

COMMISSION DECISION
of 21 December 1983
concerning a proceeding under Article 85 of the EEC Treaty
(IV/29.598 — SABA's EEC distribution system)

(Only the German text is authentic)

(83/672/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 2, 6 and 8 thereof,

Having regard to Commission Decision 76/159/EEC ⁽²⁾ applying Article 85 (3) of the Treaty to the distribution system operated by SABA GmbH, Villingen-Schwenningen, Germany, until 21 July 1980,

Having regard to SABA's request by letter dated 2 July 1979 for an extension of the said Decision,

Having published a summary ⁽³⁾ of the agreements in question, in accordance with Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. SABA's distribution arrangements and market position

SABA GmbH, Villingen-Schwenningen, Federal Republic of Germany ('SABA'), which since August 1980 has been a subsidiary of the French Thomson-Brandt group, sells consumer electronic equipment including radios and televisions, video and hi-fi equipment and tape recorders. In the Federal Republic of Germany, including West Berlin, its

products are distributed by specialist wholesalers and retailers, with wholesalers handling over 50 % of total sales. SABA also has several sales branches of its own at wholesale level. In Denmark, the Benelux countries, France, Italy, Greece and the United Kingdom, its products are distributed by sole distributors supplying specialist retailers. The Italian and United Kingdom sole distributors are subsidiaries of SABA.

SABA's position on the Community consumer electronics market varies greatly according to area and product. For colour televisions, easily its top-selling product line, SABA's market share in 1982 was 8,3 % in Germany and 7,4 % in Italy. By contrast, in the Benelux countries and the United Kingdom it only held a share of between 0,2 and 2,7 %.

Its market share for other consumer electronic product lines is smaller. For audio equipment, for example, its share of the German market in 1979 was about 1,9 %.

SABA's total turnover from the Community countries in 1982 was DM 682 million.

B. The SABA distribution system

By Decision 76/159/EEC the agreements making up SABA's EEC distribution system were exempted by the Commission from the application of Article 85 (1) of the EEC Treaty until 21 July 1980. By a letter dated 2 July 1979 SABA requested an extension of the exemption.

In the meantime, the distribution agreements have undergone many changes.

The present set of agreements on which SABA's distribution of its products in the EEC is based comprises the following:

- the SABA EEC Dealership Agreement with Specialist Wholesalers,
- the SABA Cooperation Agreement,

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No L 28, 3. 2. 1976, p. 19.

⁽³⁾ OJ No C 140, 28. 5. 1983, p. 3.

- the SABA EEC Dealership Agreement with Specialist Retailers, and
- the SABA Fair Service Agreement.

The main terms of these agreements are as follows:

1. (a) Under the SABA EEC Dealership Agreement with Specialist Wholesalers, SABA admits to its network as a wholesaler any wholesaler who *inter alia*:

- carries on a specialist wholesale business, i.e. one which achieves over 50 % of its turnover from sales of consumer electronics equipment, or has within his business a department specializing in the wholesaling of consumer electronics equipment which is comparable to such a specialist wholesale business,
- carries on such business exclusively as a wholesaler, i.e. supplying exclusively to specialist dealers or business users, and not also to private consumers, and performs all the functions customarily performed by a specialist wholesaler,
- maintains a trained salesforce capable of marketing SABA's products in a competent manner,
- recognizes the SABA Fair Service system, is able to provide expert advice to SABA retailers through trained staff and is willing to allow such staff to undergo regular training with SABA,
- has the necessary facilities and resources for holding stocks and prompt delivery of his customers, carries as far as possible the whole SABA range and holds stocks commensurate with his sales of SABA products, and
- signs the SABA EEC Dealership Agreement with Specialist Wholesalers and — if he is to be supplied direct — the SABA Cooperation Agreement.

If SABA fails to process a wholesaler's application for admission to the network within four weeks, the wholesaler is deemed admitted and SABA undertakes to sign a dealership agreement with him immediately.

- (b) SABA wholesalers undertake the following obligations *inter alia*:

- to supply SABA products for resale in the common market only to other SABA dealers or SABA sole distributors and before supplying a customer to check with the trustee whether he is a member of the network,
- to sell SABA products to consumers only where they carry on a business, purchase the goods for use in that business, and furnish objectively verifiable evidence of this by signing a special undertaking,
- to keep records of all SABA products sold so that they can if necessary be traced by their serial numbers, and to preserve such records for at least three years,
- to observe the appropriate national law against unfair competition, and
- to assist SABA in proceeding against breaches of the dealership agreements.

- (c) SABA wholesalers are empowered to admit to the SABA dealer network any retailer who satisfies the selection criteria laid down in the SABA EEC Dealership Agreement with Specialist Retailers. The procedure is as follows: after satisfying himself by means of a test questionnaire that the dealer meets the criteria, the wholesaler invites the retailer to sign the SABA EEC Dealership Agreement with Specialist Retailers and signs it himself on SABA's behalf. Once the agreement has been signed by both parties, the wholesaler may deem the retailer a member of the network and begin supplying him with SABA products. After admitting the retailer, the wholesaler immediately sends SABA its copy of the agreement together with the test report.

- (d) The SABA EEC Dealership Agreement with Specialist Wholesalers also expressly provides that they are free to supply or take supplies from any SABA dealer anywhere in the common market and to set their own resale prices.

(e) SABA undertakes *inter alia* to guarantee the integrity of its EEC selective distribution system, only to admit to it and supply dealers satisfying the selection criteria, and to keep a list of all SABA dealers. An up-to-date copy of this list will also be lodged with a trustee, who will be responsible for immediately answering written enquiries from SABA dealers as to whether another dealer is a member of the network.

(f) Where a SABA wholesaler is found not, or no longer, to satisfy the admission criteria or to have breached the terms of the dealership in a manner which places the distribution system in jeopardy, SABA may terminate the wholesaler's dealership forthwith, specifying in writing its reasons for so doing, and cut off his supplies. Where the breach involves an infringement of the law against unfair competition, SABA may apply this sanction only if the infringement is not denied or has been proved in a court of law. A power of ordinary termination, i.e. subject to notice, is enjoyed by SABA only in the event of its abandoning its EEC distribution system.

The SABA EEC Dealership Agreement with Specialist Wholesalers is also signed by the independent sole distributors appointed by SABA for various Member States.

2. SABA wholesalers in the Federal Republic of Germany, who are supplied direct by SABA, also sign the SABA Cooperation Agreement. Under this agreement the wholesaler is obliged *inter alia* to carry as a rule the full SABA range and to agree an annual sales contract with SABA at the beginning of each year. This contract lays down a sales target for the year in German marks, by type and number of units, which is binding on both parties. Sales contracts on similar lines but going into more detail on products and dates are also agreed with SABA in January, April and August. Wholesalers achieving their three-monthly sales targets are paid a bonus at an agreed rate. For its part, SABA undertakes to involve the wholesalers in constant, close consultations on the future development and structure of its product range and to provide training courses for them or their

staff on new technological developments in its products, marketing problems, etc.

3. (a) Under the SABA EEC Dealership Agreement with Specialist Retailers, a retailer must satisfy the following criteria to be admitted to the SABA network as a specialist retailer. He must:

- carry on a specialist retail business, i.e. one which achieves over 50 % of its turnover from sales of consumer electronic equipment, or alternatively,
- have within his business a department specializing in the sale of consumer electronics products which is comparable to a specialist consumer electronics retail business, and in which specialist staff exclusively employed to advise customers on, and to demonstrate and sell, consumer electronics products are constantly in attendance during opening hours, and also
- carry on his business from, or have his specialist department in, premises which are recognizable from outside as those of a specialist consumer electronics dealer or department, and which inside have a reputable and smart appearance in keeping with the prestige of the SABA brand and are adequate for displaying and demonstrating in a technically satisfactory manner major parts of the SABA range,
- refrain from describing himself as a wholesaler or wholesaler-cum-retailer or from acting in both capacities at once,
- be able and willing to
 - take supplies of and sell SABA products on a regular basis,
 - carry as far as possible the full current SABA range and display it to best advantage,
 - keep sufficient stocks of SABA products to be able to supply customers promptly,
 - advise, service and supply customers in a competent manner with professionally trained staff possess-

ing the requisite technical knowledge,

- provide competent technical after-sales service and warranty services,
- have signed the SABA Fair Service Agreement, and
- have signed the SABA EEC Dealership Agreement with Specialist Retailers.

To be considered capable of providing competent technical after-sales service the retailer must have a suitably equipped repair workshop or have contractual arrangements with such a workshop. He is obliged to provide warranty services even to customers who did not purchase the relevant SABA product from him. He is not permitted to charge the customer separately for after-sales service, offer him a discount if he waives the right to it, or exclude it from his conditions of sale.

SABA will admit to its network any retailer fulfilling the selection criteria. SABA wholesalers can also admit retailers under the procedure described above. Applications to SABA will be deemed to have been accepted if SABA fails to process them within four weeks, in which case SABA undertakes to sign the dealership agreement with the retailer immediately. After admission the retailer is put on the SABA dealer list.

In view of the fact that the dealership agreement is standard throughout the common market, SABA has discretion to waive individual admission conditions in so far and as long as they are not usually met by consumer electronics retail outlets in the areas concerned. However, it insists on the requirements that dealers be specialists, order and sell SABA products regularly, as far as possible carry the full SABA range and keep adequate stocks, and provide after-sales and warranty services.

(b) SABA retailers undertake the following obligations *inter alia*:

- to supply SABA products for resale in the common market only to other

SABA dealers or SABA sole distributors and before supplying a trade customer to check with the trustee that it is a member of the SABA network,

- to keep records of all SABA products sold to trade customers so that the products can if necessary be traced by their serial numbers and to preserve such records for at least three years,
- to observe the appropriate national law against unfair competition,
- to assist SABA in proceeding against breaches of the dealership agreements.

The SABA EEC Dealership Agreement with Specialist Retailers expressly provides that they are free to supply or take supplies from any SABA dealer anywhere in the common market and to set their own resale prices.

(c) SABA's obligations to guarantee the integrity of the distribution system and to appoint a trustee, and the rules governing ordinary termination and termination for breach of contract, are as for wholesalers (see B 1 (e) and (f) above).

4. The SABA Fair Service Agreement which SABA concludes with its specialist retailers specifies the nature and scope of the service back-up SABA provides to its retailers. In particular, it lays down the principles governing SABA's contribution to the cost of repairing products under warranty and gives details of the spare-parts service and the constant technical assistance to retailers through technical literature and instruction manuals, field technicians and the SABA training system.

In return, the retailer undertakes to maintain a competent repair workshop and to observe the relevant technical regulations, or to contract with such a workshop for the carrying out of repairs and ensure that this workshop observes the technical regulations.

C. Comments by third parties

In response to publication of a summary of the SABA agreements the Commission received comments from a number of third parties. In most cases the following general objections were raised to exemption of SABA's distribution system:

- the system was said to impede parallel trade in SABA products within the Community,
- it tended to lead to resale price maintenance in distribution,
- its effects would be all the more damaging in view of the precedent which exemption of the SABA system would set for the similar distribution arrangements established by many other manufacturers in this business.

Among individual clauses of the dealership agreements that were criticized was the new provision under which wholesalers were delegated power to examine retailers' applications for a dealership and to admit them to the network. It was argued that this released the manufacturer from his absolute responsibility for keeping the distribution system intact and was likely to undermine it. Criticism was also made of two clauses in the retail dealership, namely the obligation in a specialist department within a larger outlet to employ specialist staff working only in that department and the requirement upon retailers generally to advise and service their customers with 'technically trained staff'. On the latter point SABA has since changed the wording of this clause (see B 3 (a)) to make it clear that it does not imply that only trained radio and television technicians can be employed in sales, but any specialist sales staff possessing the necessary professional and technical knowledge to serve customers. The other objections are not considered valid by the Commission for reasons that will be explained in this Decision.

II. LEGAL ASSESSMENT

A. Applicability of Article 85 (1) of the EEC Treaty

1. The agreements SABA has concluded or proposes to conclude with the wholesalers and retailers of its products are agreements between undertakings which have as their object or effect the restriction of competition within the common market and which may affect trade between Member States.

2. Under its EEC Dealership Agreements with Specialist Wholesalers and Retailers, SABA undertakes not to supply dealers who do not belong to its distribution network. SABA dealers, for their part, are forbidden to supply dealers who have not been admitted to the network by SABA or a SABA wholesaler.

In the present case these obligations constitute a restriction of competition because in order to be admitted to the network dealers must not only satisfy certain general professional criteria but must also be prepared to meet other special requirements pertaining to sales promotion and performance.

- (a) The Court of Justice has held (judgment of 25 October 1977 in Case 26/76 Metro [1977] ECR 1875) that selective distribution systems constitute an aspect of competition which accords with Article 85 (1), provided that the 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 (so-called 'simple selective distribution').
- (b) With regard to such 'qualitative criteria', in Case 31/80 L'Oreal ([1980] ECR 3775) the Court stated that it should also be considered whether the criteria that were laid down did not go beyond what was necessary for a competent distribution of the products concerned.

SABA's requirements regarding the professional qualifications of dealers, the specialist knowledge of their sales staff, and the quality of their trading premises, after-sales service and — in the case of wholesalers — storage facilities are no more onerous than is necessary in a selective distribution system based on high quality standards for goods as technically sophisticated as consumer electronic products. These are exactly the type of valuable consumer durables the Court had in mind in the Metro case when it found that selective distribution systems based on quality standards could be legitimate. The fast pace of innovation that is characteristic of this industry means that

existing products are rapidly improved and technologically new products are regularly appearing on the market (like the recently developed videodisc and compact disc systems). This continues to demand the setting of qualitative selection criteria for dealers. The same general criteria must apply to specialist outlets and to specialist departments of stores. Therefore, the requirement in the retail dealership agreement that sales staff should be in constant attendance even in a specialist department is justified. In a specialist shop it is taken for granted that there will always be staff on duty.

The only dealers that are excluded by the criteria are those unwilling or unable to ensure that the products will be sold by trained staff from premises in which they can be properly displayed and demonstrated and to guarantee the provision of after-sales and warranty services either themselves or by others.

The SABA dealership agreements therefore do not fall within Article 85 (1) in so far as they impose qualitative requirements.

- (c) However, the situation is different where selective distribution agreements contain obligations upon the undertakings concerned and selection criteria which go beyond the limits indicated above. They then fall under Article 85 (1), but can in appropriate cases be exempted under Article 85 (3) (judgment of the Court of Justice of 10 July 1980 in the 'Perfumes' cases, Case 99/79 [1980] ECR 2511).

SABA's agreements do impose special obligations of this nature.

Retailers must be willing and able to order and sell SABA products regularly, to carry as far as possible the whole SABA range and to keep sufficient stocks to ensure prompt delivery to customers. Wholesalers not supplied direct by SABA are likewise required to carry as far as possible the whole SABA range. Wholesalers in the Federal Republic of Germany supplied direct by SABA who sign the SABA Cooperation Agreement are required, under that agreement, to carry the whole SABA range and

also to agree an annual sales contract with SABA at the beginning of every year containing binding sales targets by product and number of units.

The obligations go beyond the requirements regarding the professional qualifications of dealers and their sales staff and the suitability of their trading premises which are necessary for proper distribution of technically-sophisticated products such as those of the consumer electronics industry. There are additional obligations concerning the dealer's sales effort, with which SABA hopes to boost sales of its products. These obligations are likely to keep many dealers who, though fulfilling the qualitative selection criteria, are unable or unwilling to assume the additional obligations, out of the distribution of SABA products.

3. These obligations in terms of sales effort also restrict dealers who join the network in their competitive behaviour. By forcing them to make a special effort to promote SABA products, they restrict the dealers' freedom to pursue their own sales policy *vis-à-vis* their retailer or consumer customers, taking advantage of competition between different manufacturers.
4. The policing obligations laid upon dealers when selling to other dealers (to record serial numbers and check whether the customer is listed) are designed to enable SABA to keep its distribution system under surveillance. Provided they do not exceed the requirements of a proper surveillance, such obligations are simply the corollary of the principal obligation which they seek to underpin and have the same status in law (Metro judgment, ground 27). Since the ban on SABA dealers supplying dealers outside the network has been shown to be a restriction of competition, this is also the case with the obligations concerning the policing and enforcement of this ban. However, such obligations do not have an independent anti-competitive character because they remain within the limits of what is strictly necessary:

— Number recording is essential for the manufacturer if he is to be able to trace breaches

of the dealership agreement and to keep the system intact. Exercise of the right to inspect a dealer's records is expressly limited by the agreement to cases of reasonable suspicion of breach of contract by the dealer or by another customer.

- The rule requiring a dealer to check whether another dealer is (still) on the SABA approved dealer list before supplying him has been amended by comparison with the old rule so as to allow such enquiries to be addressed to a trustee appointed by SABA as well as to SABA itself. This makes it possible for one dealer to supply another without SABA's knowledge.

5. SABA's distribution system covers the whole Community. Given its anti-competitive character, it is therefore inherently likely to affect trade between Member States. As regards the appreciability of this effect, the Court has held, in its judgment of 1 February 1978 in *Miller* (1978) ECR 131, that an undertaking which supplies some 5 % of the market concerned is in principle able to affect inter-State trade by its behaviour. This percentage is exceeded by SABA in the Federal Republic of Germany and in Italy; so that at least as regards those two countries it can be considered that the relevant restrictions of competition inevitably have an appreciable effect upon competition.

6. The other clauses of the agreements are unlikely to bar suitably qualified dealers from the distribution of SABA products in an anti-competitive manner or to restrict the selected dealers in their competitive behaviour.

(a) The SABA Fair Service Agreement

The SABA Fair Service Agreement merely spells out the professional standards required of SABA dealers under the dealership agreement, in addition to giving details of the arrangements for SABA's reimbursement of warranty costs, supply of spare parts and provision of technical training

and advice to retailers. Thus, it does not contain any obligations that have the effect of barring suitable dealers from distributing SABA products or lead to a restriction of competition within the meaning of Article 85 (1). The Commission can therefore grant negative clearance under Article 2 of Regulation No 17 for this agreement.

(b) Admission procedure

In their present form, the rules of the procedure for admitting suitable dealers to the SABA network are not excessive in relation to the aims of ensuring that all dealers satisfy the selection criteria and of keeping the system intact.

Under the original admission procedure, only SABA could decide whether or not a dealer fulfilled the criteria and the company was not subject to any time limit in making its decision.

On past experience of such systems, the Commission considers that a system giving the manufacturer the sole and unrestricted right of admission opens the door to discriminatory application of the admission criteria. A manufacturer can, for example, refuse to admit a dealer to the network who, although perfectly well qualified, is objectionable to the manufacturer because of his pricing or marketing policy, on the pretext that he does not comply with particular clauses of the dealership agreement, or at least the manufacturer can delay the dealer's admission on this ground. In this way the decision on admission can be coloured by extraneous factors which have nothing to do with the selection criteria themselves — the only considerations relevant to the issue — and which are anti-competitive. This danger of discriminatory application of the selection criteria, against which the Court of Justice warned, chiefly arises in relation to the retail trade, because of the large number of dealers at this level. It is largely eliminated by the new admission procedure. This involves the following changes from the earlier rules:

- SABA undertakes to take a decision within four weeks on each application from a wholesaler or a retailer, irrespective of the Member State in which the

applicant is established. If it fails to do so, the dealer in question is deemed admitted to the network and SABA is obliged to conclude a dealership agreement with him immediately. In this way any unreasonable delay in the admission procedure is avoided. SABA's commitment to admit any dealer satisfying the conditions also helps to clarify the legal position of a dealer whose application is refused within the time limit should he wish to sue SABA to secure admission.

- All SABA wholesalers are also entitled to admit dealers satisfying the selection criteria to the network. After satisfying himself that the criteria are fulfilled, the wholesaler can sign the dealership agreement with the retailer on SABA's behalf and begin supplying him. Once admitted, the retailer can also obtain supplies from any other official SABA dealer. The wholesalers, who handle about 50 % of SABA's sales and even under the old system had authority to check whether potential local customers met the criteria, are now able to decide on applications themselves and can use this power whenever required.

As wholesalers are obliged to send SABA the test report and SABA's copy of the dealership agreement immediately they have admitted a retailer, SABA is able to carry out a subsequent check and if necessary expel a retailer who has been admitted in error by terminating his contract, in accordance with the procedure and conditions to be described below. This solution both prevents discrimination and ensures uniform application of the selection criteria.

- At wholesaler level, the system whereby SABA alone decides on applications — which it is now required to do within four weeks — can stay. The number of

wholesalers in the consumer electronics trade who are potentially interested in dealing in SABA products remains within manageable proportions, so that SABA's obligation to make its decision within the stated time, and the wholesaler's ability to submit any negative decision for review under national regulations in the light of the principles here laid down, make it sufficiently certain that abuses in connection with the exclusive right of admission may be ruled out.

(c) Expulsion of dealers from the network

The provisions in SABA's dealership agreements regarding the exclusion of dealers from the network (termination of contract) and the cutting off of a dealer's supplies (i.e., ordering all official dealers to stop supplying him) are not, in their present form, objectionable on the grounds that they are open to abuse.

- A power of unconditional ordinary termination such as was provided for in the old version of the agreement would be inconsistent with the essential requirement of a legitimate selective distribution system that it should treat equally and in a non-discriminatory fashion all dealers meeting the selection criteria. Such termination is now possible only in the event of a complete change of the distribution system involving the termination of *all* dealership agreements.
- Termination for a serious reason and cutting off of supplies is provided for in the event of a dealer's failing to meet the selection criteria (for example, where an unqualified dealer has been admitted in error by a wholesaler or sole distributor), or ceasing to do so, or a dealer's breaching the terms of the dealership agreement in a manner which places the distribution system in jeopardy. The contract can be terminated without notice, but reasons must always be given. If the dealer disputes the allegations, forcing SABA to prove

them, final expulsion is only possible after a decision by a court.

- A breach of the law against unfair competition, for example by 'loss-leader' selling, does not place the distribution system in jeopardy. In such a case, therefore, SABA can only terminate the dealership and cut off supplies if the allegations are either not denied or, if denied, have been proven in a court of law. In this way the danger of a subjective finding of a breach of the law against unfair competition and of arbitrary expulsion from the network is eliminated. Furthermore, the reference to the applicability of the appropriate national competition law ensures that a dealer can only be penalized on account of actions which are considered unfair under national regulations.

B. Applicability of Article 85 (3) of the EEC Treaty

The agreements making up SABA's EEC distribution system, in their amended form, also continue to fulfil the conditions of Article 85 (3).

1. Improvement of the production and distribution of goods

Admission to SABA's distribution network is restricted to dealers meeting specified professional standards who are also prepared to make a particular effort to sell the contract goods.

The professional standards ensure that all SABA's dealers have adequate knowledge and facilities for advising and selling to customers and providing after-sales service. The special sales effort required of dealers is likely to lead to the following further improvements in the production and distribution of the contract goods.

The obligation upon wholesalers supplied direct to agree annual and four-monthly sales contracts specifying types of product and numbers of units and to take delivery of the goods ordered at the agreed time allows detailed production and sales planning and so makes for continuity of supplies, as well as

rationalizing production and distribution. These arrangements cover both directly supplied wholesalers in the Federal Republic of Germany and SABA's sole distributors, who also sign the SABA wholesale dealership agreement. In return for this cooperation SABA undertakes to offer its wholesalers and sole distributors a keenly-priced, competitive product range, and to engage them in constant close consultations about its development. The possibility of involvement in future product planning and development — a role for which the wholesalers and sole distributors are eminently well qualified because of their nearness to the market-place — ensures that the wholesalers and sole distributors get products from SABA that are fashionable and what the consumer wants.

By comparison with these advantages, it is only a minor disadvantage that during the period of their sales contracts wholesalers are unable to allocate any of SABA's share of their overall sales targets to other manufacturers. Most wholesalers' planning and ordering is on a yearly basis in any case. Once they have freely selected which of the many makes of equipment they are going to sell that year, they are bound in any case to concentrate their sales effort on the selected makes and automatically lose for that year the chance of selling other makes they have not selected. Thus, the wholesalers are not unduly restricted in their freedom of action by their annual sales contracts with SABA.

The obligation accepted by wholesalers under their dealership agreement that they will, as far as possible, carry the whole SABA range and keep adequate stocks, the corresponding unqualified obligation accepted by directly supplied wholesalers under the Cooperation Agreement, and the obligation accepted by retailers to order and sell SABA products regularly, carry as far as possible the full range and keep stocks sufficient to ensure prompt delivery of customers, all make for an uninterrupted and improved supply of SABA products to customers. Thanks to these obligations, the range and stocks of SABA products available at wholesalers and retailers are increased so that their customers can always gain a good idea of at least the main items in the

SABA range and can usually be sure of having their orders supplied quickly out of stock.

All in all, these advantages considerably outweigh the disadvantage resulting from the fact that dealerships are not open to all professionally qualified dealers but only to those prepared to accept a commitment in terms of sales effort. Together with the selection criteria which bar the non-specialist, these restrictions ensure that SABA products are distributed only to dealers who meet certain professional standards and make a special effort to promote the sales of this particular manufacturer. They therefore encourage competition between SABA and other brands, without impairing competition between individual SABA dealers.

2. Benefit to the consumer

The abovementioned advantages for distribution, in the form of efficient after-sales service and the availability of a wider range and faster delivery from wholesalers and retailers, are of immediate benefit to consumers.

The benefits SABA receives in terms of rationalization of its production and sales are likely to be passed on, in view of the fierce competition in the consumer electronics business and the fact that all its wholesalers and retailers can sell competing goods.

Competition at the subsequent distribution levels is also such that SABA wholesalers/sole distributors and retailers will be induced to pass on, both these and the rationalization benefits accruing at their own level of distribution, to consumers. After all, SABA retailers and consumers can buy SABA products from any SABA dealer in the Community; and the right of SABA dealers to supply any fellow dealer and freely to determine their prices is expressly enshrined in the dealership agreements.

3. Indispensability of the restriction of competition

SABA's distribution system contains no restrictions that are not indispensable for the attainment of the above advantages.

A restriction such as that whereby SABA products may not be supplied to dealers who have not pre-

viously been authorized to deal in them by SABA or by a SABA wholesaler is a necessary ingredient of any selective distribution system (Metro judgment, ground 27). Without this restriction, there would be a considerable amount of dealing in SABA products by dealers who were not bound by the obligations carried by membership of the distribution system. Official SABA dealers could then no longer be expected to discharge their obligations, and the selective distribution system with all its advantages would no longer be sustainable.

The commitments in terms of sales effort required of SABA wholesalers and retailers are equally indispensable to attainment of the said advantages. Without the rules on regular ordering of the major parts of the SABA range and keeping of stocks it would not be possible to guarantee reliable and fast deliveries of SABA products* to customers. The further obligations imposed on directly supplied wholesalers under the Cooperation Agreement whereby they must agree annual and four-monthly sales contracts by product are necessary for production and sales planning.

4. Elimination of competition

The agreements making up the SABA distribution system do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

In the common market there are a larger number of undertakings producing consumer electronics products in effective competition with SABA. SABA's market position in most Member States is comparatively weak.

Within the SABA network itself dealers throughout the Community, at both wholesale and retail levels, can compete with one another, and they can also take advantage of the most favourable source of supply in the particular circumstances since there are no restrictions at all on dealers within the network supplying one another.

The consumer electronics market is intensely competitive, largely due to the large number of manufacturers, the fast pace of technological advance and the varied distribution structure. Therefore, despite the fact that a number of other major consumer electronics manufacturers also have EEC-wide systems of dealership agreements, some of which, however,

only involve simple selective distribution, the Commission was unable to find any evidence that the widespread use of such systems leads to rigidity in the price structure.

Nor has the Commission found that as a result of the spread of selective distribution systems in the consumer electronics sector, particular types of outlet such as 'cash-and-carry' stores or self-service wholesale and retail supermarkets are systematically excluded from selling such products. The selection criteria for SABA dealerships are not such as to be incapable in principle of fulfilment by such types or outlet, although this might involve some changes in their selling methods.

The Commission can therefore again grant an exemption to the SABA EEC distribution agreements.

C. Applicability of Articles 6 and 8 of Regulation No 17

SABA applied by a letter dated 2 July 1979 for the exemption of its distribution system to be extended beyond 21 July 1980. On hearing of the Commission's doubts as to the further exemptability of particular clauses in the dealership agreements, SABA immediately amended the agreement to accommodate the objections raised. It is therefore appropriate that the date set for the Article 85 (3) declaration to take effect under Article 6 of Regulation No 17 should be 22 July 1980.

It is desirable to fix the period of validity of the Decision, under Article 8 (1) of Regulation No 17, at eight years including the time that has elapsed since expiry of the original exemption. The Commission will then be able to look at the effects of SABA's distribution system again after a relatively short period.

Certain conditions must be attached to the Decision to enable the Commission to check that SABA does not act in a discriminatory fashion in refusing admission to or excluding wholesalers or retailers. SABA must therefore be required to send the Commission every year reports on every case in which it has refused to admit a wholesaler to its network or withdrawn his dealership or has withdrawn a retailer's dealership or cut off his supplies after he had been admitted by a wholesaler, or has demanded to inspect a dealer's records of the serial numbers of equipment passing through his hands.

This part of the Decision is based on Article 8 (1) of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission hereby finds that there are no grounds under Article 85 (1) of the EEC Treaty for action on its part in respect of the SABA Fair Service Agreement.

Article 2

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to:

- the SABA EEC Dealership Agreement with Specialist Wholesalers,
- the SABA Cooperation Agreement, and
- the SABA EEC Dealership Agreement with Specialist Retailers.

This declaration of inapplicability shall apply from 22 July 1980 until 21 July 1988.

Article 3

SABA shall submit annual reports to the Commission, the first of them by 31 December 1984, setting out all cases in which it has:

- refused or withdrawn a wholesaler's or a retailer's admission as a 'SABA dealer', or has cut off supplies to one,
- exercised its right to inspect a dealer's records of serial numbers.

Article 4

This Decision is addressed to SABA GmbH, D-7730 Villingen-Schwenningen.

Done at Brussels, 21 December 1983.

For the Commission
Frans ANDRIESEN
Member of the Commission