

selective distribution system a request for the establishment of an infringement, the Commission must examine the facts put forward by the trader in order to decide whether the

company's application of its selective distribution system is capable of distorting competition within the common market and of affecting trade between Member States.

In Case 210/81

OSWALD SCHMIDT, trading as DEMO-STUDIO SCHMIDT, 42 Platter Straße, D-6200 Wiesbaden, Federal Republic of Germany, represented by Wolfgang Bache, Rechtsanwalt and Notary, 11a Steubenstraße, D-6200 Wiesbaden, with an address for service in Luxembourg at the Chambers of Joseph Guill, Avocat-Avoué, 23 Rue Seimetz,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Norbert Koch, assisted by Barbara Rapp-Jung, Rechtsanwältin, 43 Hochstraße, Frankfurt am Main, Federal Republic of Germany, with an address for service in Luxembourg in the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

and

WILLI STUDER REVUX GMBH, 7827 Löffingen 1, Federal Republic of Germany, represented by Peter Schon, Rechtsanwalt, 2a Börsenbrücke, D-2000 Hamburg 11, with an address for service in Luxembourg at the Chambers of Ch. Turk, Advocate, 4 Rue Nicolas-Welter,

intervener,

APPLICATION for a declaration that the notice ("Bescheid") of 11 May 1981 (Reference: No SG (81) D/6536) issued by the Commission of the European Communities in relation to Case IV/29495 concerning the

complaint lodged by the applicant with the Commission's Directorate General of Competition against Willi Studer Revox GmbH, Löffingen, is void and seeking a fresh decision by the Commission on the matter,

## THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keefe, G. Bosco, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: S. Rozès  
Registrar: P. Heim

gives the following

## JUDGMENT

### Facts and Issues

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

#### I — Facts and written procedure

##### *1. The applicant's intended business activity and the product in question*

During 1975, Oswald Schmidt, who at that time was employed as a design engineer in an machine factory (Glyco-Metallwerke) at Wiesbaden (Federal Republic of Germany), decided to set up, in addition to his work as a paid

employee, a business in the leisure electronics sector.

For that purpose, by letter of 20 April 1975 Mr Schmidt submitted his plan to the parent company, Revox International, whose registered office is at Regensdorf bei Zürich, Swiss Confederation, stating the reasons for his wish to open a distribution centre ("Studio-Revox") for products bearing the Revox trade mark in Wiesbaden.

Audio-visual products of the Revox trade mark are distributed directly in the territory of the Community by Studer Revox GmbH [hereinafter referred to as "Revox"], whose registered office is at 7827 Löffingen 1, Federal Republic of

Germany. Most of the products are distributed by means of a selective distribution system whereby certain dealers in Revox products are chosen on the basis of objective qualitative criteria, such as quality of presentation and accessibility of the business premises or sales department during normal opening hours, the skills of the sales staff, the ability to advise customers, the ability to take delivery from the factory of the equipment intended for sale, and installation of the equipment sold at the premises of the purchasers and, finally, technical skills for the provision of after-sales services.

On the other hand, the conditions for approval as a specialist retailer impose no obligation on the retailer to deal exclusively in products of the brand in question. On the contrary, it is apparent from the file that the distribution policy adopted by Revox is intended, in order to give customers a wider choice, to ensure that Revox products are presented together with those of other brands.

By letter of 7 October 1975, the Revox sales department informed Oswald Schmidt of the conditions applicable to the sale and advertising of Revox products and to the opening of a specialist retail business dealing in them. Since Mr Schmidt was unable to furnish sufficient security to enable him to obtain credit insurance, the sales conditions offered to him included a clause requiring advance payment for orders placed.

On that basis, Mr Schmidt leased premises of some 15 square metres in Wiesbaden and on 20 October 1975 opened a shop under the name "Demo-Studio Schmidt" which was open to the public on Saturday morning and from 4 to 6 p.m. on other days.

2. *The applicant's business activity: his relations with Revox*

As from that date, Revox equipment which was not subject to the selective distribution conditions was delivered by Revox against advance payment.

However, it soon became apparent to Mr Schmidt that he could cover his business expenses only by selling the so-called second generation Revox products (the "B Series", which was subject to the selective distribution conditions) when they became available.

On 15 November 1976, Mr Schmidt added to his sales range Sony television sets and on 15 April 1977 Backes und Müller active loudspeakers.

During the first half of 1977, Revox notified its distributors of its intention to amend its sales conditions with a view to the introduction on 20 August 1977 of the new "EEC Dealership Agreement" which would thenceforth govern sales of Revox products subject to the selective distribution conditions, including the second generation products known as the "B Series". Subsequently, the dealership agreement was amended by the introduction of a second version which entered into force on 10 February 1978.

After various discussions with Revox's commercial department, Mr Schmidt was informed at a meeting with a representative of that company on 19 September 1977 that he would not be allowed to become a party to the EEC Dealership Agreement and consequently it would be impossible for him to distribute the B Series products. As is apparent from a letter from Revox to Mr

Schmidt dated 13 October 1977 summarizing the contacts between the two parties during 1977, the reason put forward by Revox during that discussion seems to have been the fact that the opening hours of his shop were limited.

Mr Schmidt then undertook to obtain the services of a specialized salesman in order to fulfil that obligation. Nevertheless, after various discussions with Revox's commercial representatives, Mr Schmidt was informed by telephone on 19 April 1978 that he would not be allowed to become a party to the EEC Dealership Agreement on the ground that he did not satisfy the qualitative criteria imposed by Revox on its distributors. After various further refusals, that decision was definitively confirmed by a letter from Revox dated 27 December 1979 (not appended to the file).

Because of the commercial consequences of that decision by Revox, Mr Schmidt dispensed with the services of his salesman and thereafter opened his shop every day of the week from 3.45 to 6 p.m. and on Saturday mornings.

### 3. Procedure

Following Revox's refusal to allow Mr Schmidt to become one of its specialist distributors, Mr Schmidt pursued the matter with Revox both by appealing directly to it and by means of legal proceedings against it (approaches to the Landesverband des Hessischen Einzelhandels [Hesse Retail Traders' Association], to the Hessischer Minister für Wirtschaft und Technik [Hesse Minister for Economic Affairs and Technology] and the Bundeskartellamt [Federal Cartel Office], and actions before the Oberlandesgericht [Higher Regional Court] Frankfurt am Main and before the Hessischer Verwaltungsgerichtshof [Hesse Higher Administrative Court]). In none

of those proceedings was a decision given against Revox.

By letter of 7 June 1980 Mr Schmidt then lodged with the Commission under Article 3 (2) (b) of Regulation No 17 of the Council of 3 July 1962 (Official Journal, English Special Edition 1959-1962, p. 87) a complaint against Revox for its refusal to sell B Series Revox products to the applicant, seeking an order that Revox should be compelled to make Mr Schmidt a party to the EEC Dealership Agreement which had been in force since 1 September 1977.

The case was registered by the Commission's Directorate General for Competition under No IV/29495.

By letter of 18 September 1980, the Commission informed Mr Schmidt pursuant to Article 6 of Regulation No 99/63 of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963-1964, p. 47) of its provisional decision not to act upon his complaint and asked him to submit his comments on that assessment within a period of one month.

By letter of 12 October 1980, Mr Schmidt stated that he adhered to his complaint, stating that he did not dispute "either the legality or the propriety" of the Revox EEC Dealership Agreement but that, on the contrary, he wished to be made a party to it.

By a letter of 11 May 1981 stating the reasons on which it was based the Commission notified Mr Schmidt of its definitive decision rejecting his complaint against Revox. The Commission pointed out in particular that there was nothing to indicate that, by refusing to supply Mr Schmidt, Revox had abused a dominant position within the meaning of Article 86 of the EEC Treaty or that the distribution system used by Revox was contrary to Article 85 (1) of the Treaty.

By application received at the Court Registry on 13 July 1981, Mr Schmidt brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the notice ("Bescheid") of 11 May 1981 was void and for an order that the Commission should reconsider the complaint lodged with it.

By application received at the Court Registry on 24 September 1981, Revox requested the Court to allow it to intervene in support of the Commission. By order of 26 October 1981 the Court allowed it to do so.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By order of 19 May 1982, the Court, upon hearing the views of the Advocate General, assigned the case to the Second Chamber pursuant to Article 95 (2) of the Rules of Procedure.

In view of the change in its composition, the Court by order of 7 October 1982 assigned the case to the Third Chamber.

By order of 15 December 1982, the Court (Third Chamber), referred the case to the Full Court in accordance with Article 95 (4) of the Rules of Procedure.

## II — Conclusions of the parties

Oswald Schmidt, the applicant, claims that the Court should:

1. Declare that the notice ("Bescheid") of 11 May 1981 (Reference No SG (81) D/6536) from the Commission of the European Communities concerning Case IV/29495 is void;
2. Order the Commission of the European Communities to adopt a

fresh decision in relation to the applicant, taking account of the view expressed by the Court in its judgment;

3. Order the defendant to pay the costs.

The Commission of the European Communities, the defendant, contends that the Court should:

1. Dismiss the application as inadmissible with respect to the second head of claim and for the rest as unfounded;
2. Order the applicant to pay the costs.

Revox, the intervener, contends that the Court should:

1. Dismiss the application as inadmissible or, in the alternative, unfounded;
2. Order the applicant to pay the costs.

## III — Summary of the submissions and arguments of the parties

### *A — The admissibility of the action*

1. The Commission of the European Communities, the defendant, considers the application to be partially inadmissible.

According to the Commission, it is apparent from the terms of the application that the applicant seeks, on the basis of the second paragraph of Article 173 of the EEC Treaty, a declaration that the "communication" ("Bescheid") from the Commission rejecting his complaint is void and seeks in addition an order to the Commission to reconsider his complaint.

According to the Commission, the primary purpose of the application,

namely a declaration that its decision on the applicant's complaint is void, is admissible in so far as such a "notice" or "communication" ("Bescheid"), being final and accompanied by a detailed statement of the legal grounds on which it is based, may be contested under the second paragraph of Article 173 of the EEC Treaty. However, the Commission considers the application unfounded in that respect.

However, the Commission states that it leaves it to the Court to assess to what extent the applicant really has an interest in taking legal proceedings, in view of the fact he is not the victim of discrimination arising from the application of Revox's selective distribution system, that it cannot be considered that the provisions of the Revox EEC agreement are contrary to Article 85 (1) of the Treaty and that, even if it were admitted that there was an infringement, it is not within the power of the Commission either to compel an undertaking to supply a purchaser or to bring to an end infringements which were committed in the past and have since ceased. In consequence, according to the Commission, the admissibility of this action is dubious, by reason of the absence of an interest in taking legal proceedings.

As regards the second purpose of the application — namely to compel the Commission to reconsider the applicant's complaint — the Commission considers it inadmissible. It is clear from well-established case-law of the Court that a judgment upholding an application for a declaration that a measure is void may result in the nullity of the measure but the Court cannot prescribe the measures to be adopted by the institution from which the annulled measure emanated for the implementation of its judgment (judgment of 20 March 1957 in Case 2/56 *Mining undertakings of the Ruhr Basin* [1957 and 1958] ECR 3; judgment of 23 February 1961 in Case 30/59 *De*

*Gezamenlijke Steenkolenmijnen in Limburg* [1961] ECR 1; judgment of 22 March 1961 in Joined Cases 42 and 49/59 *Société Nouvelle des Usines de Pontlieue — Aciéries du Temple* [1961] ECR 53). Admittedly, the Commission is required under Article 176 of the Treaty to adopt the necessary measures to comply with the judgment. However, the Commission has a discretion in that regard and specific measures may not be imposed upon it. At the most, the person concerned would be entitled to bring an action against the Commission for its failure to act or for a declaration that a measure was void if he considered that the Commission had not fully complied with the judgment. It is therefore incorrect to say that if the judgment of the Court in this case declared the contested measure void it would create a legal hiatus obliging the Commission to reconsider the applicant's complaint. The Commission further states that the applicant's action is inadmissible in so far as its purpose — to secure the adoption of a measure — although envisaged by German administrative law is unknown to the Community system of legal protection as provided for, in particular, by Articles 173 and 176 of the EEC Treaty.

2. *Oswald Schmidt*, the applicant, considers his application to be admissible.

He states in his reply that the purpose of his action is to have the "communication" ("Bescheid") of the Commission declared void so that the Commission will be obliged as a matter of substantive law, as a result of the legal hiatus created by the Court's judgment declaring the measure void, to give a fresh decision on his complaint against Revox.

This claim is in every respect in conformity with the spirit and letter of Article 173 of the Treaty whose purpose is to give all citizens of the Communities full legal protection against all decisions,

*inter alia* those of the Commission, and it is for that reason that the applicant considers his claim admissible. The applicant adds that he seeks a remedy both for the discrimination of which he was a victim in the second half of 1977 and for the discrimination to which he is at present subject and which will prevent him from carrying on his business as a specialized trader in the future.

The applicant finally states that the Commission has, in his opinion, misunderstood his intentions. In his opinion it was clear that these proceedings would not allow him to obtain an order requiring the Commission to take any action against Revox and moreover that that was not the purpose of the claims which he made in his application. The applicant therefore wishes to emphasize that his second claim relates only to the taking by the Commission of a "proper decision ... in the light of a correct legal assessment".

3. *Revox*, the intervener in support of the Commission, adheres to the latter's submissions regarding admissibility.

*B — Whether the application is well founded*

1. *Oswald Schmidt* considers his action to be well founded.

Since in the applicant's opinion Revox's commercial conduct is contrary to Article 85 (1) and possibly to Article 86 of the Treaty, the Commission is, in view of the formal complaint, under a legal obligation, by virtue of Article 3 of Regulation No 17, to undertake an inquiry and to bring to an end the infringement complained of.

A — The applicant considers that he satisfied all the conditions laid down by Revox for approval as a specialist retailer, as promised orally by the latter's representatives.

In support of that statement, the applicant makes the following claims,

which he offers to prove by witness evidence:

(a) His sales premises satisfy the criteria regarding presentation and accessibility for customers. In particular, he disputes Revox's description of his premises. According to the applicant, his shop is properly equipped to ensure quality presentation and shows a significant "installation effort". He emphasizes in that regard that if Revox were to supply him that would be sufficient to ensure that his premises fulfilled the requirements for classification as a specialist shop. As regards the opening times of his establishment, the applicant claims that in September 1977 he undertook to obtain the services of a salesman in order to extend his opening hours and that it was only following Revox's refusal to approve him that he was obliged to withdraw that undertaking. He points out in that respect that he has always been willing, and still is today, to take on a specialist assistant provided that he is given an assurance that he will be approved as a specialist retailer.

(b) Moreover, he is in a position to satisfy the requirements as to skill in advising customers and in checking, presentation and installation of Revox equipment and also after-sales service.

In that connection, the applicant claims in the first place that in its letter of 13 October 1977 (Revox's reply to a protest from Mr Schmidt regarding the refusal to approve him), Revox did not dispute Mr Schmidt's technical qualifications but only his opening hours. In the second place, he states that by contract of 15 November 1976 Sony approved him as a specialist retailer, without raising any objection regarding either his shop hours or his technical qualifications. That approval is an undeniable basis of proof in so far as the selection criteria and the technical requirements of Sony are very

close, not to say identical, to those of Revox, which moreover is not surprising since the two companies have the same legal adviser, P. Schon, Counsel for Revox in the present case. The applicant adds, finally, that his capacity to receive the equipment from the factory and to install it on customers' premises and to provide after-sales service has never been disputed by his customers, who have never complained — on the contrary they have expressed their satisfaction at the fact that he has carried out installation work at their homes outside business hours and on Saturdays, the customers themselves more often than not being absent from their homes during those periods.

(c) Finally, he has always kept at the disposal of customers a stock of Revox equipment which was representative of the Revox sales range.

For those reasons, the applicant considers that, as he satisfies all the objective conditions for approval as a specialist retailer, he has been the victim of discriminatory conduct on the part of Revox, which has thus infringed the provisions of the Treaty regarding competition.

The applicant considers that the blatant discrimination to which he has been subject is clearly apparent from an examination of how Revox applies its selection criteria with respect to other retailers. The applicant maintains that, within the same area of Wiesbaden, Revox has appointed as distributor a high-fidelity retail concern which fails to satisfy at least one condition of the dealership agreement: the condition regarding presentation of the equipment. It is a shop situated in a rear courtyard

in an outlying suburb of Wiesbaden and the premises are an old shed where the equipment is exposed in a "non-representative fashion . . . on rough wooden shelving" (cf. Annexes 14 and 15 to the rejoinder). The applicant concludes from this that Revox does not observe the criteria for the specialist trade which it has itself laid down and to which it claims, in order to justify its refusal to approve Mr Schmidt, to attach so much importance. Thus, Revox's conduct may be regarded as improper.

B — Consequently, the applicant considers that the Commission should have admitted and upheld his complaint since the business conduct of Revox, namely the unjustified refusal to allow him to become one of its specialist retailers, constitutes an infringement of Community competition law (Article 85 (1) and, possibly, Article 86 of the Treaty).

The applicant criticized the Commission for taking account, in its examination of his complaint, of the factual circumstances at the time of the complaint rather than those obtaining during the negotiations between him and Revox.

This applies in particular with regard to the opening hours of his shop and his undertaking regarding the specialist salesman. This matter, which was of decisive importance for Mr Schmidt's approval as a specialist retailer entitled to distribute Revox B Series models, was settled to the satisfaction of the parties during the second half of 1977 — the period of the negotiations but of course that was no longer the position when Mr Schmidt approached the Commission, since he was obliged to decide to terminate the employment of his

salesman following Revox's refusal to make him a party to its EEC Dealership Agreement.

The applicant considers that the Commission, in dismissing his complaint, placed considerable reliance on this point. As a result the Commission's decision, being based on an erroneous assessment of the facts of the case and an incorrect statement of the reasons on which it was based, must be declared void in so far as it reflects an infringement by the Commission of the EEC Treaty and of the implementing rules thereunder, and also a misuse of powers.

Finally, the applicant points out that he still satisfies the objective criteria imposed by Revox — with the exception of opening hours, although in that connection he is still willing to take on specialist staff as soon as he obtains an assurance that he will be approved — and that, in those circumstances, the refusal to approve him constitutes discrimination which the Commission must bring to an end "even in cases other than those where undertakings occupy a dominant position on the market within the meaning of Article 86 of the EEC Treaty".

2. *The Commission of the European Communities* considers that the applicant's claims should be rejected, contending that his application is unfounded. The Commission states as follows:

On the one hand, there has been no infringement regarding which the Commission is empowered to intervene. According to the Commission it is not in dispute that the distribution agreement used by Revox does not fall within the scope of the prohibition contained in Article 85 (1), particularly since the application of that agreement to Mr Schmidt by Revox is not discriminatory.

Moreover, even if there were an infringement of Article 85 (1), the Commission could not intervene to compel an undertaking to supply or approve a retailer.

Finally, the Commission considers that action to bring to an end an infringement committed in the past does not fall within its powers.

It follows, according to the Commission, that the application is devoid of purpose.

(a) According to the Commission, the selective distribution system applied — and notified to the Commission — by Revox does not constitute an infringement of Article 85 (1) of the Treaty.

In fact, it is apparent from the judgment of the Court in Case 26/76 ([1977] ECR 1875) that selective distribution agreements do not constitute an infringement of the provisions governing competition in the Community if the qualitative criteria adopted for the choice of resellers are objective, are laid down uniformly with regard to potential retailers and are not applied in a discriminatory fashion. In the Commission's opinion, that is the position in this case; Article 85 (1) is not therefore applicable to the case before the Court.

Moreover, the Commission observes that the version of the Revox distribution agreement produced by the applicant does not correspond to the text which has been applicable since 10 February 1978 and cannot therefore be considered by the Commission, since it has no power to bring to an end any past infringements.

On the other hand, the Commission emphasizes that, as regards the condition that the shop must be open at the usual hours, the applicant cannot seriously claim ever to have satisfied that condition, even though it is an essential feature of retail business. The Commission notes that the applicant's intention is to carry on the business of retailer as a sideline to his employment

and that he does not deny that his shop is not open at the normal times. The Commission considers however that fulfilment of the criterion regarding opening hours is an integral part of the very concept of a selective distribution system in so far as it relates to the requirements of technical qualifications and quality of presentation which are essential for providing customers with information. The Commission therefore considers that it cannot be asserted that to require fulfilment of that condition is excessive and gives rise to restrictions on competition.

In particular, the Commission points out that Mr Schmidt has never employed a specialist salesman, since the conclusion of the contract was subject to Mr Schmidt's being approved as a specialist Revox retailer. Since that condition was never fulfilled, it is incorrect to claim, as the applicant does, that he had to "dismiss" his salesman. The Commission emphasizes in that regard that the question is not whether or not the applicant is prepared to engage a salesman but one of determining whether that question was resolved when the Commission issued the contested communication. In any event, it states that the applicant is mistaken to think that Revox should approve the applicant as a retailer so that he may subsequently extend his activities in accordance with the manufacturer's requirements. Since the very principle of selective distribution is to ensure that the manufacturer is "to a considerable extent protected from the risk of non-fulfilment of the selection criteria for specialist retailers", a manufacturer cannot be required as it were to perform his part of the contract in advance by approving a retailer who does not fulfil those conditions.

The Commission also refutes two arguments put forward by the applicant in an attempt to demonstrate that Revox's application of the criteria for approval of its specialist retailers is discriminatory. The Commission states, in the first place, that the fact that the applicant was approved by Sony does not in itself imply that Revox must also approve him. In addition to the fact that the Sony contract imposes no condition regarding the opening hours of its specialist traders, the Commission emphasizes that, for there to be discrimination, it is necessary for one and the same legal person to treat two legally comparable situations differently. That is not the case here since Sony and Revox are not connected, even though the two companies have the same legal adviser. In the second place, with respect to the argument regarding the sale of Revox equipment by a retailer in the suburbs of Wiesbaden who does not comply with the conditions as to presentation laid down by Revox, the Commission, having consulted the lists of specialist Revox retailers, points out that that retailer does not appear among the specialist retailers of Revox equipment. The Commission concludes from this that the retailer must have obtained Revox products clandestinely and states that this misuse of the selective distribution system cannot be attributed to the manufacturer and cannot justify a request for approval by a retailer who does not satisfy the prescribed criteria. At most, such a finding might justify a demand by the approved resellers that the manufacturer should withdraw its approval from the resellers who supplied the non-approved retailer.

For those reasons, the Commission considers that, in the circumstances, Revox cannot be criticized for basing its

refusal to supply the applicant on discriminatory application of its criteria for specialist shops; the applicant's complaint — and consequently this application — are therefore based on the erroneous view that a manufacturer is under a legal obligation to supply a reseller even before the latter has satisfied the qualitative selection criteria laid down by the manufacturer which a reseller must meet in order to guarantee the good reputation of the product and the quality of the sales service which the reseller proposes to provide in the manufacturer's name.

The Commission concludes therefore that in the absence of any infringement of Article 85 (1) of the EEC Treaty by Revox, intervention by the Commission against Revox's system of dealership agreements would have been unlawful.

(b) The Commission then considers the possibility that Revox might have applied its criteria for restricted distribution in a discriminatory manner. It concludes that even in such an event the action cannot be successful because, in view of the very nature of the alleged infringement, the sanction could not have the effect of requiring Revox to supply the applicant.

According to the Commission, the applicant is confusing the obligation to grant approval to a reseller with the obligation to supply that reseller. The Commission recognizes that in the distribution system — which is restricted but direct — applied by Revox, those two factors — approval and supply — are merged. Nevertheless, the legal distinction is important for any analysis of the nature of the obligations imposed by Article 85 (1).

According to the Commission, it is appropriate in the first place to bear in mind the fact that, in a selective distribution system using specialist resellers, discriminatory conduct of such a nature as to render that distribution system contrary to Article 85 (1) of the Treaty lies not in the refusal to supply but in the refusal to grant approval. In the second place, the Commission emphasizes that, in its opinion, any infringement of Article 85 (1) deriving from such discrimination lies not in the discrimination against the non-approved retailer but in the obligation imposed by the manufacturer on approved retailers to comply with the contract binding them to the manufacturer by not supplying a retailer who in fact fulfils all the conditions for approval. On the one hand the fact of not approving a reseller does not restrict his competitive capacity. On the other, it is not, according to the Commission, the purpose of Article 85 (1) to lay down a general principle prohibiting individual discrimination and that article cannot therefore be interpreted as entitling a retailer to be supplied or as imposing on a manufacturer an obligation to enter into an agreement. Accordingly a producer is not by virtue of Article 85 subject either to a legal obligation to approve a reseller or, having approved him, to a legal obligation not to treat him in a discriminatory manner. However, the Commission considers that if, in the latter case, the manufacturer discriminates between approved resellers he must admit that his contracts are caught by Article 85 (1).

According to the Commission, mere discrimination constitutes nothing more than a condition for the application of Article 85 (1). That provision will not become applicable unless the discrimination leads to a restriction of competition. The Commission considers that a refusal to supply an approved reseller does not in itself constitute a

restriction of competition: in fact an approved reseller can always approach another approved reseller in order to obtain supplies of products sold by the manufacturer. It is therefore the refusal to grant approval — if it is proved that it derives from discriminatory application of the criteria for approval — which may constitute an infringement of Article 85 (1). Nevertheless, in the Commission's view, the infringement does not consist in the refusal to approve the retailer — who, although not approved, retains his freedom of action — but in the fact that the other approved resellers have been placed under an obligation not to supply the retailer discriminated against.

In fact, the Commission considers that the prohibition contained in Article 85 (1) is intended to guarantee the freedom of action of undertakings against restrictions resulting from coordination of their conduct, whether by contract or otherwise. It is therefore necessary, if Article 85 (1) is to be applicable, for an agreement restricting competition to have been entered into or implemented. In the Commission's view, that condition is not satisfied in the case of discrimination against a retailer whom the manufacturer refuses to approve, whilst it is satisfied in the event of a manufacturer's compelling approved resellers to comply with the conditions of the contract granting them approval so as to deny the non-approved retailer, against whom the discrimination is directed, access to the manufacturer's products.

In such a case the Commission considers that its intervention *vis-à-vis* Revox could not satisfy the applicant. In fact, if it were established that Revox's conditions for approval were discriminatory, the Commission's action could only have the effect of abolishing the

distribution system set up by Revox. However, according to the Commission, the applicant is not claiming the abolition of that system but, on the contrary, its continuance and his right to participate in it.

In any event, the Commission reaffirms that there is no legal obligation under Article 85 (1) for a manufacturer to approve a reseller even if the latter satisfies its selection criteria. The same applies, according to the Commission, in cases where the selective distribution system is incompletely applied. As has been stated above, failure to approve a seller who satisfies the conditions may, in certain circumstances, constitute an infringement of Article 85 (1), giving rise to an order that the distribution system be discontinued but not to an obligation to approve the seller discriminated against. Likewise, in the event of the distribution system's being "incompletely applied", that is to say if certain resellers infringe their obligations by supplying other resellers who are not approved, the other approved resellers are entitled to regard themselves as released from their commitments to the manufacturer who tolerates such infringements. Such a sequence of events, in the Commission's view, leads to the collapse of the distribution system but not to the approval of a reseller from whom the manufacturer has withheld approval.

The Commission goes on to say that only if Revox abused a dominant position within the meaning of Article 86 of the Treaty would the Commission be able to adopt measures compelling Revox to accord equal treatment to the traders in the market in question. The Commission states that, even in the

opinion of the applicant himself, Revox cannot be accused of such conduct and consequently Article 86 is not applicable in this case.

For that reason the Commission concludes that the problem raised by the applicant — namely whether resellers bound by an agreement may, in reliance upon a selective distribution agreement, claim that the manufacturer must apply the criteria for specialist shops in accordance with the provisions of the agreement and consequently approve a trader who meets those criteria — is a problem falling exclusively within the purview of civil law and a solution to it may be sought only before the national courts.

(c) Finally, the Commission emphasizes that it is under no duty to intervene in order to bring to an end past infringements.

It observes that even if it were admitted that Revox had been guilty of an infringement of Article 85 (1) by refusing to approve the applicant as a specialist reseller, that infringement was confined to a very limited period, namely the second half of 1977. It was only during that period that the applicant could have claimed to satisfy the conditions required for approval, in particular that of keeping his shop open throughout the day owing to the recruitment of a salesman. Since in any event the alleged infringement has ceased, the Commission can only note it and possibly impose a penalty, perhaps in the form of a fine, but it cannot, by definition, bring it to an end.

For those reasons, the Commission considers that the applicant's action must fail on this point too.

3. *Revox*, intervening in support of the Commission, states on the one hand that the applicant does not satisfy the

objective qualitative selection criteria for a specialist Revox dealer and, on the other hand, that its selective distribution system, as defined in the EEC Dealership Agreement, infringes neither Article 85 (1) nor Article 86 of the Treaty, and finally that it considers the action unfounded.

A — Revox states that the applicant is incapable of satisfying the conditions for approval as a specialist Revox reseller.

(a) Revox states that the smallness of the premises and the restricted and disparate nature of the of the equipment offered for sale by Mr Schmidt prevent him from satisfying the conditions regarding presentation and promotion of Revox equipment. In that regard, Revox states that, since customers wish to be able to compare the products available on the market when making a purchase, it was necessary for the applicant to display for sale a representative selection of electronic leisure products and the conditions under which they are presented must be good. In this instance that was not the case and for that reason Revox considers that Mr Schmidt's shop cannot be regarded as a specialist retail shop, in view of the fact that the applicant "displayed absolutely no leisure electronic equipment with the exception of a few individual items and gramophone records".

Revox takes the opportunity to emphasize that it has always refused to allow its equipment to be distributed in premises where competing products are not marketed. In order to allow their customers a choice, both Revox and its parent company Revox International have always followed a policy of not supplying resellers who wish to specialize exclusively in Revox products. It is therefore incorrect to maintain, as the applicant did previously, that Revox had offered Mr Schmidt an exclusive dealership.

(b) As regards to opening of the applicant's shop during normal business hours, Revox states that it "was and continues to be undisputed that the applicant's shop is not open during normal business hours" and that "consumers who go there before 3.45 p.m. from Monday to Friday find the shop closed".

(c) Finally, Revox expresses serious reservations regarding the technical capacity of the applicant to carry out a check of the equipment from the factory before it is put on sale, to provide specialized advice to customers and to install and adjust the equipment sold on customers' premises. It emphasizes in that regard that Mr Schmidt has received no relevant specialist training, that is to say neither training as a radio and television technician nor training as a retailer in the audiovisual sector, and that doubts may be entertained as to whether his employment as a technical draftsman or designer has enabled him to acquire the necessary skills in that field. Finally, it states that because the applicant does not employ any outside staff and is himself an employee during the day, he is incapable of personally ensuring during normal hours delivery, installation and after-sales servicing of the equipment which he markets on customers' premises (adjustment of cables, aerials and so forth). Capability of this kind is important, from a commercial standpoint, in view of the fact that customers wish those operations to be carried out during the day and not late in the evening or on Saturdays or Sundays.

B — Revox states that it is not in breach of Article 85 (1) or of Article 86 of the Treaty as a result of its implementation of its dealership agreement system.

(a) The intervener states that it applies its system of dealership agreements objectively and without discrimination and its only effect on trade is to allow the distribution and resale of its equipment only through approved resellers or between approved resellers. This system does not therefore affect competition within the meaning of Article 85 (1) of the Treaty and it cannot be maintained that Revox's failure to enter into an agreement with the applicant by reason of factual circumstances peculiar to the case is such as to hinder trade in a manner prejudicial to attainment of the objective of a single market between States.

(b) Likewise, Revox considers that it cannot be accused of abusing a dominant position by refusing to approve the applicant.

It points out moreover that the applicant himself acknowledges that Revox does not occupy such a position in the market. Revox in fact sells only one tape-recorder in a market of 45 models and its "minimal market share" is less than 1% in the case of turntables, amplifiers, radio receivers and loudspeakers.

There is therefore no abuse of a dominant position arising from the refusal to approve and supply the applicant. In that regard, Revox points out that, in its opinion, an undertaking occupying a dominant position does not necessarily abuse that position when, without discrimination, it applies a selective distribution system which is technically justified. Revox adds that it is bound by contract to some 500 specialized resellers and that it cannot be regarded as abusing a dominant position

if by not approving a retailer who does not satisfy the qualitative criteria of the contract it refuses to infringe the terms thereof.

C — As regards the question whether the application is well founded, Revox supports the contentions of the Commission and states that the Commission is right in its assertion that it has no authority to require Revox to supply the applicant.

It states that the applicant cannot demonstrate any right to be approved and that, even if he were approved, he could not insist on being supplied by Revox directly, if only because of his insufficient credit cover. In such circumstances, it would be for Mr Schmidt, if he were approved, to seek a trader among the other approved resellers who was prepared to resell equipment to him on the basis of a private contract.

In general terms and in conclusion, Revox states that it does not wish Mr Schmidt to set up, against his wishes, a retail business marketing its products in circumstances which do not satisfy the qualitative criteria which it has imposed upon itself to ensure the good reputation of its products.

#### IV — Oral procedure

At the sitting on 16 March 1983 oral argument was presented by the applicant, represented by Wolfgang Bache, Rechtsanwalt, the Commission of the European Communities, represented by Norbert Koch, acting as Agent, assisted by Barbara Rapp-Jung, Rechtsanwältin, and Willi Studer Revox GmbH, intervening, represented by Peter Schon, Rechtsanwalt.

The Advocate General delivered her opinion at the sitting on 28 June 1983.

## Decision

- 1 By application lodged at the Court Registry on 13 July 1981, Oswald Schmidt, trading as Demo-Studio Schmidt, Wiesbaden, Federal Republic of Germany, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration of the nullity of the measure dated 11 May 1981 concerning a proceeding for the application of Articles 85 (1) and 86 of the EEC Treaty, in which the Commission, expressing its "final decision", notified the applicant that it considered that there were no grounds for upholding his complaint seeking a declaration that Willi Studer Revox GmbH (hereinafter referred to as "Revox") had infringed the competition rules laid down in Articles 85 and 86 of the EEC Treaty by refusing to approve him as a specialist reseller or to supply him with its products.

- 2 Revox distributes within Community territory the audiovisual products of the company Revox International whose registered office is at Regensdorf bei Zürich (Swiss Confederation). It distributes so-called "A Series" Revox products for the delivery of which no special conditions are applied and also so-called "B Series" Revox products; the latter are distributed under a selective distribution system whereby distributors of Revox products are selected according to objective qualitative criteria such as the quality of presentation, the accessibility of the premises or the sales department during normal business hours, the competence of the sales staff and the capacity to carry out pre-sales checks, to advise customers and to provide after-sales service. This distribution system is embodied in a contract known as the "EEC Dealership Agreement".
  
- 3 The applicant, who is employed as a design engineer in an engineering factory, decided during 1975 to set up, in addition to his employment, a business in the leisure electronics sector. For that purpose he notified Revox of his plan and opened a shop in Wiesbaden under the name "Demo-Studio Schmidt", which was open to the public on Saturday morning and on the other working days from 4 to 6 p.m. He was then supplied with Revox equipment which was not subject to selective distribution conditions. However, it soon became apparent to Mr Schmidt that he could not cover his business expenses except by selling B Series Revox products, which were subject to selective distribution conditions.
  
- 4 After numerous negotiations with Revox, the applicant was informed by Revox on 19 September 1977 that he would not be allowed to accede to the EEC Dealership Agreement and consequently he would be unable to deal in B Series products; that decision was confirmed to him, on the last occasion, by letter of 27 December 1979. The reason for the refusals was stated to be the fact that Demo-Studio Schmidt did not satisfy the qualitative criteria imposed by Revox on its distributors, in particular the condition that the sales premises must be open during normal business hours.
  
- 5 In those circumstances the applicant lodged the aforementioned complaint with the Commission on 7 June 1980, expressly requesting that Revox should be compelled to supply him with B Series products.

- 6 By letter of 18 September 1980, the Commission, acting in accordance with Article 6 of Regulation No 99/63 of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963-1964, p. 47), notified the applicant of its intention, at that stage of its inquiries, not to follow up his complaint and asked him to submit his comments on that assessment of the situation within a period of one month.
  
- 7 By letter of 12 October 1980 the applicant confirmed that he adhered to his complaint and stated that he did not dispute the propriety of Revox's EEC Dealership Agreement but sought, on the contrary, to be made a party thereto.
  
- 8 By a letter of 11 May 1981 stating the reasons on which it was based, the Commission notified the applicant of its "definitive decision" on the matter. The essential reasons on which that final decision was based were, first, that in the Commission's opinion there was no basis for concluding that, by refusing to supply the applicant, Revox had abused a dominant position within the meaning of Article 86 of the EEC Treaty and, secondly, that Mr Schmidt's shop did not satisfy the condition imposed by the selective distribution system applied by Revox that it had to be open at the usual times and that consequently Revox's attitude towards him did not constitute an infringement of Article 85 (1) of the Treaty.
  
- 9 In those circumstances the applicant brought this action before the Court seeking on the one hand that the Commission's communication of 11 May 1981 should be declared void and, on the other, that the Commission should be required to give a fresh decision on the complaint lodged with it, taking account of this judgment.

### Admissibility

- 10 According to the wording of Article 3 of Regulation No. 17, which concerns the termination of infringements:

"(1) Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

(2) Those entitled to make application are:

...

(b) natural or legal persons who claim a legitimate interest”.

- 11 Although the formal complaint lodged by the applicant on 7 June 1980 sought an order that Revox should supply him immediately, it must be interpreted — as indeed it was interpreted by the Commission during the phase prior to these proceedings and as is apparent from an analysis of the pleadings submitted to the Court — as a request for the Commission to establish an infringement of the provisions of Articles 85 and 86 of the Treaty, in accordance with Article 3 (1) and (2) (b) of Regulation No 17 and, by decision, to require Revox to bring the infringement to an end.
- 12 The Commission does not dispute the fact that its decision on the applicant’s complaint does constitute a measure which the Court may be called upon to declare void, since a “notice” or “communication” of that kind is definitive.
- 13 However, the Commission states that it leaves it to the Court to assess to what extent the applicant really has an interest in taking legal proceedings, regard being had in particular to the fact that, in the Commission’s opinion, the powers vested in it by Article 85 do not include the power to compel a company to approve a dealer as a specialized distributor or to supply him with products.
- 14 As the Court held in its judgment of 25 October 1977 in Case 26/76 (*Metro v Commission* [1977] ECR 1875) “It is in the interests of the satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3 (2) (b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests”.

- 15 The Court considers that the refusal to grant Mr Schmidt a dealership for Revox products, which was regarded by him as constituting an infringement of Articles 85 and 86 of the Treaty, was capable of affecting his legitimate interests. Moreover, at the Court held in its judgment of 6 March 1974 (Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA* [1974] ECR 223) and in its order of 17 January 1980 (Case 792/79 *R. Camera Care Limited v Commission* [1980] ECR 119), where the Commission has found an attitude on the part of a producer which constitutes an infringement of Articles 85 and 86, it has the power to order the undertaking in question to take any measures necessary to bring the infringement to an end.
- 16 The application must therefore be regarded as admissible.

### Substance

- 17 The applicant does not deny that Revox's selective distribution system is compatible with Community law. On the other hand, he claims that the system has been applied to him in a discriminatory manner and that Revox's conduct constitutes an infringement of Article 85 (1) and possibly of Article 86 of the Treaty. In support of that submission, he maintains essentially that he satisfied all the conditions laid down in the Revox EEC Dealership Agreement, in particular the requirement that the shop be open during normal business hours.
- 18 In reply, the Commission states in the first place that Revox has not applied its selective distribution system in a discriminatory manner to the detriment of Mr Schmidt since, in particular, Mr Schmidt has never satisfied the essential condition regarding opening hours. In this case therefore there is no infringement of Article 85 (1) for which it could have imposed a penalty. Moreover, the Commission emphasizes that only if Revox abused a dominant position within the meaning of Article 86 of the Treaty would it have the power to take decisions compelling Revox to accord equal treatment to traders in the market in question. It points out, however, that Revox cannot be stated to have committed any infringement of Article 86 of the Treaty.

- 19 As regards the alleged infringement of the competition rules of the Treaty, the Court considers that the Commission, having received the applicant's complaint, was under a duty to examine the facts put forward by the applicant in order to decide whether Revox's application of its selective distribution system was capable of distorting competition within the common market and of affecting trade between Member States.
- 20 As regards the alleged infringement of Article 85 (1) of the Treaty, it appears that the finding made by the Commission in the contested decision, to the effect that Mr Schmidt's shop did not satisfy the condition of Revox's EEC Dealership Agreement whereby the shop must be open during normal business hours, is not based on a materially incorrect appreciation of the facts and is not vitiated by any manifest error of assessment. Moreover, nothing in the documents before the Court allows the inference that, by refusing to enter into a contract with Mr Schmidt until he had satisfied the conditions of the EEC Dealership Agreement, Revox had any other purpose than the legitimate one of ensuring that Demo-Studio Schmidt satisfied the qualitative criteria imposed by Revox on all its distributors. The Commission was thus entitled to conclude that Mr Schmidt had not been the victim of any discriminatory application of Revox's selective distribution system such as to constitute an infringement of Article 85 (1) of the Treaty.
- 21 As regards the alleged infringement of Article 86 of the Treaty, the Court considers that the documents before it show that the Commission correctly assessed the facts of the case in evaluating Revox's share of the market in question as 1% and deducing therefrom that that share cannot be regarded as constituting a dominant position. It was therefore right, particularly since no discriminatory application of the selective distribution system had been found to exist, for the Commission to conclude that there was no basis for the view that Revox was abusing a dominant position within the common market or in a substantial part thereof within the meaning of Article 86 of the Treaty.
- 22 It follows from the foregoing that Mr Schmidt's complaint contains no factor capable of supporting the view that the application to the applicant by Revox

of the rules of its distribution system infringes the competition rules of the Community or that the Commission has failed in the duty of vigilance imposed upon it by the Treaty and by Regulation No 17. The action must therefore be dismissed.

### Costs

- 23 Pursuant to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in his submissions, he must be ordered to pay the costs, including those of the party intervening in support of the defendant.

On those grounds

### THE COURT

hereby:

- 1. Dismisses the action;**
- 2. Orders the applicant to pay the costs, including those of the intervener.**

Mertens de Wilmars	Koopmans	Bahlmann	
Galmot	Pescatore	Mackenzie Stuart	O'Keeffe
Bosco	Due	Everling	Kakouris

Delivered in open court in Luxembourg on 11 October 1983.

P. Heim  
Registrar

J. Mertens de Wilmars  
President