro should be dismissed, as being inadmissible in so far as it relates to the

letter of 14 January 1976 and unfounded in so far as it is directed against the decision of exemption. Since, if this view is accepted, the applicant and its intervener must be regarded as the unsuccessful parties, it seems appropriate to order them to bear the costs of the proceedings, including the costs of the interlocutory proceedings, and also the costs of the party intervening in support of the Commission, if it is not considered more appropriate to restrict the order for costs to the applicant and to order the intervener which supported it to bear its own costs.