II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 December 1975

relating to a proceeding under Article 85 of the EEC Treaty (IV/847 — SABA)

(Only the German, French and Dutch texts are authentic)

(76/159/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Articles 2 and 8 thereof,

Having regard to the following notifications from Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne GmbH (SABA), Villingen-Schwenningen :

— notification on 19 December 1962 of its Conditions of Sale for the domestic market (first issued May 1962, currently in the version of May 1972) ;

— notification on 12 February 1963 of the Sole Distributorship Agreements concluded :
in 1936 with A. Loschetter & Fils, Luxembourg,
in 1939 with Ets Fr. Drion, Brussels,
in 1961 with SABA Nederland NV, De Bilt (all three replaced by the 1966/67 version of the SABA Standard Sole Distributorship Agreement) ;

— notification on 20 June 1969 of the Price and Distribution Agreement for SABA Wholesalers and Specialist Retailers (1965 edition, now Distribution Agreements for SABA Wholesalers and Specialist Retailers, dated 1 July 1974) ;

— notification on 31 July 1972 of the Agreements for SABA Wholesalers and Specialist Retailers in the EEC (1972 edition, currently in the version of 1 July 1974),

— notification on 22 July 1974 of its standard form Cooperation Agreement (edition of 2 January 1974),

Having regard to the notification on 28 January 1963 by Ets Fr. Drion, Brussels, of the Sole Distributorship Agreement concluded in 1939 with SABA,

Having regard to the application pursuant to Article 3 (2) (b) of Regulation No 17, made on 7 November 1973 by Metro SB-Großmärkte GmbH & Co. KG, Düsseldorf,

Having heard the undertakings involved pursuant to Article 19 (1) of Regulation No 17 and Regulation No 99/63/EEC [2],

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No 127, 20. 8. 1963, p. 2268/63.

Having heard Metro SB-Großmärkte GmbH & Co. KG, Düsseldorf, pursuant to the second sentence of Article 19 (2) of Regulation No 17 and Regulation No 99/63/EEC,

Having regard to the publication of the essential content of the notifications, pursuant to Article 19 (3) of Regulation No 17, in *Official Journal of the European Communities* No C 116 of 7 November 1972,

Having regard to the opinions delivered on 7 March 1973 and 29 November 1974 by the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17,

WHEREAS :

1. The facts

1. The Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne GmbH (SABA), which manufactures television, radio and tape-recording equipment, distributes its products within the Community exclusively through specialist dealers. In the Federal Republic of Germany and West Berlin SABA equipment is sold through specialist wholesalers and retailers. At the wholesale level there are in addition nine legally and economically independent SABA general representatives and four sales subsidiaries. In Denmark, the Benelux countries, France, Italy and the United Kingdom, the distribution of SABA products is effected by sole distributors and specialist retailers. The appointed sole distributors for France, Italy and the United Kingdom are SABA subsidiaries. SABA has a minority holding in the share capital of SABA Nederland NV, the sole distributor for the Netherlands.

2. 97·5 % of SABA's shares are owned by the American company General Telephone & Electronics Corporation, New York. This company has other subsidiaries in the Community, none of which manufactures electronic equipment for the leisure market.

SABA's market share in the Community is relatively small. In the Federal Republic of Germany SABA's share of the market for the various types of equipment ranges from 1·8 % to 11·9 %. In the other Member States its greatest share is less than 1 %.

3. SABA has introduced a uniform system for the sale of its products throughout the common market. The salient features of the system are first the cooperation between SABA and its wholesalers and sole distributors and secondly the restriction on the number of dealers and the fact that distribution channels are determined by the manufacturer.

SABA cooperates in close partnership with its wholesalers and sole distributors in planning production and sales programmes as precisely as possible to meet the needs of consumers. For this purpose there are regular consultations on product ranges, in which SABA wholesalers can exert considerable influence through the SABA wholesalers' advisory committee representing them. SABA works out proposals for supply schedules on the basis of demand forecasts from its dealers ; these proposals, after individual negotiations, provide a basis for the conclusion of six-monthly supply contracts determining the quantities of each type to be supplied and monthly delivery quotas.

At each level of distribution SABA equipment may be sold by only a limited number of selected dealers. Selection is effected by the manufacturer, on the basis of general qualitative criteria (technical standards) and specific additional criteria (willingness to perform particular sales promotion and marketing services). Appointed dealers are prohibited from selling goods covered by their agreement to dealers outside the SABA system.

4. The legal basis for the SABA distribution system is provided by standard agreements concluded by the manufacturer with selected dealers at the various levels of distribution, i.e. SABA wholesalers, SABA sole distributors and SABA specialist retailers.

The content of the agreements varies according to level of distribution, but taken together they constitute a unified system. There are, furthermore, clauses which are identical for dealers at all levels of distribution.

5. Wholesalers in the Federal Republic of Germany and West Berlin sign the 'Agreement for SABA Wholesalers in the EEC' and the standard form cooperation Agreement. The 'Agreement for SABA Wholesalers in the EEC' consists essentially of provisions governing the distribution channels to be followed when reselling SABA equipment in the Community (EEC Distribution Agreement).

The standard Cooperation Agreement prescribes the details of cooperation between SABA and its wholesalers (see paragraph 14 below).

6. Legal relationships between SABA and its non-subsidiary sole distributors in the individual Member States of the Community are governed by the standard Sole Distributorship Agreement. The Agreement for SABA Wholesalers in the EEC is also applicable.

7. All SABA specialist retailers in the Community sign the Agreement for SABA Specialist Retailers in the EEC. This Agreement prescribes the conditions to be met by any firm seeking appointment as a retailer of SABA equipment, determines distribution channels for resale in the Community (EEC Distribution Agreement) and establishes the obligations of retailers with respect to sales and promotion.

8. SABA wholesalers and specialist retailers in the Federal Republic of Germany are in addition subject to the 'Distribution Agreement for SABA Wholesalers' and the 'Distribution Agreement for SABA Specialist Retailers'. The provisions of these Agreements largely correspond to those of the EEC Agreements. The Distribution Agreement for SABA Wholesalers demarcates the functions and responsibilities of German wholesalers and specialist retailers. The 'Conditions of Sale for the Domestic Market' apply only to the Federal Republic of Germany and West Berlin. These conditions apply to all trade with SABA ; they cover the terms of supply, prices, insurance, transfer of risk, conditions of payment, complaints, right to withdraw an order, exclusion of other claims in respect of loss, arrangements for the retention of ownership in the goods supplied, place and conditions of delivery.

9. The following rules govern the appointment of SABA wholesalers :

SABA has informed the Commission that in principle it is willing to supply any wholesaler in the Federal Republic of Germany or West Berlin who :

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

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

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

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

(d) signs the SABA Cooperation Agreement (see paragraph 14 below) ;

(e) signs the SABA agreements and complies with the provisions of the distribution agreement relevant for their area (see paragraphs 11, 12, 15 and 18).

10. To be appointed as SABA specialist retailers in the Community, dealers must :

(a) keep a specialized shop, i.e. one where over 50 % of the turnover relates to the sale of radio, television, tape-recording or other electrical equipment, or have set up a department specializing in the sale of radio, television and tape-recording equipment ;

(b) trade from retail premises which are suitable for advertising and displaying SABA products ;

(c) be prepared to stock the SABA range as fully as possible, to achieve an adequate turnover in SABA products, to keep a corresponding stock of SABA equipment and to display the same to its best advantage. 'Adequate' is considered by SABA to mean a turnover which can normally be achieved by the dealer in question, having regard to the size of his undertaking, its local importance and his sales opportunities, and which corresponds approximately to SABA's share of the market in the relevant area.

(d) if they purchase direct from SABA, be prepared to conclude a supply contract for the complete SABA range, in respect of a quantity appropriate to the size of their business and to their local importance ;

(e) be able, through qualified staff, to give proper advice and service to consumers,

(f) be able to provide customers with technical service and give a gurantee to the consumer in accordance with the SABA Guarantee ;

(g) have signed the Agreement for SABA Specialist Retailers in the EEC (see paragraphs 11, 12, 16 and 18).

(Agreement for SABA Wholesalers in the EEC, clause 3 (3) ; Agreement for SABA Specialist Retailers in the EEC, clause 2 ; Distribution Agreement for SABA Wholesalers, clause 2 ; Distribution Agreement for SABA Specialist Retailers, clauses 2.1 and 2.5).

11. All SABA dealers in the Community at all stages of distribution are subject to the EEC Distribution Agreements imposed by SABA. German SABA wholesalers, SABA sole distributors and SABA specialist retailers are obliged :

(a) to supply goods for resale within the common market only to SABA dealers (Agreement for SABA Wholesalers in the EEC, clause 1 ; Standard Sole Distributorship Agreement, clause 3 (5) ; Distribution Agreement for SABA Wholesalers, clause 1 ; Agreement for SABA Specialist Retailers in the EEC, clause 2 ; and the Distribution Agreement for SABA Specialist Retailers, clause 2.2) ;

(b) before making delivery, to check by personally consulting the EEC Agreement signed by SABA and SABA dealers and by consulting the catalogue of SABA dealers, whether the relevant retailer has actually been appointed a SABA dealer. Such appointments are made by SABA (Agreement for SABA Wholesalers in the EEC, clause 3 ; Standard Sole Distributorship Agreement, clause 3 (5) ; Distribution Agreement for SABA Wholesalers, clause 1 ; Agreement for SABA Specialist Retailers in the EEC, clause 2 ; Distribution Agreement for SABA Specialist Retailers, clause 2.2) ;

(c) to keep full registers giving serial numbers of SABA articles resold, with dates and purchasers ; SABA will request to see these registers or to have the necessary information only where it has reason to believe that the dealer or his customer is in breach of his contract, i.e. has supplied a dealer who is not an authorized SABA dealer (Agreement for SABA Wholesalers in the EEC, clause 4 ; Standard Sole Distributorship Agreement, clause 3 (5) ; Distribution Agreement for SABA Wholesalers, clause 4.1 ; Agreement for SABA Specialist Retailers in the EEC, clause 4 ; Distribution Agreement for SABA Specialist Retailers, clause 2.2) ;

(d) not to export SABA products to countries outside the EEC nor to import the same from outside the EEC. (Agreement for SABA Wholesalers in the EEC, clause 2 ; Standard Sole Distributorship Agreement, clause 3 (5) ; Distribution Agreement for SABA Wholesalers, clause 1 ; Agreement for SABA Specialist Retailers in the EEC, clause 5 ; Distribution Agreement for SABA Specialist Retailers, clause 3).

However, SABA has given the Commission an undertaking to lift these prohibitions once the relevant products are no longer subject to customs duties in trade between the Community and EFTA countries, which will be the case from 1 July onwards.

12. In the case of breach of the EEC Distribution Agreement, SABA is entitled to terminate the existing supply contract and to refuse at all times thereafter to make any deliveries to the relevant dealer (Cooperation Agreement, clause 10.4 ; Standard Sole Distributorship Agreement, clause 10 (3) (c) read with clause 3 ; Agreement for SABA Specialist Retailers in the EEC, clause 8 (2) ; Distribution Agreement for SABA Wholesalers, clause 7 (1) (a) ; Distribution Agreement for SABA Specialist Retailers, clause 4 (1) (a)).

13. The sole distributors in Belgium, Denmark, Luxembourg and the Netherlands to whom SABA has given the exclusive right to market its products each in its allotted territory, are obliged by the Standard Sole Distributorship Agreement :

(a) not to manufacture or market any competing products during the currency of the Agreement (clause 4 (g)) ;

(b) not to seek customers, establish branches or maintain distribution depots outside their allotted territory (clause 3 (4)) ;

(c) to place binding advance orders for all the goods they need for the current sales period and to take delivery of these orders in full in monthly instalments according to the delivery schedule individually agreed upon (clause 4 (a)) ;

(d) to achieve a certain minimum annual turnover in SABA products ; failure to do so entitles SABA to terminate the Agreement without prior notice (clause 10 (h)) ;

(e) to advertise SABA's products in the assigned territory at their own expense (clause 4 (c)) ;

(f) to provide efficient after-sales service and maintain repair facilities, provide service under guarantee at their own expense and give adequate customer service in respect of all goods covered by their Agreements ; this obligation continues for one year after the expiry of the Agreement (clause 4 (d)) ;

(g) to notify at SABA's request any costs incurred in their territory, such as customs duties, taxes and any other necessary expenditure, including that imposed by law, and also gross earnings and any discounts granted to customers (clause 4 (i)) ;

(h) to supply any information requested by SABA staff sent to their territory (clause 4 (4)).

14. Under the Cooperation Agreement German SABA wholesalers are required to conclude supply contracts with SABA for six months in advance and to take delivery of the goods ordered at the appropriate time. The contracts are based on SABA delivery estimates. In establishing these estimates, SABA assumes that the wholesaler will achieve an adequate turnover in SABA products. 'Adequate' is considered by SABA to mean a turnover which can normally be achieved by the dealer in question, having regard to the size of his business, its local importance and his sales opportunities, and which corresponds approximately to SABA's share of the market in the relevant area. Furthermore, a supply contract is concluded only when agreement is reached on a volume of supplies which reflects in a mutually satisfactory manner the

estimated growth of the domestic market in electronic equipment for domestic leisure purposes. SABA is not required to accept counter proposals by SABA wholesalers which do not satisfy these criteria (Cooperation Agreement, clause 5).

To give SABA wholesalers an incentive to accept the supply targets worked out by SABA and to ensure that the supplies contracted for are actually taken up, SABA has introduced a system of premiums whereby upon conclusion of the supply contract SABA wholesalers receive a graded premium (0·3 % to 0·5 %) in respect of amounts contracted for by them over and above 95 % of the supply targets, and in addition a graded annual premium (1 % to 2 %) in respect of all goods of which they actually take delivery over and above 85 % of the amount contracted for by them (clause 6 of the Cooperation Agreement).

Although it is in SABA's best interests that these contracts should be performed in full, it is prepared to accept a lesser degree of performance. Where a wholesaler does not take delivery of the full volume contracted for, his annual premium may be reduced or even lost altogether.

15. Under the Distribution Agreement for SABA Wholesalers (clause 2 (2)), SABA wholesalers in the Federal Republic are also obliged to refrain from supplying SABA products to consumers in the Federal Republic, including West Berlin, except where the consumer

— can prove he is engaged in trade;

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

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

SABA may impose on a SABA wholesaler who is in breach of these obligations the same penalties (see paragraph 12 above) as may be imposed for infringement of the Distribution Agreement for the EEC (Agreement for SABA Wholesalers, clause 7 (1)). This limited prohibition on direct supplies to the domestic market is enforced by a corresponding application of the clauses governing registers of serial numbers, provision of information and disclosure of business records (see paragraph 11 (c) above, Distribution Agreement for SABA Wholesalers, clause 4).

16. The Agreement for SABA Specialist Retailers in the EEC (clause 1) and the Distribution Agreement for SABA Specialist Retailers (clause 2.1) require such retailers to achieve an adequate turnover in SABA products, to keep appropriate stocks and to display SABA products in a representative manner.

17. SABA is under an obligation to enforce strictly its distribution arrangements in Germany and to use all means at its disposal to proceed immediately against dealers in breach of these arrangements. It has undertaken to supply only customers who accept in writing their obligations under the distribution arrangements. (Distribution Agreement for SABA Wholesalers, clause 8; Distribution Agreement for SABA Specialist Retailers, clause 3).

18. Uniform guarantee and repair arrangements apply throughout the Community. SABA specialist retailers are under an obligation to provide a full guarantee service in accordance with the SABA Guarantee, and they may not be discharged from this obligation nor contractually exclude it. They are furthermore obliged to carry out all forms of repair, on terms to be agreed with the customer. The same obligations bind SABA wholesalers and sole distributors where they make direct deliveries to the consumer. All SABA dealers (wholesalers, sole distributors and specialist retailers) must guarantee that all SABA dealers obtaining supplies from them will in their turn provide service under the SABA Guarantee (Agreement for SABA Wholesalers in the EEC, clause 4, first sentence; Cooperation Agreement, clause 4 (d); Agreement for SABA Specialist Retailers in the EEC, clauses 3 and 6). The dealer may sub-contract for guarantee and repair services. The SABA Guarantee expressly allows consumers to call for these guarantee and repair services from any SABA dealer.

19. The Commission has received no observations from third parties on the agreements within the prescribed period after publication of the summary of the notifications.

20. Metro SB-Großmärkte GmbH & Co, Düsseldorf, subsequently made a complaint to the Commission about the SABA distribution system and under Article 3 (2) (b) of Regulation No 17 requested the Commission to declare that in virtue of the agreements constituting its distribution system SABA was in breach of Articles 85 and 86 of the EEC Treaty, and to require SABA by decision to bring the infringement to an end.

Metro's complaint primarily concerned clauses of the earlier version of the Distribution Agreement for SABA Wholesalers, which prohibited SABA wholesalers in Germany from supplying SABA equipment direct to the consumer in the Federal Republic, including West Berlin. As a result German wholesale supermarkets, of which Metro is one, were, so it was claimed, prevented on a discriminatory basis from stocking SABA equipment. Metro stated that a substantial part of its turnover derived from consumer sales and that for economic reasons it was unable to do without such sales, so that it could not become a SABA wholesaler. Nor could it become a SABA specialist retailer, in view of its business structure and its function as a wholesale supermarket.

In response to representations by the Commission, SABA has now amended the Distribution Agreement for SABA Wholesalers so that German wholesalers can under certain conditions supply SABA products directly to the final consumer (see paragraph 15 above).

21. Earlier versions of SABA's agreements further contained the following clauses prohibited by Article 85 (1), which SABA has also deleted in response to Commission representations :

(a) SABA wholesalers and specialist retailers in the Federal Republic of Germany and West Berlin and SABA sole distributors in the Benelux countries, and their customers, were prohibited from exporting SABA equipment, directly or indirectly, to other EEC countries. German specialist retailers could not reimport SABA equipment. The object and effect of these prohibitions was to insulate national markets within the Community.

(b) In response to representations by the Commission SABA withdrew the above restrictions, but without abandoning the principle of market separation :

— during the period that resale price maintenance was lawful in Germany (i.e. until 31 December 1973) SABA wholesalers and specialist retailers in Germany could sell to customers in other Community countries only at the price obtaining in Germany ;

— until 31 December 1973 SABA specialist retailers in Germany had to respect the price obtaining in Germany when reselling SABA equipment which they had re-imported from other Community countries. SABA sole distributors in the Benelux countries were also obliged to observe the German price when delivering to customers in the Federal Republic or West Werlin, and were prohibited from selling to dealers who did not respect the fixed price ;

— 'cross supplies' (i.e. by wholesaler to wholesaler or retailer to retailer) and 'return supplies' (i.e. from retailer to wholesaler) were prohibited ;

— SABA wholesalers and sole distributors were prohibited from supplying SABA products directly to the consumer.

(c) To be a SABA specialist retailer it was necessary to be a retailer whose turnover was derived predominantly from the sale of radio, television and tape-recording equipment, or other electrical apparatus. This meant in particular that throughout the Community departments stores of all kinds, and also discount stores and undertakings using similar distribution techniques, were without objective justification excluded from the supply of SABA products.

22. These restrictions did not qualify for exemption under Article 85 (3) of the EEC Treaty. They made no perceptible contribution to improving the production or distribution of goods such as would offset their harmful effects on competition and the freedom of trade within the common market, nor did they allow the consumer a fair share of the benefits which could result from distribution agreements. The prohibitions and restricitions on exporting and re-importing prevented SABA dealers and customers from obtaining SABA equipment elsewhere in the common market. Territorial protection was thus attained, so as to allow the charging of different consumer prices in the different Member States. The extension of German resale price maintenance to exports and reimports prevented SABA dealers from supplying their customers, particularly in the case of consumer sales, at prices more favourable than those obtaining in Germany. The exclusion of discount stores, self-service shops, supermarkets and similar establishments meant that SABA equipment could not be sold in shops which have traditionally charged low prices to the consumer.

23. The SABA distribution system as it currently operates offers SABA dealers the following possibilities :

(a) SABA wholesalers in Germany and SABA sole distributors in the other EEC countries can supply SABA products not only to any SABA specialist retailers in the common market but also, by cross supplies, to other SABA wholesalers or to other SABA sole distributors and, by direct supplies, to any consumer in the EEC. In Germany, however, the German SABA wholesalers are allowed to make direct supplies only to trade consumers.

(b) SABA specialist retailers can supply SABA products not only to any (private or trade) consumer in the common market, but also, by cross supplies, to other SABA specialist retailers or, by return supplies, to any SABA wholesalers or sole distributors in the EEC.

(c) SABA dealers, i.e. SABA wholesalers, SABA sole distributors and SABA specialist retailers, are themselves free to determine the prices at which they sell SABA products in the common market. There is no resale price maintenance for SABA products in any of the EEC Member States.

(d) SABA wholesalers in Germany and SABA specialist retailers in all the Member States may deal in competing products.

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

Article 85 (1) of the EEC Treaty prohibits, as incompatible with the common market, all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

A. *Provisions falling within Article 85 (1)*

24. The agreements concluded or to be concluded by SABA with wholesalers, sole distributors and retailers are agreements between undertakings, having as their object and effect a series of restrictions and distortions of competition within the common market, and may affect trade between Member States.

25. In the distribution system set up by the individual agreements, SABA undertakes not to supply dealers outside the distribution system. SABA dealers are for their part prohibited from supplying dealers who have not been appointed by SABA.

26. These obligations restrict the commercial freedom of SABA and its dealers. They have as their object and effect the restriction of competition within the common market to a perceptible degree. Admission to the SABA distribution system is given only to those dealers who not only fulfil general qualitative requirements, but who also are prepared to undertake specific measures of sales promotion and to achieve a particular sales performance.

27. In so far as the appointment of SABA dealers is based on general qualitative criteria which are objectively required to ensure an adequate distribution of equipment for domestic leisure purposes (technical requirements), and provided that all persons who fulfil these requirements are in fact appointed as SABA dealers, no restriction of competition within the meaning of Article 85 (1) arises.

28. Application of purely qualitative tests such as the technical qualifications of dealers and specialist knowledge of their staff, participation of wholesalers in the creation of a distribution network and service system, the suitability of trading premises and adequacy of customer service (see paragraphs 9 (a), (b) and (c) and 10 (a), (b), (e) and (f) above) (technical requirements) would generally exclude from the SABA distribution system only those dealers not capable of selling electronic equipment for domestic leisure purposes in a manner satisfactory to the consumer or of providing the necessary service. If technically advanced electronic equipment for domestic leisure purposes is to be marketed adequately, trained personnel must be available to sell the goods from premises suitable for their display, stocking and demonstration. Dealers must also be in a position to provide guarantee and after-sales services themselves or through third parties.

29. The SABA agreements nevertheless include further obligations not justifiable by the needs of adequate distribution of the products concerned. Specialist wholesalers must accept the obligations set out in the Cooperation Agreement (conclusion of six-monthly supply contracts, adequate turnover, acceptance of supply targets) (see paragraph 9 (d) and 14). Specialist retailers must stock the SABA range as fully as possible, achieve an adequate turnover in SABA products and maintain corresponding stocks of SABA equipment (see paragraphs 10 (c) and (g) and 16 above). These obligations ensure a high degree of dependence by dealers on SABA. They lead to the exclusion of those undertakings meeting the qualitative criteria of appointment but which are not in a position or not willing to comply with these additional obligations.

These obligations amount to a restriction of competition within the meaning of Article 85 (1). For these means of selection, which go beyond technical requirements, impede to an appreciable extent the appointment of undertakings as SABA dealers, and thus restrict access to the trade in SABA products.

30. Compliance by SABA dealers with the above obligations can be verified through the enquiries they are required to make, before supplying a retailer, as to whether he has actually been appointed a SABA dealer, by consulting the EEC Distribution Agreement and the list of SABA dealers (see paragraph 11 (b) above). This result is also achieved through the obligation on SABA dealers to keep a register of serial numbers (see paragraph 11 (c)). SABA thereby retains the means where a non-appointed dealer obtains supplies, to dsicover which SABA dealer made the delivery.

31. The obligations imposed on SABA dealers described in paragraphs 29 and 30 in their object and effect restrict and distort competition within the common market. They prevent SABA and its dealers from supplying dealers who are not part of the distribution system. They further restrict the freedom of choice both of dealers capable of marketing electronic equipment for domestic leisure purposes but not appointed by SABA, and of consumers. They may also affect trade between Member States, since no dealer outside SABA's system may acquire SABA equipment for export to other Member States.

32. In the Standard Sole Distributorship Agreement, SABA undertakes to sell its products for resale within a given area of the common market only to the sole distributor responsible for that territory (see paragraph 13 above). SABA sole distributors are obliged not to manufacture or sell competing products (prohibition on dealing in competing products) nor to advertise or set up branches or distribution centres outside their own territory (prohibition on canvassing customers) (see paragraph 13 (a) and (b). These obligations are restrictions of competition within the terms of Article 85 (1), and may affect trade between Member States.

B. *Provisions which are not prohibited by Article 85 (1)*

33. The agreements between SABA and its wholesalers, sole distributors and specialist retailers contain further provisions which are not prohibited by Article 85 (1), and obligations which, at least if applied reasonably, would not have restrictive effects within the meaning of Article 85 (1).

34. The prohibition imposed on SABA wholesalers in Germany, preventing them from supplying goods covered by the agreement to private customers in the Federal Republic and West Berlin is neither in its object nor in its effect a restriction of competition within the meaning of Article 85 (1). This prohibition admittedly prevents SABA wholesalers from competing with SABA specialist retailers in Germany and SABA dealers from other countries of the Community. The supply of goods by SABA wholesalers to private customers in Germany would however be inappropriate in a multi-level system such as that operated by SABA, with its clear definition of function between wholesalers and retailers. SABA wholesalers would furthermore have an unfair competitive advantage over SABA retailers. This type of unfair competitive advantage would not be protected by Article 85.

35. The absolute prohibition (up to 1 July 1977) on SABA dealers exporting SABA products from the EEC or reimporting them (see paragraph 11 (d)) is not an appreciable restraint of competition affecting trade between Member States. The double customs duties involved in crossing the Community frontier twice discourage SABA dealers and consumers in the Community from obtaining from a non-member country goods exported there by SABA or by a SABA dealer, as SABA does not offer purchasers in non-member countries prices more favourable than those than those those in the EEC.

36. The Conditions of Sale for the Domestic Market (edition of May 1972) (see paragraph 8) contain no obligations directly or indirectly restricting competition within the meaning of Article 85 (1) of the EEC Treaty. Accordingly, the Commission can to this extent grant negative clearance under Article 2 of Regulation No 17.

37. The obligation on sole distributors to inform SABA upon request of their gross income and of discounts granted to their customers and to supply any information required by SABA's representatives (see paragraph 13 (g) and (h)) is not to be regarded as restrictive of competition simply because it enables SABA to find out how its sole distributors are competing with each other. As long as SABA refrains from recommending them not to sell products outside

their own area or to apply particular prices, and does not offer advantages or threaten disadvantages in order to achieve these ends, the provision of such information cannot be regarded as a means of restricting competition. The Commission has no evidence at present that SABA has been applying these clauses for such purposes.

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

Pursuant to Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not :

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives ;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

38. Access to the SABA distribution system is restricted to those dealers who fulfil certain objective criteria and who particularly devote themselves to the distribution of products covered by the agreements.

39. By these means it can be ensured that for the sale of SABA products there are available dealers possessing the necessary technical knowledge and quipment for the sale of technically complex electronic equipment for leisure purposes (i.e. capable of providing qualified service and advice and of installing the equipment correctly) and for providing the necessary after-sales service.

40. The fact that SABA dealers must particularly devote themselves to the distribution of the products covered by the agreements result in improvements in the following respects :

The obligation on SABA wholesalers to conclude six-monthly advance supply agreements and to take delivery within the prescribed period of the quantities of goods ordered enables SABA to plan its production and sales in detail and to ensure continuity of supplies and rationalize manufacture and marketing. As a corresponding obligation exists for SABA sole distributors, SABA is able to take account of their requirements in its planning. Within the framework of this cooperation SABA is itself obliged to offer a competitive range of goods at reasonable prices to its wholesalers and sole distributors. This requires a close and continual exchange of views with wholesalers, in particular as to the future structure and product mix of the SABA production schedules. Thus the SABA wholesalers and exclusive distributors are able to participate in production planning, for which, because of their proximity to the market, they are particularly suited. In this way it is ensured that SABA wholesalers and sole distributors are supplied with equipment suitable for the market and appropriate to the particular local requirements of the consumers.

The obligation on SABA wholesalers and specialist retailers to achieve an adequate turnover in the products, and the obligation on SABA wholesalers to agree a delivery quota reasonably appropriate to the predictable growth in the domestic market for electronic equipment for leisure purposes, contribute to a rationalization of distribution, a more intensive exploitation of the market and the promotion of sales. The obligation arising from the supply agreement for SABA wholesalers to stock SABA products, as well as the obligation undertaken by SABA specialist retailers to market as full a range as possible of SABA products and to keep a corresponding stock, result in an increase in wholesalers' locally available stocks and thus in wider coverage of the SABA range and in an improvement in the level of stocks held by SABA specialist retailers.

41. Finally, it can be accepted that the agreements concluded between SABA and its sole distributors help to improve the distribution of the relevant products, as is generally the case with exclusive dealing agreements in interstate trade, for the reasons given in the preamble to Commission Regulation No 67/67/EEC.

42. The consumer benefits directly from the advantages derived from improved customer service, continuity of supplies, adaptation of SABA equipment to the particular local requirements of consumers, increase of stocks held by local wholsesalers and the broader range of goods offered by retailers.

43. With respect to the benefits resulting from SABA's rationalization of production and distribution, it can be assumed that the keen competition in the market for electronic equipment for leisure purposes will oblige SABA to pass on these benefits to the consumer, especially as German SABA wholsesalers and SABA specialist retailers in all the EEC countries are also permitted to sell competing products.

Furthermore, there is sufficient pressure as a result of the competition at each successive stage of distribution to oblige SABA wholesalers, sole distributors and specialist retailers to pass on to the consumer the benefits of rationalization, both those mentioned above and those resulting at their own stage of distribution. For SABA specialist retailers and consumers can buy SABA products from any SABA dealer in the EEC. It is only in the supply of the private consumer in Germany that German wholesalers are not in competition with other SABA dealers. Elsewhere, such competition is ensured by the fact that all SABA dealers are free to set prices at their own discretion.

44. The SABA distribution system contains no provision restricting competition which is not indispensable to the attainment of the benefits mentioned above (see paragraphs 39 to 41).

45. The rules governing SABA's selective distribution system fall under Article 85 (1) of the EEC Treaty in that they deny supplies of SABA equipment not only to unsuitable dealers but also to dealers who are qualified to sell the same but who do not undertake obiigations beyond those of a purely technical nature (see paragraph 29). Without these obligations the improvements and objectives discussed above (paragraph 40) could not be attained.

46. SABA's obligation under the Standard Sole Distributorship Agreement to supply its products for resale within a given area of the common market only to the sole distributor responsible for that area comes within the terms of Article 1 (1) (a) of Commission Regulation No 67/67/EEC and may therefore be regarded as an indispensable restriction, while the sole distributor's obligation not to manufacture or market competing products, and not to advertise for customers or set up branches or distribution centres in other EEC countries, are restrictions of competition of a type expressly permitted by Article 2 (1) of Commission Regulation No 67/67/EEC and therefore do not preclude the application of Article 85 (3) of the EEC Treaty.

47. The agreements constituting 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.

48. Within the common market there are many firms manufacturing television, radio and tape-recording equipment which can compete effectively with SABA, since SABA's market share in the EEC countries is relatively small.

49. Even in the market for SABA products in the Federal Republic of Germany, many SABA wholesalers can compete not only with each other, but also with SABA specialist retailers in all the EEC countries.

In the other Member States, where SABA products are handled by SABA sole distributors, SABA specialist retailers, despite the exclusive right given to the sole distributors, can also obtain SABA products from other sole distributors and from German wholesalers, as well as from the SABA specialist retailers of their choice, while, despite the prohibition on advertising by sole distributors, the latter can also supply SABA dealers in other EEC countries.

At the retail level there are many SABA specialist retailers in business in the EEC (some 8 500 in the Federal Republic of Germany alone), who all compete against each other, since they can supply as many consumers or other SABA dealers as they wish.

50. Accordingly, the agreements constituting the SABA distribution system, namely :

1. Agreement for SABA Wholesalers in the EEC,
2. Standard Sole Distributorship Agreement,
3. Distribution Agreement for SABA Wholesalers,
4. Cooperation Agreement,
5. Agreement for SABA Specialist Retailers in the EEC,
6. Distribution Agreement for SABA Specialist Retailers.

meet all the requirements for exemption under Article 85 (3) of the EEC Treaty.

IV. Application of Articles 6 and 8 of Regulation No 17

51. The last important amendments to the agreements governing the distribution of SABA products in the EEC which were required in order for these agreements to be exempted were made by SABA on 22 July 1974. The Decision under Article 85 (3) of the EEC Treaty should therefore, in accordance with Article 6 of Regulation No 17, have effect from 22 July 1974 subject to the following exception :

The last amendment to the Distribution Agreement for SABA Wholesalers which was required for the exemption of this Agreement was made by SABA on 20 February 1975. With respect to the Agreement, the Decision under Article 85 (3) of the EEC Treaty may therefore take effect, pursuant to Article 6 of Regulation No 17, only from that date.

52. Because of the special features of this case, the duration of this Decision should be fixed in accordance with Article 8 (1) of Regulation No 17 at six years, so that the Commission may re-examine the effects of the SABA distribution system within a relatively short period.

53. Obligations should be attached to the Decision, so that the Commission may be in a position to examine whether access to the trade in electronic equipment for domestic leisure purposes is being impeded unjustifiably by the SABA distribution system and whether SABA is restricting competition to an extent greater than that arising from the terms of the distribution agreements, such as by influencing the fixing of retail prices. Yearly reports are therefore to be supplied by SABA to the Commission from the date of the Decision, setting out any cases where dealers are refused appointment as a SABA dealer or where such appointment is withdrawn, where agreements for supply are refused or supplies withheld, or where SABA has requested inspection of a SABA dealer's register of serial numbers. The legal basis for these obligations is Article 8 (1) of Regulation No 17.

V. Applicability of Article 7 (1) of Regulation No 17

54. The Standard Sole Distributorship Agreement concluded with Ets Fr. Drion on 18 and 24 November 1966, replacing the Sole Distributorship Agreement notified by Drion on 28 January 1963 and essentially in the same terms, satisfied the requirements of Article 7 (1) of Regulation No 17. Nevertheless it would be unjustifiable to give exemption from the prohibition in Article 85 (1) for any specified period before 16 December 1972. Even after the Commission had pointed out in its statement of objections dated 10 March 1971 ; that :

— the obligation imposed on the Belgian sole distributor

to obtain the approval of SABA before supplying German retailers and to sell SABA products to such retailers only at the prices fixed by SABA, and

to require its customers, when selling products to the consumer in Germany, to observe the price fixed there by SABA and, when supplying German retailers, to obtain prior approval from SABA ; and

— the specialist trading agreements, which prevented certain types of retailer from obtaining supplies,

were prohibited by Article 85 (1) and that the requirements for exemption under Article 85 (3) were not satisfied, the undertakings in question nevertheless maintained the restraints on competition until 15 December 1972.

55. The other agreements under the SABA distribution arrangements do not satisfy the requirements of Article 7 (1) of Regulation No 17, in that :

— the Agreement for SABA Wholesalers in the EEC (1972 edition),

— the Standard Sole Distributorship Agreement (1966/67 version) and

— the Distribution Agreement (1965 edition),

— the Model Cooperation Agreement (edition of 2 January 1974),

— the Agreement for SABA Specialist Retailers in the EEC (1972 edition)

and

— the Conditions of Sale for the Domestic Market (edition of May 1962)

become applicable only after Regulation No 17 entered into force, while the Standard Sole Distributorship Agreements concluded with

— A. Loschetter & Fils and

— SABA Nederland NV

were notified only after expiry of the time limit set by Article 5 (1) of Regulation No 17,

HAS ADOPTED THIS DECISION :

Article 1

The Commission hereby declares that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) of the Treaty establishing the European Economic Community for action on its part in respect of the Conditions of Sale for the Domestic Market (May 1972 version) which are currently being used by SABA (Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne GmbH) for the sale of its products in the Federal Republic of Germany.

Article 2

Pursuant to Article 85 (3) of the Treaty establishing the European Economic Community, the provisions of Article 85 (1) of the Treaty are hereby declared inapplicable to :

— the Agreement for SABA Wholesalers in the EEC (edition of 1 July 1974);
— the Standard Sole Distributorship Agreement (amended version 1966/67);
— the Distribution Agreement for SABA Wholesalers (amended edition of 1 July 1974);
— the Model Cooperation Agreement (amended edition of 2 January 1974);
— the Agreement for SABA Specialist Retailers in the EEC (edition of 1 July 1974); and
— the Distribution Agreement for SABA Specialist Retailers (edition of 1 July 1974).

Article 3

Article 2 shall have effect from 16 December 1972 with regard to the Standard Sole Distributorship Agreement concluded between SABA and Ets Fr. Drion, from 20 February 1975 with regard to the Distribution Agreements for SABA Wholesalers, and from 22 July 1974 with regard to the other Agreements listed in Article 2, and shall apply until 21 July 1980.

Article 4

SABA (Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne GmbH) shall submit annual reports to the Commission, the first of them on 31 December 1976, setting out all cases of

— refusal to appoint a dealer as a SABA dealer or withdrawal of such appointment,
— refusal to conclude a supply contract with a SABA dealer or withholding of supplies,
— exercise of its right to inspect the register of serial numbers of a SABA dealer.

Article 5

This Decision is addressed to the following undertakings:

— SABA (Schwarzwälder Apparate-Bau-Anstalt August Schwer und Söhne GmbH), Villingen-Schwenningen, Hermann-Schwer-Strasse;
— A. Loschetter & Fils, 41 boulevard Prince Henri, Luxembourg;
— Ets. Fr. Drion, avenue Albert Giraud 96/100, Brussels;
— SABA Nederland, NV, Utrechtseweg 340, De Bilt.

Done at Brussels 15 December 1975.

For the Commission

A. BORSCHETTE

Member of the Commission