

OPINION OF MR ADVOCATE GENERAL LENZ  
 DELIVERED ON 20 JUNE 1984<sup>1</sup>

*Mr. President,  
 members of the Court,*

This reference for a preliminary ruling concerns the interpretation of Regulation No 67/67 of 22 March 1967 "on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements". Its period of validity was extended to 30 June 1983 by Regulation No 3577/82 (Official Journal 1982 L 373, p. 58).

A — The facts of the case

Dr. Andreoli, the personally liable member and manager of the firm Compact and manager of the firm Officine Sant'Andrea (which are both registered in Italy), developed light-metal radiators in which he holds the industrial property right. Those radiators are manufactured by Compact and marketed under its trademark "Ghibli" registered in Italy.

In October 1975 an agreement was entered into with the German company Hydrotherm under which that company was granted a world-wide exclusive licence (excluding Italy, Greece and Turkey) to manufacture and distribute the radiators. At the same time a production contract was concluded under which Hydrotherm was obliged to purchase the products covered by the contract (at least 100 000 items a year)

only from Compact. With the permission of the trademark owner Hydrotherm registered the trademark in its own name in several countries, including the Federal Republic of Germany. As a result of a disagreement Hydrotherm gave notice to terminate the agreements as from 31 December 1977.

In October 1977 a new agreement was then concluded for a period of three years, replacing the previous agreements and this time involving on the Italian side Compact, Dr Andreoli and Officine Sant'Andrea. Under the new agreement Hydrotherm had the exclusive right to distribute Ghibli radiators in Western Europe (excluding Italy, Greece and Turkey) and exclusive rights to distribute "Type S Series A" radiators in Western Europe (excluding France, the Benelux countries and Austria). It provided further that during the life of the contract Hydrotherm was not directly or indirectly to represent other manufacturers, retailers or makers of radiators, hot-plates or convectors made from aluminium or aluminium-alloy or do business with them in the licensed territory; it also contained a clause on the quantity of goods to be purchased and a clause dealing with the legal consequences of the termination of the first agreement.

In performance of the new agreement Hydrotherm bought a certain quantity of goods and then refused to buy any more. Thereupon Compact terminated the contract and claimed damages on its own behalf and, by subrogation, on behalf of Dr Andreoli and Officine Sant'Andrea.

<sup>1</sup> — Translated from the German.

In the subsequent legal proceedings Hydrotherm questioned in particular whether the agreement entered into was compatible with Article 85 of the EEC Treaty. In reply to that point Compact relied on Regulation No 67/67 on block exemption. In September 1980 Dr Andreoli (acting on his own behalf and for the two firms) had in fact formally notified the agreement of October 1977 to the Commission. Subsequently, on 30 March 1982, both he and Hydrotherm were informed by the Directorate General for Competition of the Commission of the European Communities that the file had been closed on the ground that the agreement notified was covered by Regulation No 67/67 on block exemption. On appeal the Oberlandesgericht concurred with that view and held that the claim for damages was well founded because of the breach of the contractual obligation to purchase goods.

The case then came before the Bundesgerichtshof for a decision on a point of law. After considering the agreement that court decided that it entailed restrictions of competition within the meaning of Article 85 of the EEC Treaty and, since the appellate court had made no finding on this point, assumed that the restrictions were appreciable. The Bundesgerichtshof also decided that, owing to the combined annual turnover of the undertakings concerned, the Commission Notice of 27 May 1970 (replaced by the Notice of 19 December 1977, Official Journal C 313, p. 3) could not be applied. It therefore needs to know whether Regulation No 67/67 is in fact applicable, as the Commission stated in the above-mentioned communication, which, in the view of the Bundesgerichtshof, is not binding on the courts.

In this regard the Bundesgerichtshof sees two problems concerning the interpret-

ation of Article 1 of the regulation, which provides that:

“Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation it is hereby declared that until 31 December 1972 Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby:

- (a) one party agrees with the other to supply only to that other certain goods for resale within a defined area of the Common Market; or
- (b) one party agrees with the other to purchase only from that other certain goods for resale; or
- (c) the two undertakings have entered into obligations, as in (a) and (b) above, with each other in respect of exclusive supply and purchase for resale.

...”

The first problem of interpretation arises from the fact that Dr Andreoli (as owner of the industrial property rights) was also party to the 1975 agreement and that he, Officine Sant'Andrea and Compact were all party to the 1977 agreement and must be regarded as an economic entity for the purposes of the agreement.

The second problem of interpretation arises inasmuch as the exclusive dealing agreement also covers countries outside the European Community.

Furthermore, the Bundesgerichtshof sees a problem of interpretation in relation to Article 3 (b) (1), which provides that:

“Article 1 (1) of this Regulation shall not apply where:

- (a) ...
- (b) the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the Common Market, in particular where the contracting parties:
  - (1) exercise industrial property rights to prevent dealers or consumers from obtaining from other parts of the consumer market or from selling in the territory covered by the contract goods to which the contract relates which are properly marked or otherwise properly placed on the market;

...”

The question of interpretation arise from the fact that:

Compact allowed Hydrotherm to register the trademark “Ghibli” in its own name, which it did, and the trademark was used in the course of trade;

No provisions were adopted concerning the use of the trademark whilst its use to prevent parallel imports was neither stated to be an object nor expressly forbidden;

The Oberlandesgericht did not find any attempt to prevent parallel imports and,

according to the case-law of the Court of Justice, the prevention of parallel imports by the assertion of rights under trademarks of the same origin is prohibited and not legally possible.

In that regard the Bundesgerichtshof considers in particular that it is not clear that exemption is excluded only if the industrial property rights are *actually used* for the purpose of preventing parallel imports since it cannot be regarded as usual for the legality of an agreement to depend on the extra-contractual conduct of the parties.

By an order of 28 June 1983 the Bundesgerichtshof therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. (a) Must Regulation No 67/67/EEC (on block exemption) be applied even if several legally independent undertakings participate on one side of the contract?
  - (b) Is it important that the undertakings participating on one side of the contract are bound *inter se* at the personal level and form a single economic entity for the purposes of the contract?
2. Must Regulation No 67/67 be applied even if the obligations entered into cover not only a defined area of the Common Market but also countries outside the European Community?
3. In order for Article 3 (b) (1) of Regulation No 67/67 to apply, must the parties have adopted terms on the exercise of an industrial property right

(in this instance a trademark) which suggest that it may be used to prevent or hinder goods to which the contract relates and which are properly marked or placed on the market from being obtained or sold, or is it sufficient for the purposes of that provision that the use of the trademark to prevent or hinder parallel imports is not dealt with in the contract?

4. Is Article 3 (b) (1) of Regulation No 67/67 applicable even if the parties to the contract do not legally have the power, by exercising the trademark rights, to prevent goods to which the contract relates, and which are properly marked or placed on the market, from being obtained or sold?
5. If the fourth question must be answered in the affirmative, is it also necessary in order for Article 3 (b) (1) to apply that the parties to the contract must actually use the trademark to prevent or hinder goods covered by the contract from being obtained?

B — In my view those questions should be answered as follows:

1. With regard to the first question, that is to say, the point whether Regulation No 67/67 is applicable even if several legally independent undertakings participate on one side of the contract and whether it is important for the purposes of that question that the undertakings are bound *inter se* at the personal level and act as a single economic unit for the purposes of the contract.

It is quite clear from Article 1 of Regulation No 19/65 of the Council (Official

Journal, English Special Edition 1965-1966, p. 35), the main enabling provision on which Regulation No 67/67 is based and which provides that:

“Without prejudice to the application of Council Regulation No 17 and in accordance with Article 85 (3) of the Treaty the Commission may by regulation declare that Article 85 (1) shall not apply to categories of agreement to which only *two undertakings* are party . . .” and from the wording of Article 1 of Regulation No 67/67 that it applies only to agreements to which only two undertakings are party, which obviously means legally independent undertakings.

On the other hand, it must be recognized that in Community competition law, as the decisions of the Court demonstrate, an economic, and not a purely legal, approach is necessary. For example, in the judgments in Cases 48/69 and 52/69<sup>1</sup> it was pointed out that it had to be presumed that a parent company and its subsidiary formed a single economic unit in so far as the subsidiary did not decide independently its own conduct on the market but carried out in all material respects the instructions given to it by the parent company (if the parent company held the majority of the shares or had complete control of the subsidiary). The Court reached a similar conclusion where a subsidiary was not economically independent (Case 22/71<sup>2</sup>), where one undertaking controlled another, indicating concerted action on the market and joint responsibility for their

1 — Judgment of 14 July 1972 in Case 48/69, *Imperial Chemical Industries Limited v Commission* [1972] ECR 619; Judgment of 14 July 1972 in Case 52/69, *J. R. Geigy AG v Commission*, [1972] ECR 787.

2 — Judgment of 25 November 1971 in Case 22/71, *Béguelin Import Co and Others v SA G.L. Import Export and Others*, [1971] ECR 949.

conduct towards other undertakings (Joined Cases 6 and 7/73<sup>1</sup>) and where the relationship between parent company and subsidiary was seen to be a mere internal allocation of tasks to which Article 85 of the EEC Treaty did not apply (Case 15/74<sup>2</sup>).

Accordingly, it is quite obvious that such an approach must be right in the case of Regulation No 67/67 as well, since we are dealing with competition law. It therefore seems logical to apply the regulation to agreements in which several legally independent persons are involved on one side, if they act as a single entity for the purposes of the agreement because they are closely linked to one another and no competition exists between them, only an internal allocation of functions whereby one participant produces goods and another supplies them (broadly in the way in which this appears to be done in this case, namely that the participating limited partnerships are wholly dependent for capital and management on a natural person who is also party to the agreement).

In any event it may not be objected, as Hydrotherm did at the hearing, that Article 1 of Regulation No 67/67 refers only to *undertakings* and thus does not cover natural persons, such as Dr Andreoli, who was also party to the agreement now in question. It is clear that the term "undertaking" must be construed in a functional sense and for that reason unquestionably covers

natural persons in so far as they carry on a business activity.

Nor do I find any validity in the counter-argument, which Hydrotherm also advanced, to the effect that, in order to establish the existence of an economic entity in the sense of the decisions mentioned above, detailed investigations will often be necessary for which there will be scope only in a proceeding in which an application for individual exemption is considered. Obviously that cannot constitute a decisive criterion for determining the scope of Regulation No 67/67. In the first place, determining whether an economic entity exists will not involve any great difficulties in many (if not most) cases. Secondly, it is clear that, as regards other provisions of the regulation, economic concepts and circumstances are of considerable importance and these may likewise entail difficulties in regard to determination and delimitation.

That does not in fact involve an excessively burdensome task for the authorities responsible for applying the regulation, in particular, it does not pose insuperable difficulties for the courts, especially since the latter can, if necessary, obtain a certain amount of assistance under Article 177 of the EEC Treaty for the purposes of arriving at a decision.

2. With regard to the *second question*, that is to say the point whether Regulation No 67/67 applies even if an agreement covers not only a defined area of the Common Market but also countries outside the European Community.

1 — Judgment of 6 March 1973 in Joined Cases 6 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents v Commission*, [1974] ECR 223.

2 — Judgment of 31 October 1974 in Case 15/74 *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc.*, [1974] ECR 1147.

It must be admitted that, as Hydrotherm argues, the fact that Article 1 of the regulation refers to only a defined area of the Common Market might be a reason for answering this question in the negative. However, it is easy to show that it would be wrong to construe the regulation in that way. There are various reasons for this.

The first important point is that the territory in which Community competition law applies consists only of the territory of the Member States of the Community. It must therefore be assumed that provisions in this field only concern conduct which has an effect within the Community and so it seems logical to start from the premise that the phrase in question was only intended to state that the regulation does not apply to agreements covering the whole Community, though no conclusion regarding agreements that also cover territory outside the Community may be drawn from it.

Furthermore, although it cannot be ruled out that agreements concerning non-member countries may produce effects on competition in the Common Market, it is difficult to see how this could be the case, in any objectionable form, as regards the dealing agreements of the kind in question, particularly since Community law requires that it must be ensured that parallel imports are not impeded.

Nor must it be overlooked that Regulation No 67/67 contains rules concerning an *exemption* from the prohibition laid down in Article 85 (1). As may be seen from the preamble to the regulation, that exemption is granted because exclusive dealing agreements

relating to international trade may in general lead to an improvement in distribution. They are therefore considered to have a positive effect on facilitating distribution, promoting regular sales and thus on the rationalization of productions and distribution. Those positive effects, which are the most important, are, however, not reduced if similar effects are also produced on the markets of non-member countries.

Finally, it should not be forgotten that in the preamble to Regulation No 67/67 particular stress is placed on the fact that such agreements are often the sole means whereby small and medium-sized undertakings can compete in the market and thus promote competition between producers. It is clear, however, that it is often precisely such undertakings which need to choose larger areas for the organization of sales. If an individual exemption was always considered necessary in such cases, where areas outside the Community are also covered by the agreement, this would certainly defeat the purpose of Regulation No 67/67 because it could not be applied where it appeared most suitable, namely to relatively harmless agreements between small and medium-sized undertakings.

The second question can therefore be answered only in the affirmative.

3. *The third, fourth and fifth questions concerning the interpretation of Article 3 (b) (1) of Regulation No 67/67*

So far as is relevant to this case, Article 3 provides that no exemption is possible where the parties to it make it difficult

for intermediaries or consumers to obtain the goods to which the agreement relates from other dealers within the Common Market, in particular where the parties “exercise industrial property rights to prevent dealers or consumers from obtaining from other parts of the Common Market or from selling in the territory covered by the contract goods to which the contract relates which are properly marked or otherwise properly placed on the market”. In that regard it is stated in the preamble that the possibility of parallel imports must be ensured and that industrial property rights and other rights cannot be allowed to be exercised in an abusive manner in order to create absolute territorial protection.

(a) In view of the wording of Article 3 and that passage in the preamble one can only assume that it is the actual exercise of industrial property rights which is meant and that it is whether they are used to prevent parallel imports which matters. During the proceedings the Commission, which drew up the regulation, confirmed that this was the intention.

The answer to the point concerning the interpretation of Article 3 raised in the fifth question is therefore plain: Article 3 applies where industrial property rights are actually exercised, hence where there is an actual abuse. The contracting parties need not act in concert (as might be concluded from the use of the plural in Article 3), since, where industrial property rights are transferred from the proprietor to a dealer for the purposes of their actual exercise, it is clear that only conduct on the part of the dealer is required.

I would also suggest that to a certain extent the decisions of the Court confirm the correctness of that view. First, there are the judgments on Article 3 of Regulation No 67/67 in which the Court made it clear that industrial property rights and other rights cannot be allowed to be exercised in an abusive manner in order to create absolute territorial protection (Case 40/70<sup>1</sup>), or in which it stressed that, if such conduct occurs (a right is exercised in order to prevent dealers or consumers from obtaining goods covered by the agreement from other parts of the Common Market), an exemption under Article 1 (1) of Regulation No 67/67 is not possible (Case 22/71<sup>2</sup>).

Secondly, I must refer to judgments from which it may be inferred that the mere transfer of an industrial property right is not an abuse but only the actual exercise of the right (that is to say, the unilateral conduct of the owner of the right). This was demonstrated in Joined Cases 56 and 58/64<sup>3</sup> in which it was held that Community law affects the exercise of industrial property rights but restricts their exercise only to the extent necessary to give effect to the prohibition laid down in Article 85 (1) and a trademark right may not be misused for purposes which are contrary to Community competition law. This was made clear in

1 — Judgment of 18 February 1971 in Case 40/70, *Sirena Srl v Eda Srl and Others* [1971] ECR 69, paragraph 6 at pp. 81 and 82.

2 — Case 22/71, *Béguelin Import v SA G.L. Import Export*, [1971] ECR 949, paragraphs 23 and 24, at p. 961.

3 — Judgment of 13 July 1966 in Joined Cases 56 and 58/64, *Consten GmbH and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 299, at p. 345.

Case 40/70<sup>1</sup> in which it was also held that, although industrial property rights are not affected by Articles 85 and 86 of the Treaty as far as their *exercise* is concerned, their *exercise* may still fall under the prohibitions imposed by those provisions and that Article 85 is therefore applicable where trademark rights are invoked to prevent products from different Member States bearing the same trademark from being imported. The judgment in Case 28/77<sup>2</sup> (in which it was stressed that the *use* of the trademark strengthens the territorial protection) is also relevant in this regard as well as the judgment in Case 258/78<sup>3</sup>, in which, owing to the specific nature of the products in question, an “open” exclusive licence was not held to be contrary to Article 85 (1).

concerning an *exemption*. According to Article 8 of Regulation No 17, *conditions* may be attached to decisions adopted in application of Article 85 (3) of the EEC Treaty. As the Commission has shown, this may involve the unilateral conduct of the parties in purely factual respects, such as conduct on the market, development of market shares and turnover; even the supplying of information to the Commission may be involved. It is therefore hard to see why this should not be possible under the regulation granting block exemption and why it should be questionable to make the validity of an agreement depend on the extra-contractual conduct of a party to it. After all, the fact that Regulation No 67/67 is not applied means only that the exemption is not applicable and not that the relevant exclusive dealing agreement is caught by Article 85 and therefore void.

Moreover, it can hardly be regarded as unusual or even disturbing if in a case such as this the *unilateral conduct* of one of the contracting parties is taken as a point of departure. I have no doubt that this is permissible by virtue of the Council's enabling provision, since in Article 1 of Regulation No 19/65 it is stated that the block exemption regulation must specify in particular the clauses which must be contained in the agreements or the *other conditions* which must be satisfied. Moreover, it should not be forgotten that Article 3 of Regulation No 67/67 is a provision

(b) In view of what I have stated, it is quite clear how the *third question* of the Bundesgerichtshof must be answered.

(i) For the purposes of Regulation No 67/67 it is not necessary for the parties to have adopted provisions on the exercise of industrial property rights which are intended to create, or inevitably result in, obstacles to parallel imports, as the French Government states. “(Thus that Government also takes the view that Article 3 can only cover measures arising from an agreement and adopted in performance of an agreement)”. Had that been the intention, it would certainly have been stated in clear words and purely factual terms, such as are found in Article 3,

1 — Case 40/70, *Sirena v Eda* [1971] ECR 69, paragraph 5 at p. 81 and paragraph 11 at p. 83.

2 — Judgment of 20 June 1978 in Case 28/77, *Tepea BV v Commission*, [1978] ECR 1391, paragraph 44 at p. 1416.

3 — Judgment of 9 June 1982 in Case 258/78, *L. C. Nungesser KG v Commission*, [1982] ECR 2015, paragraph 58 at p. 2069.



would not have been used. Moreover, it can be argued that this view is supported by the scheme of Regulation No 67/67. The regulation carefully distinguishes between clauses which may be contained in exclusive dealing agreements (Articles 1 and 2) and the surrounding factual circumstances (Article 3, which merely refers to the *exercise* of industrial property rights or to *measures* taken to prevent dealers or consumers from obtaining goods covered by the agreement from elsewhere in the Common Market).

On the other hand, if agreements to exercise industrial property rights in the way described are entered into, it is quite self-evident that Regulation No 67/67 cannot be applied *a priori* to such agreements because they are obviously intended to ensure absolute territorial protection and, as may be concluded from the judgments in Joined Cases 56 and 58/64<sup>1</sup> and Case 258/78<sup>2</sup>, are thus clearly incompatible with Article 85 (1) of the EEC Treaty.

(ii) Furthermore, the mere fact that the exercise of industrial property rights is not dealt with, that is to say that no obligation is imposed to refrain from exercising the rights to prevent parallel imports, is not sufficient for the purpose of Article 3 of Regulation No 67/67. Hydrotherm takes a different view,

namely that the transfer of trademarks obviously impedes parallel imports and one is bound to suspect that agreements to the effect, restricting competition have been made. If that view were taken, the mere *transfer* of trademark right and the *possibility* of using them would bar an agreement from exemption.

There are a number of considerations to show that this was not the intention.

First of all, Article 3 itself refers not to the transfer or grant of industrial property rights but to their *exercise*, which in this context can only mean their exercise to prevent parallel imports. Secondly, Article 2 (2) (b) of Regulation No 67/67 provides that there is no objection to an exclusive dealer's undertaking to sell the goods to which the contract relates under trademarks specified by the manufacturer. This can only mean that the existence of agreements regarding the use of trademarks is presupposed and that they are not considered objectionable. Then there is the basic principle underlying the decisions of the Court which I have already mentioned, namely that in competition law it is not the existence of industrial property rights (or, therefore, their transfer) which is relevant but their misuse. Finally, it is also clear that exclusive dealing agreements often involve the transfer of trademarks, for instance where exclusive dealers must arrange packaging and advertising, where it is a question of opening up new markets, which dealers will not do without some protection against competitors, or where dealers — particularly smaller undertakings — do not register trademarks in their own name in all the countries in which they would like to do

1 — Judgment of 13 July 1966 in Joined Cases 56 and 58/64, *Consten GmbH and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 299, at p. 345.

2 — Case 40/70, *Sirena v Eda* [1971] ECR 69, paragraph 5 at p. 81 and paragraph 11 at p. 83.

business because of the costs involved. If the application of Regulation No 67/67 were to be excluded in such cases despite the positive effects of such agreements on competition, the regulation would lose much of its importance which consists precisely in making it easier to process a large number of typical contracts.

(c) The *fourth question* is obviously referring to previous judgments of the Court concerning the exhaustion of industrial property rights. According to those judgments, the exercise of trademark rights to prevent products properly marked or otherwise properly placed on the market from being bought or sold is not permissible. On this point we should adopt the view of those who maintain that, even if, as a matter of law, such use of trademarks is not permissible, only the *actual exercise* of rights is relevant for the purposes of Article 3.

In its statement of reasons (at p. 14) the Bundesgerichtshof asks what is the practical significance of Article 3 (b) (1) of Regulation No 67/67 in view of the decisions of the Court on the exhaustion of industrial property rights.

In reply I should like to refer to the judgment in Case 258/78<sup>1</sup> in which the Court stated that the power of the Commission is not affected by the fact that persons are in a position to reply upon the provisions of the Treaty

relating to the free movement of goods in order to escape restrictions arising out of the exercise of industrial property rights (*Nungesser v Commission*, [1982] ECR 2015, paragraph 63 at p. 2070).

According to the preamble to Regulation No 67/67, the purpose of Article 3 is to ensure the possibility of parallel imports. (This was meant to be the Commission's contribution to the maintenance of the free movement of goods in the field of competition law). That aim remains valid even after the delivery of the judgments I have mentioned on the exhaustion of industrial property rights and that is why Article 3 was not amended. One can easily imagine that attempts to hinder parallel imports using trademarks rights (which are often made by applying for an interlocutory injunction) will not always be resisted, since for that purpose — that is to say in order to prove that the exercise of those rights is unlawful in the particular case — the third party adversely affected must obtain information and since he may perhaps also draw back in the face of the risk as to costs. It is also certain that when such an attempt is resisted the legal proceedings can be time-consuming and that until they are successfully concluded there will be a *de facto* impediment which is unacceptable.

According to the view supported here, any person can rely directly on Article 3 of the regulation, which is intended to ensure the possibility of parallel imports.

C — Without going into the question of the relationship between Regulation No 67/67 and Article 85 (1) which the Bundesgerichtshof has not raised, I therefore propose that the questions submitted should be answered as follows:

<sup>1</sup> — Judgment of 9 June 1982 in Case 258/78, *L. C. Nungesser KG v Commission*, [1982] ECR 2015, paragraph 58 at p. 2069.

1. Regulation No 67/67 must also be applied where several legally independent undertakings participate on one side of the agreement but, by reason of their interpenetration at the personal level and as regards capital, are linked in such a way that for the purposes of the agreement they must be regarded as an economic unit within which no competition but only an internal allocation of tasks exists.
2. Regulation No 67/67 must be applied even if the obligations entered into cover not only a defined area of the Common Market but also countries outside the Community.
3. Article 3 (b) (1).
  - (a) is not necessarily applicable if an agreement does not deal with the exercise of a trademark right to prevent or impede parallel imports,
  - (b) applies if the parties to the agreement have agreed to provisions on the exercise of an industrial property right which suggest that it may be used to prevent or impede the purchase or sale of goods covered by the agreement which are properly marked or otherwise properly placed on the market,
  - (c) is applicable if an industrial property right is actually used for that purpose,
  - (d) is also applicable if the parties to the agreement do not have the legal right to use an industrial property right in that way.