

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 10 December 1984

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.299 — Grohe's distribution system)

(Only the German text is authentic)

(85/44/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty<sup>(1)</sup>, as last amended by the Act of Accession of Greece, and in particular Articles 2, 3 and 6 thereof,

Having regard to the notification to the Commission on 12 February 1981 by Friedrich Grohe Armaturenfabrik GmbH & Co., Hemer, Federal Republic of Germany, pursuant to Article 4 of Regulation No 17, of an EEC-wide dealership agreement for which it sought negative clearance or an exemption under Article 85 (3) of the Treaty,

Having decided on 6 July 1983 to open proceedings in the case,

Having given the undertaking concerned the opportunity to reply to the objections raised by the Commission pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17<sup>(2)</sup>,

Having heard, pursuant to Article 19 (2) of Regulation No 17 and Commission Regulation No 99/63/EEC, the views of the Bundesverband des Sanitär-

Fachhandels eV, Bonn, the Zentralverband Sanitär, Heizung, Klima, St Augustin, and the Bundesverband der Selbstbedienungs-Warenhäuser eV, Bonn,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

## I. THE FACTS

## A. Friedrich Grohe

- (1) Friedrich Grohe Armaturenfabrik GmbH & Co. (Grohe), which has its registered office in Hemer, Federal Republic of Germany, manufactures fittings for plumbing systems. The Grohe range of plumbing fittings is very wide and Grohe distributes them in all EEC countries through a network of wholesalers specializing in plumbing fittings and sanitary ware. In 1983 Grohe had a turnover within the EEC of ... million ECU<sup>(3)</sup>. Grohe is a well-known and leading brand of plumbing fittings and the firm supplies the majority of plumbing and sanitary ware wholesalers in the EEC.
- (2) According to its own estimates, Grohe's share (by value) of the plumbing fittings market for the year 1983 was ... in the Federal Republic of

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

<sup>(3)</sup> Pursuant to Article 21 (2) of Regulation No 17, business secrets are not published in the Official Journal.

Germany, ... in France, ... in Italy, ... in the United Kingdom, ... in the Netherlands, ... in Belgium and ... in Denmark. The bulk of Grohe's sales are in three product lines: two-hole mixers, single-lever mixers and thermostats. These three lines account for by far the biggest part of its plumbing fitting sales.

#### B. The Grohe dealership agreement of 29 December 1980

- (3) On 12 February 1981 Grohe notified to the Commission a standard dealership agreement which it proposed to sign with specialist plumbing and sanitary ware wholesalers throughout the common market. Grohe began to introduce the new agreement at the end of 1980. On 12 June 1981 the Bundesverband der Selbstbedienungs-Warenhäuser eV (BdSW) complained to the Commission about the introduction of the Grohe dealership agreement.

The main features of the Grohe dealership agreement are as follows:

- (a) Grohe only supplies its plumbing fittings to specialist plumbing and sanitary ware wholesalers who satisfy the specialist wholesaler criteria laid down in the Grohe dealership agreement and who sign that agreement. The wholesaler must:

- (i) specialize in the sale of plumbing fittings and sanitary ware and carry the full range customarily sold by plumbing and sanitary ware wholesalers (clause 3.1);
- (ii) display a representative range of Grohe products in suitable sales premises (clause 3.2);
- (iii) employ specially trained sales staff with the necessary specialist knowledge to give competent advice and service to customers. A fairly long experience in the trade is deemed evidence of adequate training. Grohe itself provides training courses for sales staff and the certificate from such a course is also regarded as evidence of the necessary professional qualifications (clause 3.3);
- (iv) keep at all times appropriate stocks of the Grohe range so as to be able to fulfil normal orders from plumbing contractors out of stock. Besides stocking complete Grohe products the

wholesaler must also keep sufficient stocks of spare parts and accessories (clause 3.4). The wholesaler must stock the full range of Grohe plumbing fittings so as to be able to guarantee supplies of the full range to plumbing contractors (preamble, point 3);

- (v) have adequate transport facilities to fulfil customer's orders promptly (clause 3.5);
  - (vi) provide the after-sales service customarily provided by specialist wholesalers, in particular providing spare parts, advice and guidance to customers as and when required and handling complaints (clause 3.6);
  - (vii) make efforts to boost sales of Grohe products by carrying out appropriate advertising for them in the sale and display of plumbing fittings, distributing Grohe catalogues, taking part in Grohe sales promotion campaigns and engaging in other forms of advertising customary in the trade, particularly when new products are being introduced (clause 3.7).
- (b) The wholesaler may supply Grohe plumbing fittings within the EEC only to the following classes of customer (clause 4.2):
- (i) plumbing contractors, i.e. firms 'which meet the statutory, administrative or technical requirements for installing plumbing systems under the applicable national law'. Plumbing contractors may be supplied only in such quantities as they normally require in that business;
  - (ii) other plumbing and sanitary ware wholesalers in the same or another country who have signed the Grohe dealership agreement. When selling to other wholesalers the wholesaler must make sure that they are members of the Grohe network by asking to see their dealership agreement or checking with Grohe;
  - (iii) specialized industrial firms for their own installation and — though only in exceptional cases, since Grohe normally supplies such customers direct — property development companies, building cooperatives, general building contractors, prefabricated housing

manufacturers and public bodies or private individuals or entities having building work done for them, in so far as the fittings will be installed by or under the guidance of licensed plumbers.

- (c) The wholesalers are obliged to report immediately to Grohe any breaches of the dealership agreement that may come to their notice and generally to assist Grohe in every way possible in policing the distribution system. They must keep records of all goods entering and leaving their possession and note the serial numbers of goods they supply to fellow wholesalers (clauses 7.1 and 7.2).
- (4) On 19 July 1983 the Commission sent Grohe a statement of objections in which it questioned whether the terms of the standard dealership agreement outlined in paragraph 3 above were compatible with Article 85 (1) of the EEC Treaty. It objected in particular to the criteria for admission to the Grohe wholesale network and to the restriction of resale only to plumbing contractors.
- (5) Regarding the selection criteria for wholesalers, Grohe maintained that the criteria contained in its agreement reflected the particular distribution functions performed by plumbing and sanitary ware wholesalers. The wholesalers had to assume special distribution functions such as stockholding, providing advice and guidance to customers as and when required, handling complaints, supplying spare parts and maintaining a showroom. Plumbing contractors generally did not keep complete stocks or have a showroom. They often placed orders from individual customers with the wholesaler. Grohe also observed that the requirement for a wholesaler to be a specialist in plumbing fittings and sanitary ware was satisfied if the wholesaler had a department specializing in the sale of such products.
- (6) In defence of the restriction of resale to plumbing contractors, Grohe argued that plumbing fittings were semi-finished products which because of their technical complexity and the need for them to be installed required competent advice and guidance and professional standards of workmanship in their installation.

Grohe also submitted that consumers were in any case obliged under the German Water Supply Regulations (AVB Wasser V) of 20 June 1980 to have their water supply systems installed and any major alterations to them carried out only by the water distribution company or a plumbing contractor registered with the water distribution company. There were similar regulations, Grohe said, in other EEC countries. By reserving sale and installation for skilled craftsmen, the Grohe dealership agreement was protecting the consumer from risk.

- (7) Grohe further claimed that its dealership agreement was necessary to prevent damage to its reputation by the misuse of Grohe products as loss-leaders by department stores. Its trade mark could also be harmed, it said, by installation by DIY enthusiasts, who tended to blame any faults on the manufacturer rather than a faulty installation.
- (8) Grohe also argued that if it did not restrict retailing to plumbing contractors it would lose a lot of their custom and suffer a considerable drop in sales revenue, which might even jeopardize its future. Since 1979 department stores had been selling Grohe products extensively at rock-bottom prices, which had produced strong reactions from the plumbers' guilds and led to a fall in its sales revenue. Grohe maintained that introduction of its dealership agreement was necessary to avoid possible boycotts by plumbing contractors. Its dealership agreement was also a reaction to the introduction of a selective distribution system by Hansa Metallwerke AG in the Federal Republic of Germany. Hansa was one of its competitors on the German market.
- (9) Grohe further submitted that its dealership agreement would help to maintain the competitiveness of the traditional plumbing trade. If plumbing contractors could not earn a minimum profit margin on the sale of fittings, they would be forced to put up the rates they charged for plumbing work to levels many consumers would be unable to afford. This would encourage moonlighting and threaten the survival of the traditional plumbing trade. In the Metro case, Grohe submitted, the European Court of Justice had expressly recognized it as a legitimate concern of a manufacturer to preserve traditional distribution channels.

(10) Finally, Grohe denied that its dealership agreement would appreciably affect trade between Member States. It said that in the Federal Republic of Germany only 2 % of the wholesalers it was supplying at the time the dealership agreement was introduced had not signed the agreement and were no longer supplied by the company. At the retail level its products were sold by 15 400 plumbing contractors, whereas there were only about 300 to 400 DIY stores that were no longer supplied with its products. Introduction of the Grohe dealership agreement had also caused department stores to go over increasingly to buying plumbing fittings from smaller manufacturers and importers, which had actually intensified competition on the plumbing fittings market.

(11) The VSI, representing the wholesalers, and the ZVSHK, representing the plumbing contractors, supported the position taken by Grohe. They referred *inter alia* to the regulations governing skilled trades, the laws against moonlighting and unfair competition and public health and building standards regulations. They submitted several memoranda and reports supporting Grohe's position. However, Grohe and the two associations did not deny that other makes of plumbing fittings, even high value-added and modern ones like single-lever mixers and thermostats, were sold in department stores, ironmongers' shops and other types of retail outlet and that before the introduction of the Grohe dealership agreement even Grohe fittings had been widely sold from such outlets. Nor did they deny that plumbing contractors also sell fittings to private householders to install themselves.

(12) The Bundesverband der Selbstbedienungs-Warenhäuser (BdSW), which had lodged a complaint against the Grohe dealership agreement, stated that plumbing wholesalers had been supplying the newer forms of retail outlet for years and there had never before been any restriction on how the products were distributed. The plumbing contractors now appeared to have got the major manufacturers to introduce restrictive distribution systems for their products with the aim of completely excluding the low-price retailers. The Grohe distribution system would severely restrict the retailing of plumbing fittings by retailers who were not also plumbing contractors. Householders buying plumbing fittings to install themselves did not usually need individual advice and guidance because the shop displays, the extensive standardization of threads and connections and the fitting instruc-

tions enclosed with the goods enabled non-experts to fit them themselves. Grohe's claim that its distribution system helped avoid the hazards which could arise for public water supplies was not supported by a single example of an accident. The danger, the BdSW said, was rather when old fittings were not replaced early enough. In any case, accident prevention was a matter for the public authorities, which had already introduced regulations in this area, and not for the manufacturers of plumbing fittings.

## II. LEGAL ASSESSMENT

### A. Article 85 (1)

(13) The Grohe dealership agreement establishes a selective distribution system which has as its **object and effect** restrictions of competition within the common market which may appreciably affect trade between Member States.

(14) The Court of Justice has held (see judgments in cases 26/76 Metro [1977] ECR 1875, 31/80 L'Oréal [1980] ECR 3775 and 126/80 Salonia [1981] ECR 1563) that selective distribution systems constitute an aspect of competition which accords with Article 85 (1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (so-called 'qualitative selective distribution system'). With regard to the qualitative criteria, the Court stated that it was necessary to consider whether the characteristics of the product in question necessitated a selective distribution system in order to preserve its quality and ensure its proper use and whether those objectives were not already satisfied by national rules governing admission to the resale trade or the conditions of sale of the product. Finally, inquiry should be made as to whether the criteria laid down did not exceed the requirements of a selective distribution system based on qualitative requirements.

(15) **Since it is doubtful whether plumbing fittings can be considered as technically advanced products and since wholesalers generally do not sell directly to final consumers but to retailers, it is questionable, at least at wholesaler level, whether the characteristics of the products necessitate a selective distribution system in order to preserve their quality and ensure their proper use.** It is thus doubtful whether the

purely qualitative criteria which Grohe imposes in its dealership agreement with wholesalers are compatible with Article 85 (1) of the EEC Treaty. These criteria concern the requirements that the wholesalers should be specialists in the sale of plumbing fittings and sanitary ware or have a department specializing in the sale of such products and should carry the whole range customarily sold by specialized wholesalers (clause 3.1), that they should display Grohe products in suitable sales premises (clause (clause 3.2), employ trained sales staff with the necessary specialist knowledge to give competent advice to customers (clause 3.3), have adequate transport facilities to fulfil customers' orders promptly (clause 3.5) and provide the after-sales service customarily provided by specialist wholesalers (clause 3.6).

It is also doubtful whether the obligations in terms of sales effort, namely the obligation to keep at all times sufficient stocks of the whole range of Grohe products (preamble and clause 3.4) and the obligation to make efforts to boost sales of Grohe products by appropriate advertising (clause 3.7), are compatible with Article 85 (1). The stocking requirement, at least in so far as it obliges wholesalers to stock the whole range of Grohe products, can mean that wholesalers have to make a particular effort to promote Grohe products and are correspondingly restricted in their dealings with other manufacturers of plumbing fittings. A proliferation of such comprehensive stocking obligations is also relevant in this context. The same applies to the obligation to make efforts to boost sales of Grohe products by appropriate advertising, in that such an obligation is likely to restrict the freedom of action of Grohe wholesalers.

It is unnecessary, however, to examine in detail whether in the present case the above-mentioned obligations fall within Article 85 (1), since the Grohe dealership agreement contains in any event an important restriction on resale which does fall within Article 85 (1) and cannot be exempted under Article 85 (3) (see paragraphs 16 and 20 to 22 below). The Grohe dealership agreement is principally based on exclusive supplies to plumbing contractors.

- (16) The obligation upon wholesalers to supply Grohe plumbing fittings only to plumbing contractors is a restriction of competition falling within Article 85 (1). It prevents the wholesalers supplying the fittings to retailers which are not plumbing contractors. Moreover, they may supply the fittings to plumbing contractors only for use in their own contracting business and

only in such quantities as they normally require in that business. At the oral hearing Grohe stated that this restriction on the quantities which could be supplied to plumbing contractors was a back-up measure to prevent the plumbing contractors themselves supplying retailers who were not plumbing contractors.

These restrictions on resale have the effect of excluding any retailer which is not a plumbing contractor from buying and selling Grohe plumbing fittings anywhere in the common market. It affects all retailers which are not also contractors, be they traditional retailers such as ironmongers' shops or modern types of outlet for plumbing fittings such as department stores, with or without a specialized plumbing and sanitary ware department. These restrictions on resale also exclude from the network wholesalers which, though meeting the selection criteria, are not prepared to undertake not to supply Grohe products to retailers that are not plumbing contractors. Such wholesalers are no longer supplied by Grohe. The restriction also inhibits wholesalers which join the network in their competitive behaviour by preventing them satisfying demand from retail outlets which are not plumbing contractors, in particular department stores.

- (17) The obligation upon wholesalers to check before supplying another wholesaler that it is a member of the network and generally to assist Grohe in policing the distribution system (by keeping records of goods entering and leaving their possession and noting serial numbers) is a restriction of competition to the extent that this obligation serves to support the ban on resale to retail outlets other than plumbing contractors (see *Metro* judgment, ground 27).
- (18) As the notified Grohe dealership agreement applies throughout the common market (see paragraph 3), it is inherently likely to affect trade between Member States. Inter-State trade is in particular likely to be affected because all the wholesalers and retailers which are barred from selling Grohe plumbing fittings will be unable to export these products to other Member States. As regards the appreciability of the restrictions and their impact on inter-State trade, the exclusion of all wholesalers who refuse to supply the goods only to plumbing contractors and the blanket exclusion of retail outlets other than plumbing contractors are by their very nature likely appreciably to affect inter-State trade. This is confirmed by the important market shares of Grohe in almost all EEC countries (see paragraph 2). Grohe's claim that only 2 % of the German wholesalers



previously supplied by it have not signed the dealership agreement and that the bulk of its sales are made through plumbing contractors anyway does not prove that the restrictions of competition contained in the dealership agreement cannot have an appreciable effect on inter-State trade. Though the percentage of wholesalers and retailers not supplied in the Federal Republic of Germany may be small, over the EEC as a whole the numbers of distributors barred from the network is likely to be considerable. The argument that introduction of the Grohe dealership agreement has caused department stores to buy plumbing fittings increasingly from smaller manufacturers and importers does not alter the fact that the agreement contains serious restrictions of competition which may appreciably affect inter-State trade.

#### B. Article 85 (3)

- (19) The Grohe dealership agreement does not fulfil the conditions of Article 85 (3).
- (20) The restriction of resale to plumbing contractors does not fulfil the conditions of Article 85 (3). This is a serious restriction of competition imposed on wholesalers, which bars all retailers which are not themselves plumbing contractors from the distribution of Grohe plumbing fittings. The disadvantages of this restriction heavily outweigh any improvement in distribution which might arise from sale through plumbing contractors.

The sale and installation of plumbing fittings are two separate functions which can be, and for many years have been, performed by different persons. Plumbing fittings of other makes are sold in retail outlets such as ironmongers' shops, DIY stores and department stores. Until 1980 Grohe plumbing fittings, too, were sold without dealer selection or resale restrictions. They were sold extensively from department stores, for example. Plumbing contractors also sell plumbing fittings to private householders to install themselves.

Even assuming that there was a need for expert advice and guidance to be provided when

selling plumbing fittings to final consumers, such a need would not mean that plumbing fittings could only be sold by plumbing contractors. It is not necessary to be a trained plumber to sell plumbing fittings. The advice and guidance at the point of sale can be provided by specially trained sales staff, and such staff can also be employed in other retail outlets. There is nothing to prevent retail outlets which do not offer plumbing contracting services from employing trained sales staff to sell plumbing fittings. The Grohe selective distribution system, however, simply excludes all retailers other than plumbing contractors from the distribution of Grohe fittings. Even assuming that plumbers provide better customer advice when selling plumbing fittings — which has not been demonstrated — this advantage is not sufficient to outweigh the disadvantages associated with the blanket exclusion of all non-plumbers.

- (21) A restriction of resale to plumbing contractors is certainly not indispensable for meeting the alleged requirement for advice and guidance in the sale of plumbing fittings, since the sale and installation of plumbing fittings are two separate functions. The advice and guidance in the sale of plumbing fittings, if such advice and guidance are at all necessary, can be provided by specially trained sales staff, which can also be employed in other retail outlets.
- (22) The restriction of supply to plumbing contractors to the contractor's requirements for his own plumbing contracting business and to such quantities as they normally require in that business (see paragraph 16) is, as Grohe has stated, solely designed to prevent plumbing contractors supplying retail outlets other than plumbing contractors. This restriction therefore merely underpins the restriction of resale to plumbing contractors and has the same status in law. The same applies to the obligation of wholesalers to assist Grohe in policing the selective distribution system (see paragraph 17).
- (23) Grohe, the VSI and the ZVSHK have referred to the fact that under the German Water Supply Regulations and other statutory provisions consumers are obliged to have their water supply systems installed and any major altera-

tions to them carried out only by licensed plumbing contractors. They said similar regulations existed in other EEC countries (see paragraph 6).

As far as the German Water Supply Regulations are concerned, it should be noted that these regulations do not prevent the sale of plumbing fittings by persons who are not plumbing contractors. Nor do these regulations oblige the manufacturers of plumbing fittings to ensure that their fittings are installed only by plumbing contractors. They merely require the consumer to have certain parts of his plumbing system installed and altered by a plumbing contractor. German law thus requires the consumer to call in a plumber for certain work connected with the installation of plumbing fittings. Similar regulations exist in other EEC countries.

Since the use of a particular trade for certain work on plumbing systems is required by law, there is no need for any private regulation of such work by the manufacturer. The consumer must in any case call in a plumber for any major and potentially hazardous work in installing or altering his plumbing system. It is not the task of a selective distribution system to impose restrictions on the installation or replacement of plumbing fittings by the consumer which exceed those imposed by legislation. The householder who does not wish to purchase plumbing fittings from a plumbing contractor but from another retailer should be free to do so. He should also be free to install the fittings himself or, if he does not feel competent or if it is against the law to install it himself, to have the fittings installed by a plumbing contractor.

- (24) Grohe also claimed that its selective distribution system is necessary to prevent its reputation being damaged by loss-leader selling by department stores and improper installation by DIY enthusiasts (see paragraph 7). As far as loss-leader selling is concerned, national unfair competition laws offer effective remedies for such abuses. Grohe's claim that improper installation by DIY enthusiasts has also damaged the reputation of its products is a blunt and unsubstantiated assertion which contains an unduly sweeping condemnation of self-help by practical householders. First of all, Grohe has produced no specific evidence of alleged improper installation of its plumbing fittings by DIY enthusiasts. If on occasion a householder did badly install a fitting, he would not necessarily blame the fault on the manufacturer's product.

If he did not notice his mistake himself, he would probably have it pointed out to him by an expert when he eventually called one in to rectify the fault. Another factor is that most DIY work on plumbing systems is concerned with replacing fittings at withdrawal points, since for major alterations to their plumbing systems householders are by law obliged to call in a plumber anyway. It is also a fact that plumbing contractors, too, sell fittings to householders to install themselves. The Grohe selective distribution system does not close this avenue to the alleged improper installation of fittings by DIY householders. However, even if Grohe's allegation were adequately substantiated, it would still not be a sufficient reason to exclude all retailers who are not plumbing contractors from the distribution of its products.

- (25) Finally, Grohe has sought to justify its selective distribution system by claiming that there was a danger of plumbing contractors deserting its products unless it introduced the system and that the system was in the interests of the survival of the plumbing trade (see paragraphs 8 and 9).

Regarding the alleged danger of plumbing contractors deserting the Grohe brand in the absence of its selective distribution system, the first observation to make is that the majority of the other manufacturers of plumbing fittings, some of whom have much smaller market shares than Grohe, continue to supply retailers who are not plumbing contractors. Therefore, Grohe is not put at a disadvantage compared with other manufacturers and has no reason to fear that plumbing contractors would go over to these other manufacturers. Since the Commission is at the same time refusing an exemption for the similarly worded dealership agreement introduced by Ideal-Standard, Grohe has no reason to fear that plumbers will go over to this competitor either. As far as the dealership agreement of Hansa Metallwerke is concerned, it must be noted that this agreement, which is already the subject of a prohibition decision by the Federal Cartel Office, only applies in the Federal Republic of Germany. A Hansa selective distribution system in Germany cannot justify Grohe in introducing an EEC-wide selective distribution system which contravenes Article 85 (1) of the Treaty.

As far as the alleged drop in sales which Grohe claims has resulted from supplying department stores is concerned, there is no clear causal relation between this and the reactions of plumbing

contractors. The fall in Grohe's sales may be due to other factors, such as the general decline in activity in the building industry, fiercer competition, and even the exclusion of retailers other than plumbing contractors from the distribution of Grohe fittings.

- (26) As to the alleged threat to the survival of the traditional specialist plumbing trade, here too it must be said that a concern to protect the trade of plumbing contractor does not justify the blanket exclusion of all other types of distribution channels from the sale of plumbing fittings. Grohe cites the Metro judgment in support of its contention that the preservation of traditional distribution channels can be a legitimate concern of a manufacturer and claims that by helping to ensure that plumbing contractors can earn a minimum profit on the sale of plumbing fittings, its selective distribution system helps to keep down the rates plumbing contractors charge for installation work and to keep them in business.

In the Metro judgment the Court of Justice said that the desire to maintain a certain price level, where this corresponded to the desire to preserve, in the interests of consumers, the possibility of the continued existence of a specialist channel of distribution in conjunction with new methods of distribution based on a different type of competition policy was one of the objectives that could rightfully be pursued. However, the selective distribution system at issue in the Metro case did not wholly exclude certain types of distribution channels *a priori*. The Court in fact stated expressly in the Metro judgment (ground 50) that the conditions laid down by SABA for appointment as a wholesaler could largely be fulfilled without inconvenience by self-service wholesalers. The Grohe dealership agreement, however, eliminates competition from all retailers other than plumbing contractors.

- (27) In its judgment of 25 October 1983 in case 107/82 AEG-Telefunken [1983] ECR 3151, the Court of Justice further stated that the maintenance of a certain price level was only permissible in so far as it was 'directly warranted by the requirements of the system, within which competition must continue to play the role assigned to it by the Treaty, the sole purpose of such a system being to improve competition, in so far as this is based on factors other than price, and not to guarantee a high profit margin for the authorized dealers' (ground 42). A restriction of price competition is thus only permis-

sible if it is necessary for improvement of competition by the services provided by a specialist trade. If such services can be provided, however, by department stores or by other new types of retail outlet, 'which because of their form of organization can provide these services more cheaply, then the maintenance of a minimum profit margin would lose all justification, because such a margin would no longer serve to ensure competition in areas other than price' (ground 73).

It follows from this judgment that the preservation of a traditional form of distribution may not be secured by shielding it from other forms which are able to offer lower prices. Since there is nothing to stop other retailers meeting the need for advice and guidance when selling plumbing fittings, assuming such advice and guidance are at all necessary, they can provide the same services in the sale of plumbing fittings as are provided by plumbing contractors. If other retailers provide these services more cheaply, then this makes for effective competition between plumbing contractors and other retailers on the plumbing fittings market. If certain types of outlet provide such services at much lower prices, this by itself is not a justification to restrict resale to plumbing contractors.

- (28) The actual plumbing work of plumbing contractors is not affected as long as a real need for this activity and sufficient demand for it from consumers persist. The consumer is in any case obliged under statutory provisions to have his water supply system installed and any major alterations to it carried out by a licensed plumbing contractor. As for moonlighting, this is against the law in most EEC countries. In any case, it is not for the manufacturer to intervene in such areas touching on the public interest by means of private agreements. It is concluded that the restrictions of competition established in paragraphs 16 and 17 above infringe Article 85 (1) and are not eligible for exemption under Article 85 (3).
- (29) On 31 October 1984 Grohe informed the Commission that it intended to amend its notified dealership agreement so that it would in future apply only in the Federal Republic of Germany. In this Decision the Commission therefore finds only that the dealership agreement which Grohe notified on 12 February 1981 infringed Article 85 (1) during the period from 12 February 1981 until the date on which the amendment of the agreement takes effect. The Decision is necessary in order to clarify the



legal status of the Grohe dealership agreement during that period *vis-à-vis* third parties. The Commission reserves its position with regard to a dealership agreement applying only in the Federal Republic of Germany,

Grohe in policing its distribution system (clauses 7.1 and 7.2), to the extent that this obligation serves to support the obligation referred to in subparagraph (i).

HAS ADOPTED THIS DECISION:

*Article 1*

The Grohe dealership agreement as notified on 12 February 1981 constitutes an infringement of Article 85 (1) of the Treaty in so far as it imposes the following obligations on plumbing and sanitary ware wholesalers:

- (i) to supply Grohe plumbing fittings within the EEC only to plumbing contractors meeting the statutory, administrative or technical requirements for installing plumbing systems under the applicable national law and to supply such plumbing contractors only for use in their own plumbing contracting business and only in such quantities as they normally require for that business (clause 4.2 (a)), and,
- (ii) to check when selling to other wholesalers that the other wholesaler is a member of the Grohe network (clause 4.2 b)) and generally to assist

*Article 2*

The application for negative clearance or an exemption under Article 85 (3) of the EEC Treaty in respect of the Grohe dealership agreement notified on 12 February 1981 is hereby refused.

*Article 3*

This Decision is addressed to: Friedrich Grohe, Armaturenfabrik GmbH & Co., Hauptstraße 137, D-5870 Hemer.

Done at Brussels, 10 December 1984.

*For the Commission*

Frans ANDRIESEN

*Member of the Commission*