the persons participating together, as a single party, in the agreement in question is impossible.

2. Regulation No 67/67 is applicable where 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) of Regulation No 67/67 must be interpreted as excluding an agreement from block exemption only if it is clear from the actual terms of the agreement or from the conduct of the parties that they intend to use, or are in fact using, an industrial property right in such a way as to prevent or impede, with the aid of that right, parallel imports into the territory covered by the exclusive dealership. The fact that an agreement does not contain any provision to prevent abuse of an industrial property right is not in itself a sufficient reason for excluding that agreement from the application of Regulation No 67/67.

In Case 170/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the action pending before that court between

HYDROTHERM GERÄTEBAU GMBH, having its registered office in Dieburg, Federal Republic of Germany,

and

COMPACT DEL DOTT. ING. MARIO ANDREOLI & C. SAS, having its registered office in Savigno, Bologna, Italy,

on the interpretation of Articles 1 and 3 of Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Articles 85 (3) of the Treaty to certain categories of exclusive dealing agreements,

THE COURT (Fourth Chamber)

composed of: T. Koopmans, President of Chamber, K. Bahlmann, P. Pescatore, A. O'Keeffe and G. Bosco, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Compact, which is a limited partnership having its registered office in Savigno, Bologna, and whose personally liable partner is Dr Mario Andreoli, an engineer, manufactures and sells radiators made from pressure-cast aluminium alloy which are marketed under the trademark "Ghibli" registered by Compact in Italy.

By a contract dated 10 October 1975 Dr Andreoli granted Hydrotherm Gerätebau GmbH, which has its registered office in Dieburg, Federal Republic of Germany, and is a subsidiary of Automation Industries Inc of Los Angeles, California, USA, an exclusive manufacturing and distribution licence for the whole world except Italy, Greece and Turkey.

On the same day Hydrotherm undertook in a "production contract" to obtain the products covered by the contract only from Compact and to buy a minimum of 100 000 items a year from Compact.

Pursuant to the contract Hydrotherm had the trademark "Ghibli" registered in its own name in several permitted countries, including the Federal Republic of Germany.

The contracts between Compact and Hydrotherm could be terminated at the earliest on 31 December 1977.

Disagreements arose between the contracting parties, particularly over pricing, and Hydrotherm terminated the contracts as from 31 December 1977.

Before then, on 12 October 1977, a new agreement was concluded between Hydrotherm of the one part and Compact and the company Officine Sant'Andrea (OSA) of Rastignano, Italy, also run by Dr Andreoli, of the other part.

The new agreement cancelled all previous agreements and was concluded for a period of three years.

Under the new contract Hydrotherm was granted an exclusive licence to distribute "Ghibli" radiators in Western Europe excluding Italy, Greece and Turkey and to distribute "Type S Series A" radiators in Western Europe excluding France, the Benelux countries and Austria.

By the same contract Hydrotherm undertook that in the licensed territory it would not directly or indirectly represent or do business with other manufacturers, retailers or makers of radiators, hotplates or convectors made from aluminium or aluminium alloy.

Hydrotherm also agreed to place a firm order with Compact amounting to approximately DM 1 000 000. The first

six-monthly deliveries were to take place from September 1977 to March 1978 inclusive in the quantities and on the dates fixed by Hydrotherm.

After buying goods to the value of DM 867 389.22, Hydrotherm refused to buy any more.

Compact thereupon terminated the contract without notice and claimed damages from Hydrotherm on its own behalf and, by subrogation, on behalf of Dr Andreoli and Officine Sant'Andrea.

Hydrotherm's defence to that claim for damages was in particular that the agreement was void by virtue of Article 85 (2) of the EEC Treaty.

By letter dated 19 September 1980 Dr Andreoli, on his own behalf and on behalf of the two firms Compact and Officine Sant'Andrea, formally notified the Commission of the agreement with Hydrotherm and applied for negative clearance under Article 2 of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87).

After the Commission had announced, by communication of 19 November 1981 (Official Journal 1981 C 300, p. 4), its intention to adopt a favourable decision on the agreement, the Director General of the Directorate General for Competition sent a letter to Compact on 30 March 1982 in which he notified that company of his decision to close the file as the agreement notified was covered by the declaration of inapplicability referred to in Article 85 (3) of the EEC Treaty and provided for by Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (Official Journal, English Special Edition 1967, p. 10).

On appeal the Oberlandesgericht [Higher Regional Court], Frankfurt am Main, ruled that Compact's action for damages of DM 1 710 912 for non-performance of the contract of 12 October 1977 was in substance well founded. On the question of the amount of damages and a counterclaim by Hydrotherm for a declaration that it was not liable to pay any damages for breach of the production contract of 10 October 1975, the Oberlandesgericht remitted the case to the Landgericht [Regional Court].

Hydrotherm appealed on a point of law against that judgment to the Bundesgerichtshof.

By order of 28 June 1983 the Kartellsenat [Restrictive Practices and Monopolies Division] of the Bundesgerichtshof decided pursuant to Article 177 of the EEC Treaty to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

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?

The order of the Bundesgericht was registered at the Court on 3 August 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were lodged on 11 October 1983 by the Commission of the European Communities, represented by its legal Adviser, Norbert Koch, and Ingolf Pernice, a member of its legal Department, on 28 October 1983 by the Government of the French Republic, represented by Jean-Paul Costes, of the Secretariat General of the Interministerial Committee for Questions of European Economic Cooperation, and on 8 November 1983 by Compact, represented by Paolo Mengozzi, Advocate at Bologna and at the Corte di Cassazione, Professor of International Law at the University of Bologna.

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 preliminary inquiry.

By order of 1 February 1984 the Court assigned the case to the Fourth Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

II — Written observations submitted to the Court

Compact, the respondent in the main proceedings, considers that the five questions submitted by the Bundesgerichtshof may be reduced to three main issues which are whether Regulation No 67/67 is applicable to a contract where one party is composed of several legally independent undertakings, whether it is applicable to agreements covering countries outside the Community and whether it is applicable to an exclusive dealing agreement under which the exclusive dealer owns or may use a trademark on products to which the

agreement relates. The third issue, raised by the third, fourth and fifth questions, is particularly important.

(a) The principle is clearly laid down in the case-law of the Court that the unity of the conduct on the market of the parent company and its subsidiaries outweighs the formal separation between those companies resulting from their separate legal personality. That principle also applies where one of the parties to the contract is composed of three entities bound *inter se* by a natural person who runs the other two undertakings and where the same natural person is both the majority shareholder and sole fully liable partner in two limited partnerships. The three entities form one economic unit and must be treated as a single undertaking. A contract concluded by such an undertaking with an exclusive dealer should be treated as an agreement between two undertakings for the purposes of Article 1 of Regulation No 67/67.

(b) Regulation No 67/67 is applicable to an exclusive dealing agreement covering territory situated outside the Community. Its purpose is to recognize the validity of exclusive dealing agreements covered by the regulation on account of their positive effect on intra-Community trade and their contribution to the development of competition between different brands. The fact that such an agreement covers non-member countries as well does not *ipso facto* diminish the positive function of the agreement or require a different assessment. Since the regulation's aim is to enable parallel sales to take place, only agreements which exclude that possibility are prohibited.

In addition to those points there is a practical argument: undertakings which grant exclusive rights to deal in their products in large territories, often including countries outside the Community, are mostly small-sized undertakings. To exclude application of the regulation to such undertakings would mean rendering the regulation ineffective in the very circumstances in which the needs it is meant to satisfy are particularly acute.

(c) It is clear from the grounds of the order for reference that the third issue is of primary importance for resolving the first two issues. The Bundesgerichtshof placed great emphasis on the principle of interpretation which requires a provision to be given its fullest effect and maximum practical value. Since the Court has ruled out the possibility of using industrial property rights to prevent parallel supplies, the question must be asked whether it is right for Article 3 (b) (1) of Regulation No 67/67 to be robbed of all its practical value in assuming that its aim is to prevent the application of the block exemption only where an industrial property right is actually used to impede parallel supplies and not also where the mere possibility exists of being able to attempt to do so.

The precise question put by the Bundesgerichtshof to the Court is whether an exclusive dealing agreement under which the dealer possesses industrial property rights is excluded from block exemption and void. The critical rôle accorded to the principle of preferring the interpretation which gives a provision its fullest effect and the practical importance consequently attributed to Article 3 (b) (1) make it clear that the Bundesgerichtshof, in assuming that exclusive dealing agreements are illegal *per se*, recognizes that the basic effect of Regulation No 67/67 is to validate such agreements in clearly defined cases by way of exception.

In order to resolve this issue it is necessary to examine it in the wider context into which it was placed by the Bundesgerichtshof in the grounds for its order.

In this regard the question whether agreements of the kind in question are in principle unlawful must be answered in the negative owing to the historical and institutional link between Regulation No 67/67 and the decisions of the Court of Justice, the rationale and scope of the regulation and the relationship between the regulation and article 85 (1) of the EEC Treaty.

The decisions of the Court of Justice cited by the Bundesgerichtshof in its order for reference started a gradual process which ended in the recognition in Community law of the principle of the "exhaustion" of rights in commercial or industrial property. At the time of the adoption of Regulation No 67/67 that process was only just beginning; in establishing that agreements covered by Article 3 are in principle contrary to the aims of the competition law of the Community the Commission wished to add its contribution to the clarification of Community law in this field.

The Court's elaboration of the principle of the exhaustion of industrial property rights has not led to the abrogation of Article 3 (b) (1) of Regulation No 67/67 because two institutions, acting in different contexts, are involved: the Court of Justice, applying Articles 85, 30 and 36 to industrial property rights, and the Commission, regulating exclusive dealing agreements. The Commission maintained Article 3 (b) (1) of Regulation No 67/67 in order to promote the widest possible application of the principle of the free movement of goods.

Regulation No 67/67 cannot be construed as defining those exclusive dealing agreements which, on the assumption that they are in principle unlawful under Article 85 (1) of the Treaty, are permitted exceptions. It can be seen from the fourth and fifth recitals of the preamble to the regulation that in the Commission's view the exclusive dealing agreements defined in Article 1 may but do not have to be caught by Article 85 (1) and that it is not necessary expressly to exclude from the category as defined those agreements which do not fulfil the conditions of Article 85 (1). The Court of Justice has held that the sole function of the regulation is to define the scope of application of the competition rules to such agreements and to facilitate their application in view of the large number of individual applications for exemption submitted to the Commission before the adoption of

the regulation; its purpose is to establish the lawfulness of agreements (irrespective of whether they are found to be constitutive or declaratory) in order to maintain their positive economic function, particularly crucial for small and medium-sized undertakings which are able by means of the agreements to withstand competition on international markets.

As from 1966 the Court of Justice held that exclusive dealing agreements that affect trade between Member States are not incompatible *per se* with EEC competition law. In distinguishing between open and closed exclusive licences the Court gradually formulated the view that such agreements are unlawful only where they confer absolute territorial protection and exclude the possibility of parallel supplies. The Court subsequently hesitated to declare such agreements incompatible by nature with Article 85 (1) and ruled that they simply had no effect as against importers of goods lawfully bearing trademarks. Although trademark rights present monopolistic features, they must be judged positively as they help to promote competition between brands. In a case concerning plant-breeders' rights the Court held that the grant of an open exclusive licence is not in itself incompatible with Article 85 (1). That principle also applies to other industrial property rights since the Court pointed out that breeders' rights do not have characteristics of so special a nature as to require, in relation to the competition rules, different treatment.

The fifth question must accordingly be answered in the affirmative: where an exclusive dealing agreement is concluded in which the parties have not inserted terms encouraging its use for preventing or hindering trade in the products covered by a trademark, only an actual abuse of the trademark right can lead to the application of Article 85 (1). Accordingly, only the actual use of that right can exclude the application of Regulation No 67/67. To attribute to Article 3 (b) (1) the effect of excluding exemption even in cases in which a trademark right is used only by an exclusive dealer would be to ascribe to the regulation a function that is contrary to its aim, which is to promote brand competition beneficial to the consumer.

Even if its relationship to Article 85 (1) is disregarded, the regulation should be construed in the light of the decisions of the Court of Justice. It is a characteristic feature of the most commonly used exclusive dealing agreements that they are entered into in conjunction with the grant of trademark rights which are meant to protect the dealer against direct competition from third parties or from the licensor and to enable the dealer to bear the risk and expense of marketing the new product. Without that link to trademark rights exclusive dealing agreements could not fulfil their positive economic function which was the reason for the adoption of Regulation No 67/67. To construe the regulation as excluding exemption whenever an ex-

clusive dealing agreement is linked to the exercise of a trademark right and to adhere to the practical meaning of Article 3 (b) (1), which is different from that attributed to it by the Court of Justice in its decisions, would be to rob the provision of any practical value.

It must be borne in mind that the finding of the German court of appeal that the agreements in question contain restrictions on competition likely to have an appreciable effect on trade between Member States has been answered, in particular by the argument based on the Commission's notification of the closing of its file on the application for negative clearance on the ground that although the agreement notified was caught by Article 85 (1) it came within the terms of Article 1 (a) and Article 2 (a) of Regulation No 67/67. Since the Commission considered Regulation No 67/67 applicable, the appeal court did not investigate whether the agreements in question were by their nature caught by Article 85 (1) and there was no great advantage to be gained by Compact in challenging that finding. Since the Court of Justice is requested to give a ruling on the question whether Regulation No 67/67 is applicable to contracts such as those at issue in the main proceedings, it should consider not only the individual provisions of the regulation but also the requirements for their application and in particular the relationship between Article 85 (1) of the Treaty and the regulation. It is well known that in applying Regulation No 67/67 the Commission assumes that contracts such as those in question are by their nature likely to fall foul of Article 85 (1). If the Court of Justice wishes to provide the national court with an answer which takes account of the true needs of interpretation in the main proceedings and look beyond the actual wording of the questions submitted, it will also deal with the issues clearly arising from the documents submitted in the main proceedings and from the order for reference.

The *Government of the French Republic* submits observations only on the third, fourth and fifth questions and leaves it to the Court to answer the first two questions as it considers fit.

In assessing the legality of a contract with reference to Regulation No 67/67 a distinction should be made between, on the one hand, the actual terms of the contract and the measures adopted in its performance and, on the other hand, the practices of the contracting parties. The traditional distinction drawn by the Court of Justice between the existence and exercise of industrial property rights operates in the contractual context; extra-contractual practices must be treated quite differently.

(a) Article 3 (b) (1) of Regulation No 67/67 excludes an agreement from exemption if the contracting parties make parallel imports difficult, in particular where they exercise industrial property rights in order to do so. Such restrictions or such an exercise of rights must be clear from the contract. The eventual application of Article 3 (b) (1) to an agreement presupposes that certain terms of the agreement are intended to erect, or in practice inevitably produce, obstacles to parallel imports of products that have been properly marked and placed on the market. To assert that the

absence from an agreement of terms whereby the parties undertake not to exercise their industrial property rights to prevent parallel imports leads then to erect obstacles to such imports amounts to charging them with unlawful intention. Those considerations do not exclude the possibility of examining the parties' conduct with reference to Article 85 of the Treaty.

(b) Exemption is not dependent on the effectiveness of the means of resisting parallel imports. It is not excluded merely because the contracting parties possess property rights with which they could prevent such imports. Conversely, the existence of terms envisaging such action would preclude exemption.

The parties' sharing of the trademark rights available in the various countries cannot be regarded as an intention to partition the Common Market. There are practical reasons why this is done, including the sharing of the expenses of obtaining, maintaining and protecting the property rights. The contract must be examined in the light of its terms and their normal effect and not in the light of their presumed unlawful effect. The fact that the parties do not legally have the power to prevent parallel imports by the exercise of the trademark rights does not render Article 3 (b) (1) of Regulation No 67/67 inapplicable *a priori*. The various possible situations must be distinguished.

Where an agreement does not contain any terms whose purpose or effect is to impede, by the exercise of an industrial property right, parallel imports of products properly marked and placed on the market, it is not caught by Article 3 (b) (1); the same holds true if the parties also do not legally have the power to prevent parallel imports.

If an agreement contains terms covered by Article 3 (b) (1) or leads to practices covered by that provision, the fact that the parties do not legally have the power to implement them does not render the provision in question inapplicable to the agreement.

Where obstacles to trade in goods are caused by the parties' conduct but do not directly arise from the agreement, it is not caught by Article 3 (b) (1) of Regulation No 67/67; in that case the legality of the obstacles erected must be examined independently with reference to Article 85 of the Treaty.

(c) If the terms of the agreement are covered by Article 3 (b) (1) or actually lead to the erection of obstacles to parallel imports through the exercise of the trademark rights, the agreement does not escape application of that provision. On the other hand, actual use of the trademark to hinder parallel imports that does not arise from the agreement is not sufficient to render Article 3 (b) (1) applicable.

(d) Article 3 (b) (1) of Regulation No 67/67 should be construed as meaning that it can be invoked only where the existence of obstacles arising from the use of a trademark is due to the terms of the agreement, irrespective of the parties'

legal power and irrespective of their conduct not legally based on the actual terms of the agreement.

After setting out the basic facts of the case, the *Commission* submits in essence the following observations.

(a) It is clear from the wording of Article 1 of Regulation No 67/67 of the Commission and Article 1 of Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (Official Journal, English Special Edition 1965-1966, p. 35) that the exemption applies only to agreements to which only two undertakings are party to the exclusion of those where one contracting party is composed of several legally independent undertakings.

Nevertheless, the competition rules must be applied in the light of economic considerations. In many of its decisions the Commission has consequently regarded two or more legally independent undertakings as a single economic entity and treated them as a single undertaking forming one party to the contract. That approach is possible in the case of three undertakings which are bound personally *inter se* or of which two are totally dependent on the third and between which all possibility of competition is excluded.

(b) The fact that the territory covered by the agreement includes non-member countries does not preclude the application of the block exemption. For this concerns only restrictions on competition arising in the Common Market and capable of offering the general advantages referred to in Article 85 (3). In principle those positive effects are not diminished by the fact that the licensed territory also includes non-member countries. The reference to the Common Market in Article 1 (1) (a) of Regulation No 67/67 must not be construed restrictively.

(c) The purpose of Article 3 (b) (1) is to ensure that parallel supplies can take place. In view of that aim, referred to in the ninth recital of the preamble to the regulation, the actual exercise of an industrial property right with the view to impeding parallel supplies is sufficient to exclude block exemption. An agreement to that effect is not necessary. However, the mere fact that the possibility is open to a dealer to use a specific property right, even if this may lead to an abuse, is not sufficient to render the exemtion inapplicable, for the benefits of an exclusive dealing agreement are often dependent on the grant of appropriate licences.

(d) Article 3 (b) (1) of Regulation No 67/67 is applicable even if it is legally impossible for parallel supplies to be prevented by the exercise of industrial property rights. On 30 March 1982 the Commission informed the parties to the main action that under present Community law it is no longer possible by reliance upon a trademark to oppose parallel imports of products lawfully put on the market in another Member State. However, in view of the aim of ensuring

that parallel supplies can take place in every case, the determining factor is not the lawfulness of the restrictions on such supplies but only the actual use of industrial property rights to prevent them.

(e) The mere theoretical possibility that industrial property rights may be exercised in the way described in Article 3 (b) (1) of Regulation No 67/67 is not sufficient to exclude the block exemption. That approach would certainly reduce the legal uncertainty which may exist where the validity of a contract depends on the actual conduct of the parties but would mean that exclusive dealing agreements coupled with the grant of licences would on the whole no longer be exempted. The regulation would lose much of its value. The provision excluding the application of the block exemption on the ground of the actual conduct of the parties can certainly cause practical difficulties; without it, however, there would be no guarantee that the conditions for the grant of an exemption are actually fulfilled. The Court of Justice has not raised any objection to the corresponding provision of Article 3 (b) (2) of Regulation No 67/67.

(f) The questions submitted by the Bundesgerichtshof require the following answers:

1. (a) In principle Regulation No 67/67 is not applicable if more than two legally independent undertakings participate in an exclusive dealing agreement.

   (b) If several legally independent undertakings together forming one of the two parties to the exclusive dealing agreement and bound *inter se* at the personal level form a single economic entity for the purposes of the agreement, this does not preclude the application of Regulation No 67/67.

2. Regulation No 67/67 applies to exclusive dealing agreements covering a defined area of the Common Market provided that the other requirements of the regulation are fulfilled and irrespective of whether or not the agreements also cover territory outside the Community.

3. In oder for Article 3 (b) (1) of Regulation No 67/67 to apply and block exemption to be excluded, the exclusive dealing agreement in question need not contain terms on the hindering of parallel imports through the exercise of industrial property rights.

4. The application of Article 3 (b) (1) of Regulation No 67/67 does not presuppose that the parties have legally enforceable means of hindering purchases or sales of products to which the agreement relates and which are properly marked or otherwise properly placed on the market.

5. In order for block exemption to be excluded under Article 3 (b) (1) of Regulation No 67/67, the contracting parties must actually use their industrial property right to prevent or hinder parallel imports.

III — Oral procedure

At the hearing on 29 March 1984 Hydrotherm, the appellant in the main proceedings, represented by Bernhard Mielert, Rechtsanwalt, Frankfurt am Main, Compact, the respondent in the main proceedings, represented by Heinz-L. Bauer, Rechtsanwalt, Frankfurt am Main, and the Commission, represented by Ingolf Pernice and Norbert Koch, presented oral argument and answered questions put to them by the Court.

In essence Hydrotherm's submissions were as follows:

(a) Regulation No 67/67 does not apply to an agreement to which several legally independent undertakings are party. This is quite clear from the actual wording of Article 1 (1) of the regulation, which refers to agreements to which only two undertakings are party. No other interpretation is possible.

Article 1 (1) is a provision which must be construed literally and is quite obviously intended to restrict the scope of application of Regulation No 67/67. The question whether the various undertakings party to the agreement are bound *inter se* is irrelevant. In any case, the nature and extent of any links between them could be established only after a thorough examination which would be beyond the scope of Regulation No 67/67. Therefore an individual exemption ought to be requested if necessary.

Moreover, a natural person, not being an undertaking, cannot be considered to be one of the parties to the agreement.

Reasons of economic expediency should not obscure the clear and precise language of the regulation.

(b) Regulation No 67/67 is not applicable to agreements covering countries outside the Community. The wording of Article 1 (a) precludes the application of the regulation to agreements covering the entire Common Market. Such agreements must be considered case by case; they might restrict competition more than agreements which affect only a defined area of the Community.

The same is true of "mixed" agreements covering territory outside the Community. In so far as they restrict competition, such agreements do not fall into the category of agreement envisaged by the regulation; they must therefore be examined to ascertain whether individual exemption is possible.

(c) In order for Article 3 (b) (1) of Regulation No 67/67 to apply, the parties need not adopt specific terms on the exercise of an industrial property right for the purpose of impeding parallel imports.

They will obviously not include in their agreement detailed provisions on the exercise of the industrial property rights whereby they intend to reduce competition. If the agreement is drawn up in such a way that one of the parties exercises all the industrial property rights, the presumption of restraint of trade is so strong that it ceases to qualify for block exemption. In that case, too, only an individual exemption is possible.

An assignment of the trademark is neither necessary nor usual and must be examined pursuant to an application for individual exemption; the assignment to the other party of all the industrial property rights is in itself an exercise of those rights.

(d) Article 3 (b) (1) of Regulation No 67/67 is applicable even if under Community law the parties to the agreement may not use the industrial property rights in order to prevent parallel imports.

In many cases it is quite possible to create a *de facto* restriction on free trade by unlawful means.

A different interpretation of Article 3 of the regulation would have no sense: as a matter of law, industrial property rights may never be exercised for the purpose of restricting trade; Article 3 must therefore be applied if this actually happens.

(e) In order for Article 3 (b) (1) of Regulation No 67/67 to apply, the parties to the agreement need not actually use the trademark or other industrial property rights.

The regulation is intended to exempt typical cases in a simplified manner; a case in which the parties to an agreement enable themselves to exercise industrial property rights in order to impede trade is not a typical case and does not justify block exemption.

The validity of an agreement cannot depend on the actual conduct of the parties to it.

The Advocate General delivered his opinion at the sitting on 20 June 1984.

Decision

1 By an order dated 28 June 1983, which was received at the Court on 3 August 1983, the Bundesgerichtshof [Federal Court of Justice] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions on the interpretation of Articles 1 (1) (a) and 3 (b) (1) of Regulation No 67/67 of th Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (Official Journal, English Special Edition 1967, p. 10).

2 As is clear from the order for reference and the documents before the Court, Mr Andreoli, an engineer from Bologna and the personally liable member of the limited partnership Compact, is a manufacturer of a type of light-metal radiator bearing the trademark "Ghibli". Compact entered into two successive agreements with the Germany company Hydrotherm, a subsidiary of an American corporation, granting Hydrotherm the exclusive right to sell

the radiator. Under the first agreement Hydrotherm had the right to register the trademark "Ghibli" in its own name and did so in various States, including the Federal Republic of Germany.

3 The second agreement, which was concluded after difficulties arose in the performance of the first agreement, granted Hydrotherm the exclusive right to sell "Ghibli" radiators in Western Europe excluding Italy, Greece and Turkey. In the case of a special type of radiator, the licensed territory was defined as Western Europe excluding France, the Benelux countries and Austria. Under that agreement Hydrotherm undertook that in the licensed territory it would not "directly or indirectly represent other manufacturers, retailers or makers of radiators, hotplates or convectors made from aluminium or aluminium alloy, or do business with them". Hydrotherm also undertook to buy radiators from Compact for a specific amount. It should be noted that the other parties to the second agreement were Mr Andreoli, Compact and another firm belonging to Mr Andreoli, Officine Sant'Andrea, Rastignano, Italy.

4 Difficulties also arose in the performance of the second agreement. At one point Hydrotherm refused to accept further goods from Compact whereupon Compact terminated the contract and claimed damages.

5 The court which tried the case at first instance, the Landgericht [Regional Court] Frankfurt am Main, decided in its judgment of 13 September 1979 that the agreement between the parties was void because it was contrary to Article 85 of the EEC Treaty. According to the Landgericht, the block exemption provided for by Regulation No 67/67 was not applicable, since Article 3 of the regulation precluded such exemption where trade in the products covered by the agreement might be hindered by the exercise of industrial property rights.

6 After appealing to the Oberlandesgericht [Higher Regional Court], Frankfurt am Main, Compact notified the agreement to the Commission, which, in a letter dated 31 March 1982, confirmed that it fell within the block exemption provided for by Regulation No 67/67.

7 By judgment of 13 May 1982 the Oberlandesgericht Frankfurt am Main held that in principle Hydrotherm was liable to pay damages and remitted the case to the Landgericht. In the grounds of its judgment the Oberlandesgericht considered the question whether the agreement between the parties was compatible with Community rules on competition. It acknowledged that the agreement had the effect of restricting competition in the Common Market; however, since the parties had not specifically agreed that there should be absolute territorial protection, the agreement was not to be regarded as contrary to Article 85 (1) by reason of such prohibition. The Oberlandesgericht did, however, raise the question whether even an "open" exclusive distribution right might possibly infringe the competition rules in view of the position held by the parties on the relevant market. If the relevant market were the general market in radiators, the proportion of turnover affected by the contract would be so trifling that the possibility of its having an appreciable effect on intra-Communtiy trade would be ruled out. The situation might be different if the relevant market were the market in radiators made of aluminium or aluminium alloy. The Oberlandesgericht considered it unnecessary to clarify that question, since the agreement in question was in any case covered by the block exemption provided for in Regulation No 67/67 because it fulfilled the requirements of both Article 1 (1) (a) and (b) and Article 2 (1) of that regulation.

8 According to the Oberlandesgericht, the fact that the licensed territory included some countries which were not members of the Community was irrelevant to the question whether Regulation No 67/67 was applicable since that regulation concerned only intra-Community trade. Nor did the agreement in question cease to qualify for block exemption as a result of Article 3 of Regulation No 67/67, which excluded such exemption where the contracting parties exercised industrial property rights to prevent dealers or consumers from obtaining from other parts of the Common Market goods to which the contract related which were properly marked or otherwise properly placed on the market. The fact that Hydrotherm had registered the trademark "Ghibli" did not enable it to prevent parallel import by using that trademark. In any event, that would not have been permissible in view of the decision of the Court of 18 February 1971 in Case 40/70, *Sirena* v *Eda*, [1971] ECR 69. Moreover, there was no evidence suggesting that Hydrotherm had used the trademark "Ghibli" to prevent or obstruct parallel imports. The negative clearance granted by the Commission on 30 March 1982 led to the same conclusion. Although the findings and assessments of the Commission were not binding on the national court (judgment of the

Court of 10. 7. 1980 in Case 99/79, *Lancôme* v *Etos,* [1980] ECR 2511), it could nonetheless take account of the facts found in the clearance.

9 Hydrotherm appealed on a point of law against that judgment to the Bundesgerichtshof. After examining the issues raised regarding the Community rules on competition, the Bundesgerichtshof decided that the application of Regulation No 67/67 to the agreements at issue raised various questions concerning the interpretation of that regulation. The Bundesgerichtshof, being a court against whose decisions there is no judicial remedy under national law and thus required by the third paragraph of Article 177 to request the Court of Justice for a preliminary ruling on any questions of interpretation which may arise, therefore submitted the following questions to the Court:

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 is 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?

The first question (the term "undertaking")

10 In Article 1 (1) of Regulation No 67/67 Article 85 (1) of the Treaty is declared inapplicable to agreements "to which only two undertakings are party". There is doubt about the applicability of that provision because the agreement at issue was concluded between Hydrotherm on the one hand and three different persons — Mr Andreoli, a natural person, and the undertakings Compact and Officine Sant'Andrea — on the other. It is an undisputed fact that Mr Andreoli has complete control of both those undertakings.

11 In competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal. The requirement of Article 1 (1) of Regulation No 67/67 is therefore fulfilled if one of the parties to the agreement is made up of undertakings having identical interests and controlled by the same natural person, who also participates in the agreement. For in those circumstances competition between the persons participating together, as a single party, in the agreement in question is impossible.

12 The answer to the first question must therefore be that Regulation No 67/67 must be applied even if several legally independent undertakings participate in the agreement as one contracting party provided that those undertakings constitute an economic unit for the purposes of the agreement.

The second question (territorial scope of the agreement)

13 Under Article 1 (1) (a) of Regulation No 67/67, block exemption is applicable to agreements in which one party agrees with the other "to supply

only to that other certain goods for resale within a defined area of the Common Market". The agreement in question defines the licensed territory as "Western Europe" excluding certain States, which, in one case, are Italy, Greece and Turkey and, in the other, France, the Benelux countries and Austria.

14 The Bundesgerichtshof wishes to know whether the regulation may be applied where the obligations entered into thus cover not only a defined area of the Common Market but also countries outside the Community.

15 Regulation No 67/67 is designed to regulate an aspect of competition in the general context of the area to which the EEC Treaty, and more particularly Article 85, which refers to competition "within the Common Market", applies. The requirements of the regulation are therefore satisfied when the object of the agreement is to establish the territorial scope of the exclusive dealership right within the framework of a "defined area" of the Common Market, provided always that such territorial delimitation as expressed in such a way that there remains a real possibility of competition — and thus of parallel imports — between the territory for which the exclusive dealership is granted and the remainder of the Community, which is not disputed in this case. The fact that non-member countries are included in the territory covered by the exclusive dealership does not therefore alter the requirements for the application of the regulation.

16 The answer to the second question must therefore be that the regulation on block exemption is applicable where the obligations entered into cover not only a defined area of the Common Market but also countries outside the Community.

The third, fourth and fifth questions (use of the trademark right)

17 The exclusive dealing agreement at issue is characterized by the fact that one party granted to the other the right to use a trademark for the precise purpose of carrying out the agreement. In this regard the Bundesgerichtshof raises the question whether, and in what circumstances, the exercise of an industrial property right may bring such an agreement within the terms of Article 3 (b) (1) of Regulation No 67/67 which excludes block exemption. In

substance, it asks whether it is sufficient for the purposes of that provision that an industrial property right may be used under an exclusive dealing agreement in such a way as to prevent the relevant goods from being obtained in the Common Market, or if the provision applies only if such use of the industrial property right arises from the terms of the agreement itself or the actual conduct of the parties.

18 According to Article 3, the block exemption provided for by Article 1 of Regulation No 67/67 does not apply where "(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 . . . 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 . . .".

19 The reason for that provision is explained in the ninth recital in the preamble in which it is stated that ". . . it is in particular advisable to ensure through the possibility of parallel imports that consumers obtain a proper share of the advantages resulting from exclusive dealing . . . it is therefore not possible to allow industrial property rights and other rights to be exercised in an abusive manner in order to create absolute territorial protection."

20 It follows from those considerations that the regulation is not intended to exclude an agreement from block exemption simply because an industrial property right is granted under the agreement in the circumstances stated in Article 1 in order to allow an exclusive dealership to operate normally. The restriction laid down in Article 3 is therefore not applicable where the right to use an industrial property right is assigned in terms which raise no doubt that the exclusive dealership right granted is an "open" right.

21 The prohibition laid down in Article 3 can therefore apply only if either the terms of the agreement itself or the actual conduct of the parties suggest that an industrial property right is being exercised abusively in order to create absolute territorial protection. The mere possibility of such use, arising from

the fact that the parties have not adopted any express provisions in their agreement, is therefore not a sufficient reason for excluding an agreement form block exemption.

22 The answer to the third, fourth and fifth questions must therefore be that Article 3 (b) (1) of Regulation No 67/67 must be interpreted as excluding an agreement from block exemption only if it is clear from the actual terms of the agreement or from the conduct of the parties that they intend to use, or are in fact using, an industrial property right in such a way as to prevent or impede, with the aid of that right, parallel imports into the territory covered by the exclusive dealership. The fact that an agreement does not contain any provision to prevent abuse of an industrial property right is not in itself a sufficient reason for excluding that agreement from the application of Regulation No 67/67.

Costs

23 The costs incurred by the Government of the French Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

24 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber)

in answer to the questions submitted to it by the Bundesgerichtshof by order of 28 June 1983, hereby rules:

1. **Regulation No 67/67 of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to categories of exclusive**

dealing agreements must be applied even if several legally independent undertakings participate in the agreement as one contracting party provided that those undertakings constitute an economic unit for the purposes of the agreement.

2. Regulation No 67/67 is applicable where 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) of Regulation No 67/67 must be interpreted as excluding an agreement from block exemption only if it is clear from the actual terms of the agreement or from the conduct of the parties that they intend to use, or are in fact using, an industrial property right in such a way as to prevent or impede, with the aid of that right, parallel imports into the territory covered by the exclusive dealership. The fact that an agreement does not contain any provision to prevent abuse of an industrial property right is not in itself a sufficient reason for excluding that agreement from the application of Regulation No 67/67.

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 12 July 1984.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the Fourth Chamber