The Legal Framework Applicable to Practices of Pharmaceutical Companies With Respect To Parallel Trade

Romano Subiotto
Cleary Gotlieb Steen & Hamilton, Brussels

I. Introduction

As you know, Articles 81 and 82 are the EC Treaty provisions that pharmaceutical companies must watch when dealing with parallel trade.

Article 81 does not apply to unilateral conduct, but it does apply to agreements and concerted practices. Article 82 applies to unilateral conduct, but only of dominant companies.

II. Article 81

Concerning, first, the scope of Articles 81, recent developments indicate that we have come a long way.

There was a time when the established wisdom was that any unilateral conduct that took place in the context of an existing contractual relationship should be deemed bilateral, and thus as constituting an agreement or concerted practice, unless the distributor had expressly rejected such unilateral conduct. Thus, the mere fact of continuing the contractual relationship was deemed to amount to acceptance of the unilateral conduct.

The cases providing support for this approach include the Court's judgments in *AEG* and *Ford.*

The Commission's view was expressed clearly in the Court of First Instance's December 3, 2003, judgment in *Volkswagen II*. There it argued that "it is not necessary, at least in the case of selective distribution systems [….] to look for acquiescence to a call by the manufacturer in the behaviour which the dealer adopts in the context of that call […] Such acquiescence must be regarded as established as a matter of principle, from the mere fact that the dealer has entered the distribution network. It is therefore deemed to have been given by the dealer […]".

The Commission added in that case that "[I]t is presumed that by joining a distribution system, the dealer approves the manufacturer's distribution policy in advance, a policy which is naturally not foreseeable in all its details when the dealer joins".

The Commission could, after all, point to the words used by the Court of Justice, recently repeated in its judgment in *Volkswagen I*, where it stated that "it is settled case law that a call by a motor vehicle manufacturer to its authorized dealers is not a unilateral act which falls outside the scope of Article [81(1)] of the Treaty but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance".

Of course, there is very little to distinguish the situation just described, and a situation in which wholesalers have been regularly purchasing products from a manufacturer, thereby

establishing a contractual relationship under a number of national laws, even in the absence of an express contract between the manufacturer and the wholesaler, and unilateral conduct by the manufacturer with respect to that wholesaler.

The Court of First Instance rejected the Commission's position. It held that the Commission must establish express or implied acquiescence by the distributors in the attitude adopted by the manufacturer. But for such acquiescence, the manufacturer's attitude remains unilateral.

In this case, the Commission had failed to establish such acquiescence as it had gone no further than to observe that the manufacturer's unilateral act had taken place in the context of an existing contractual relationship, which itself was fully compliant with EC competition law. The Court held that the mere signature of the dealership agreement by Volkswagen's dealers could not be deemed to amount to implied acceptance, given in advance, of Volkswagen's anticompetitive initiatives.

The Court distinguished the apparently contradictory European Court of Justice's statements in *Ford* and in *AEG* by stating that those cases concerned the Commission's assessment whether the selective distribution systems in question fell within the scope of Article 81(1). The manner in which such a system is implemented by the manufacturer is of course relevant to such a question. In both cases, admittance to the distribution network required acceptance of the manufacturer's policy, aimed at preventing parallel trade in the first case and at maintaining high prices in the second.

The Court added that the Commission's position amounts to claiming that a dealer who has signed a dealership agreement which complies with competition law is deemed, upon and by such signature, to have accepted in advance a later unlawful variation of that contract, even though, by virtue precisely of its compliance with competition law, that contract could not enable the dealer to foresee such a variation.

This approach was confirmed by the European Court of Justice in its judgment rendered on January 6, 2004, in *Bayer Adalat*.

It confirmed that the concept of an agreement within the meaning of Article 81(1) of the EC Treaty requires a concurrence of wills between at least two parties, regardless of the form in which it is manifested. The undertakings must have expressed their common intention to conduct themselves on the market in a specific way (para.96).

You will all remember that Bayer had been selling its product, Adalat, in Spain and France. A situation in which there were hardly any exports of this product was followed by an explosion in exports fuelled by a corresponding increase in Bayer's sales in Spain and France. Bayer proceeded to limit the amount of its product sold in Spain and France at the levels it was selling before the export explosion.

Bayer thus decreased sales to the wholesalers, but did not tell them where they had to sell the product, did not condition sales on the final destination of the products, and did not even monitor the final destination of the products.

Bayer and the wholesalers in this case could not be found to have expressly agreed on an export ban. Bayer simply reduced the amounts sold, and the wholesalers continued to purchase available amounts, and tried to obtain more by a variety of means, including setting up new wholesalers.

The issue was thus whether the concurrence of wills and common intention to restrict parallel trade in Adalat could be deduced from the conduct of the parties concerned (paras. 99 and 117), *i.e.,* whether the wholesalers had tacitly acquiesced in Bayer's policy.

In this connection, the ECJ stated that tacit acquiescence, and therefore an agreement within Article 81(1) of the EC Treaty, cannot result merely from what is only the expression of unilateral policy of one of the contracting parties, which can be put into effect without assistance of others, as this would confuse the scope of Articles 81(1) and 82 (para. 100).

Also, the mere fact that a hindrance to parallel imports exists is insufficient to demonstrate the existence of an agreement prohibited by Article 81(1) of the EC Treaty (para. 109).

Rather, the manifestation of the wish of one of the contracting parties to achieve an anticompetitive goal must constitute an invitation to the other party, whether express of implied, to fulfil that goal jointly, *a fortiori* when such an agreement is not at first sight in the interests of the other party, namely the wholesalers (para. 101).

This could for example have been the case if Bayer had imposed an export ban on its wholesalers or if Bayer's conduct could have supported the conclusion that it had required of the wholesalers, as a condition of their future contractual relations, that they should comply with Bayer's new commercial policy of restricting exports of Adalat (paras. 102 and 118).

Absent these circumstances, the Commission should have focused on whether the wholesalers' actual conduct following Bayer's adoption of its new policy of restricting supplies could have legitimately enabled the Commission to conclude that the wholesalers acquiesced in that policy (para. 119), *i.e.,* that they shared Bayer's intention to prevent parallel imports. (Para. 120)

The ECJ confirmed the Court of First Instance's finding that the facts of this case could not support a finding of tacit acquiescence on the part of the wholesalers in Bayer's policy, and that the Commission had incorrectly relied upon the available documentary evidence and on the wholesalers' conduct to find that the wholesalers had tacitly acquiesced in Bayer's policy. (Paras. 52-55)

Importantly, the ECJ held that the "mere fact that the unilateral policy of quotas implemented by Bayer, combined with the national requirements on the wholesalers to offer a full product range, produces the same effect as an export ban does not mean that the manufacturer imposed such a ban or that there was an agreement prohibited by Article 81(1) of the EC Treaty". (Para. 87)

The ECJ also confirmed that "[t]he mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists". (Para. 140)

In short, to summarize the case law as it stands today:

A manufacturer and a wholesaler can expressly agree to limit exports of the manufacturer's product. An easy case would be, for example, *BMW Belgium v. Commission* (a judgment of 1979) where BMW sent a circular to its dealers discouraging them from exporting cars to Germany, and the dealers signed and returned the circular.

More recently, the Court of First Instance in *Opel Nederland* found that 9 dealers had given a commitment to the manufacturer not to export.

These cases do not present any problems. Rather, some uncertainty still arises with respect to cases in which implied acceptance of the manufacturer's apparently unilateral act is deemed to exist.

In *Sandoz* (1990), the "apparent unilateral conduct consisted in the supplier's inclusion of the words "export prohibited" in its invoices. This policy was deemed tacitly accepted, and thus an agreement was deemed to exist, in that customers all received the same standard invoice but still continued to order the products are issue and made successive payments without protest.

The inclusion of "export prohibited" as a term of the sales contract could be read to make the continuance of the contractual relation conditional on not exporting.

Similarly, in the pharmaceutical sector, if a manufacturer were to stop selling to export-only wholesalers, which is a category that exists in France, the competition authorities would presumably find little difficulty in finding that the manufacturer will only make sales subject to an implied condition that the purchaser refrain from exporting products.

Another situation is that where a pharmaceutical manufacturer sells to a wholesaler a quantity of say 100 units over one year. The manufacturer then provides that the quantity sold in the following year shall be reduced by the amount of units that the wholesaler has not sold to pharmacies in the wholesaler's country. Thus, if the wholesaler only sold 50 units to pharmacies in year 1, that wholesaler could only obtain 50 units for year 2, and so on. This could be presented as a system designed to keep volumes sold in the territory at the level needed by domestic patient demand, as this is normally what sales to pharmacies amount to.

The Commission could well try to allege that the system is one where sales to wholesalers are conditional on the wholesaler not exporting, since the wholesaler will obtain less the more he exports, and will obtain nothing if he has exported everything. If the wholesaler deals with

the manufacturer on those terms, the Commission may say that the wholesaler acquiesced to the conditions of trade imposed by the manufacturer, for the only way the wholesaler will be able to maintain relations with the manufacturer will be by not exporting, but rather by selling to pharmacies in his territory.

One then has to consider implied acceptance that the Commission can legitimately deduce from the purchaser's conduct. First, the manufacturer's apparent unilateral conduct must be an invitation to achieve an anticompetitive goal jointly with the purchaser. In the words of the European Court of Justice: the manifestation of the wish of one of the contracting parties to achieve an anticompetitive goal must constitute an invitation to the other party, whether express of implied, to fulfil that goal jointly. Second, the wholesaler's conduct must amount to tacit acquiescence of that goal.

A clear case is presented by the Commission's decision in *Tipp-Ex*, confirmed by the European Court of Justice. In that case, the manufacturer asked its exclusive distributor in France to raise prices to a customer in order to stop exports out of France. The manufacturer checked that the distributor complied and issued warnings and threats. The exclusive distributor acquiesced in the manufacturer's policy by raising prices only to the exporting customer. After the exporting customer interrupted purchases for one year, it wanted to begin purchasing again, but the distributor refused to sell to that customer. The Court found that the Commission had establishd that the distributor had acted upon the request of Tipp-Ex not to sell to cuustomers that resold Tipp-Ex in other Member States.

Aside from these clear circumstances of acquiescence based on conduct, the notion of tacit acquiescence does raise some uncertainty. For example, a manufacturer's invites his purchaser to refrain from exporting his products. The proportion of purchases of that product that the purchaser exports remains the same. In such case, the purchaser's conduct cannot be deemed to amount to tacit acceptance. As the Court of First Instance said in *Volkswagen II*, it is not established that "the calls at issue were implemented in practice". But even that is open to discussion: for example, if the price differentials between importing and exporting countries had widened significantly, might a lack of increase in the proportions exported not suggest an agreement if, absent such agreement, the proportions exported would have increased. Of course, the Commission would then be faced with significant issues of evidence.

But what if the overall proportion of purchases of that product that the purchaser exports reduces only slightly. What then? What sort of a reduction is needed to imply acceptance?

The Commission could refer to *Woodpulp* and say that an agreement or concerted practice must be presumed to exist if there is no other explanation for the reduction, even slight, than the manufacturer's invitation to reduce exports. The Commission could do this with any reduction, on the grounds that the *de minimis* rule does not apply to restraints on parallel trade.

There are also other cases, where the manufacturer bundles several practices, as for example, Volkswagen did in *Volkswagen I.* In that case, in order to block reimportation into Germany

from Italy, Volkswagen implemented two principal hurdles for residents outside Italy to obtain cars from Italian dealers. First, it enacted a bonus system that gave Italian dealers an economic incentive not to sell more than 15% of their vehicles outside their contract territory (the "15% rule"). The 15% rule provided that a dealer's annual 3% bonus should be calculated taking account of sales outside the contract territory, but only up to a maximum of 15% of that dealer's total sales. Second, Volkswagen restricted supply volumes to its Italian dealers so as to limit supply of vehicles available for re-exportation.

Volkswagen's appeal to the ECJ with respect to the CFI's finding on the 15% rule was declared inadmissible by the ECJ because Volkswagen had simply repeated the arguments it had made at first instance.

With respect to the supply limitations, the Court found that Volkswagen had imposed the supply quotas on Italian dealers with the express aim of blocking reexports from Italy and that supplies could be limited by virtue of the dealership contract. The Court concluded that, by accepting the dealership contract, Italian dealers consented to a measure that was used for the purpose of blocking exports.

The Court added that Italian dealers had been influenced by Volkswagen to sell the cars entirely or almost entirely in Italy, as they faced the 15% rule restricted supplies, and clear indications that reexports were not favored.

I have several observations on this judgment: first, the Court did not try to establish each individual measure's contribution to the reduction in exports. There was simply a bundle of measures that led to a reduction in exports, and all the individual measures were thus tainted.

Moreover, the holding in Volkswagen cannot lie in the existence of a pre-existing agreement that allowed supply reductions. If this were the case, the ECJ's judgment would contradict the CFI's judgment in Volkswagen II. In essence, it is not because a dealer accepts a legal agreement that he should be deemed to have accepted illegal variations made to it by the manufacturer. In this case, the agreement provided for possible supply reductions, but it was not stated that the reductions were designed to achieve an illegal objective. As a result, although the dealers should be deemed to have accepted possible supply reductions, they should not be taken as having accepted reductions designed to restrict parallel trade.

Rather, the significance of the ECJ's judgment lies in the purchasers' acquiescence to the manufacturer's objective, as reflected by the absence or significant decrease in exports, regardless of which individual measure or bundle of measures contributed to this reduction.

Pricing Incentives to Refrain from Exporting. The Commission has consistently objected to dual pricing systems and discount practices that have the effect of isolating markets and restricting parallel trade. The recent Glaxo-Wellcome decision merely confirms the Commission's reluctance to create special exceptions for the pharmaceutical industry.

Kodak was the first case where the Commission dealt with dual pricing. It held that a provision whereby customers had to pay the prices applicable in the country of destination,

rather than in the territory where the seller is located, was an illegal restriction of competition.

In *The Distillers Company Ltd.* ("DCL"), the Commission ordered DCL to put an end to the price differentiation designed to discourage exports of Scotch whisky, gin, vodka and Pimm's to other EC countries. DCL had instituted price terms under which allowances and rebates usually granted to U.K. customers were withheld if they exported the spirits to other EC countries. Accordingly, a U.K. dealer wishing to export these spirits had to pay a price which was approximately double that which applied to its purchases for resale in the United Kingdom. The Commission considered that this practice amounted to an indirect export ban and was detrimental to the establishment of the common market.

In *John Deere*, the Commission condemned the imposition of less favorable payment terms for goods known to be exported (by requiring prompter payment), as well as the refusal by Deere to grant quantity or special discounts or other aids to selling for goods known to be exported.

In general, bonus, discount or price schemes which depend on the destination of the sales have been likened to export bans and, for that reason, have been heavily criticized in the Commission's case law.

In *Sperry New Holland* and *Ford Agricultural*, the Commission considered it to be illegal for a company to provide a discount to purchasers based on proof that the product had not been exported to another Member State.

In particular, in *Sperry New Holland* the Commission condemned the requirement to give evidence showing that a product would not be re-exported for a particular sale to be taken into account for the application of a bonus scheme, as well as the condition that the products be registered for use within the territory of the dealer or that the warranty service be completed within that territory.

In *Ford Agricultural* the Commission condemned the imposition of a 5% surcharge on goods known to be exported and the making of discounts conditional on registration within the territory or on the original purchaser retaining and using the purchased product.

Also, in *Gosme-Martell-DMP* and *Tipp-Ex*, the Commission condemned the complete abolition of all normal discounts or preferential sales conditions for export sales, and in *Newitt/Dunlop,* the reduction of discounts on exports in order to protect the local exclusive distributor in the importing Member State.

Even in the pharmaceutical sector, where differences in national price control and health care systems result in significant differences in product prices between Member States, the Commission has condemned practices which restricts parallel trade in drugs. The following cases illustrate this point:

In *Organon,* Organon Laboratories notified its wholesale customers of a new pricing system for its contraceptive pills. The new price regime differentiated between pills to be sold in the

United Kingdom and those intended for import. Only the former qualified for a 12.5% discount rate (brought about by virtue of the system of pharmaceutical pricing control in place in the United Kingdom), whereas previously Organon had applied a discount on all products supplied to its customers regardless of their destination. Following several complaints and Organon's notification of the new pricing system, the Commission initiated proceedings against Organon and issued a statement of objections. The Commission considered that the new price regime discriminated according to the geographical destination of the product and as a result, consumers in other EC countries would no longer enjoy the benefits of parallel trade. Organon decided to withdraw the new pricing regime and to re-introduce previous price conditions.

In *Glaxo-Wellcome* the Commission condemned a dual pricing system requiring Spanish wholesalers to pay a higher price for products to be exported to the UK. The Commission rejected Glaxo-Wellcome's argument that the price differences in the EEA result from Government regulatory action and that dual pricing was a legitimate means to neutralize the distortive effect on trade. It pointed out that divergent national price regulation cannot excuse restrictions on parallel trade (referring to the *Merck/Primecrown* judgment of 1996), especially if price regulation allows some scope for negotiations. Moreover, much of the price difference was due to currency fluctuations rather than State action. The Commission equally rejected attempts to justify dual pricing by the need to avoid losses due to parallel trade that would in turn affect R&D budgets. The Commission found no evidence of a causal link between parallel trade and the size of R&D budgets, and took the view that the losses were minor in comparison with these budgets. Finally, in the absence of evidence that price regulation and parallel trade discouraged the supply of pharmaceuticals to the Spanish market, parallel trade restrictions could not be justified by a possible shortage of supply.

For the record, the most recent pronouncements of the courts in Luxembourg concern *Volkswagen I*, where the Court of First Instance confirmed the Commission's decision declaring Volkswagen's 15% rule illegal. The 15% rule simply meant that Volkswagen agreed to grant bonuses to dealers based on their overall purchases, except that exports would be taken into account only insofar as they represented less than 15% of overall sales . Thus, if exports represented 30% of overall sales in one year, only half of those sales would be taken into account to calculate the bonus granted to dealers.

Finally, in *Opel Nederland*, the Court of First Instance confirmed the Commission's finding that limiting bonus payments to domestic sales amounts to a restriction by object because it creates a disadvantage for export sales in comparison to domestic sales. Bonuses were only paid within special promotion campaigns for selective models. At the end of a campaign, Opel Nederland determined how many local retail sales the dealer had made for the car models covered by the campaign. On this sales the dealer would receive a bonus payment. Opel Nederland maintained that this was legitimate because promotion campaigns were designed to stimulate local demand. A given car model may experience difficulties in the Netherlands requiring special promotion but may not have any problems in another Member State. Bonus payments were designed to reward dealers for their efforts to stimulate local demand. Opel claimed that this did not amount to a restriction of competition by object since it did not reduce the incentive of dealers to export. This point has been appealed to the European Court of Justice.

III. Article 82

And now for a few words with respect to Article 82. Given the apparent difficulty of establishing an agreement under Article 81, some complainants and antitrust enforcement agencies have focused on Article 82. The hurdle there is of course to establish the existence of a dominant position. We know that the Commission normally looks at the third ATC class and moves up or down from there, in accordance with the class level that best reflects the same therapeutic use of a particular class.

Some wholesalers argue that each product is a market of its own because pharmacists cannot change prescriptions. But of course, this looks at the wrong stage of the demand process. The first point is to consider the range of products available to doctors, from which they can prescribe the preferred product. It is at this stage that competition between products takes place. Whether a prescription can be changed once it has been written out is not relevant.

In any event, assuming a company is found to be dominant, how can Article 82 apply to prevent restriction on parallel trade that result purely from unilateral conduct? Such unilateral conduct will normally be a refusal to supply additional products ordered, or reducing the amounts supplied in the past.

This issue is currently before the Court of Justice in *SIFAIT v. GlaxoSmithkline.* The reference arises from questions submitted by the Greek Competition Commission to the ECJ concerning the application of Article 82 of the EC Treaty. In essence, the questions ask whether it is contrary to Article 82 for a dominant firm unilaterally to refuse to sell additional quantities of products to wholesalers who wish to make greater profits by selling the products concerned in other Member States, *i.e.*, by engaging in parallel trade.

From the Order of Reference, two important assumptions of fact can be made. First, the dominant undertaking does not stipulate as a contractual matter that products will only be sold on condition that they are used only for domestic consumption: this case simply concerns unilateral behavior. Second, the export activities concerned are useful mainly because they allow wholesalers to make higher profits by selling in countries where medicine prices are higher: as the Order of Reference states, "the ultimate consumer/patient derives limited financial advantage from the parallel trade".

Absent additional abusive behavior, no principle under Article 82 requires a dominant firm to supply additional quantities of product to a third party simply because that third party can make higher profits by selling them elsewhere.

As a general matter, a dominant firm is entitled to decide with whom and on what terms it will deal with customers. None of the exceptions to this principle would apply in the present case:

- The only principle that would oblige a dominant firm to supply new customers with whom it has not dealt with before is the "essential facility" doctrine developed under the *Bronner* line of case law. As a preliminary matter, it should be understood that essential facilities principles are mainly intended for access to infrastructure – usually infrastructure owned by former state monopolies such as utilities – and should not apply to valuable intellectual property and products

representing the fruit of substantial investment, such as pharmaceutical products. However, even if this were not the case, none of the necessary conditions for the application of this doctrine are met here.

- First, the dominant firm's refusal to supply would not eliminate all competition from the market. The dominant company has not refused to sell, but merely to sell the full amount of the quantities that it has been asked to supply.

- Second, access to supplies from the dominant firm is not in any event "essential" for wholesalers and retailers within the meaning of the case law. "Essential" requires that there are no alternative supply outlets for the requesting party: in the present case, there are no indications from the Order for Reference that, first, the dominant firm is the only supplier of all substitutable products on the relevant market(s), and, second, that even if it was, other undertakings could not develop substitute products with appropriate effort.

  Nor would the dominant firm's refusal to supply increased quantities affect the viability of wholesalers and retailers: they are multi-product companies who would easily continue operations by selling other pharmaceutical companies' products (in addition to the quantities that the dominant firm does in fact continue to make available and additional quantities of the same product that they could very well obtain from other wholesalers and retailers in Greece and elsewhere).

- Finally, as the Order for Reference makes it clear, there would be no material benefits arising to consumers from compulsory dealing: "the ultimate consumer/patient derives limited financial advantage from the parallel trade". This is true of patients in the importing Member States, and undeniable with respect to patients in the exporting Member States, who, in addition, may very well be faced by shortages of essential products, absent a regulatory framework ensuring continued supplies. If Article 82 were applied in this circumstance, competition law would protect competitors, but certainly not consumers, which would be contrary to the stated purpose of competition law.

– Outside of essential facilities, a dominant firm may not suddenly *terminate* supplies to *existing* customers who have a strong dependence on the dominant firm in certain limited circumstances (*Commercial Solvents*). However, this principle does not prevent the dominant firm from deciding whether or not to *increase* the quantities of their products currently supplied to existing customers. Any contrary principle would require a dominant firm to deal with all available buyers at all times for all the quantities they request, which would (i) be an onerous and unjustified interference with the freedom of contract, (ii) lead to absurd results, and (iii) result in surplus quantities of products and tremendous waste. Even if there were such a principle, Article 82 only prevents the dominant firm "limiting production[...]<u>to the prejudice of consumers</u>". The Order for Reference makes it clear that no material consumer benefits would arise in the present case from parallel trade. Article 82 EC does not require dominant undertakings to generate competition against themselves simply because that would benefit competitors.

- Finally, although a compulsory dealing obligation may be an appropriate remedy where the refusal to deal is linked with other behavior that is abusive, that line of case law does not apply here. In particular, a refusal to supply additional quantities simply because customers express a wish to export them is not an abuse in itself:

  - The dominant company would not be preventing the wholesaler from exporting. If the wholesaler so chose, it could clearly reduce its sales to its domestic retailers and divert them to export trade, subject to any applicable public service obligations.

  - An unilateral decision to reduce supplies to a particular customer is legitimate behavior even if the effect of that decision is that the customer has less products to sell than before, whether for export or otherwise. The situation would only be different where it is clear that supplies were materially reduced only as "punishment" for export activity or if the reduction drove the wholesaler out of the market. No such allegation is made here.

  - A dominant widget manufacturer can take many different forms of unilateral action that affect the patterns of trade without any of them being unlawful under Article 82 for that reason alone. Most obviously, it could legitimately withdraw from a particular national market simply because of insufficient returns, which the ECJ has held would be legal. Likewise, it might apply a uniform pricing policy across Member States. This would inevitably mean that there would be less parallel imports than before in certain Member States. However, there can clearly be no suggestion that this circumstance *alone* would render the dominant firm's unilateral behavior unlawful. A dominant company must be able to take decisions about how to run its business.

  - A rule of law based on such a statement of intention would be impossible to apply. All customers would declare an intention to export, regardless of their true intention, so as to have a claim to all quantities ordered, thus making the rule of law invalid, absurd, and irrelevant. The fulfillment of that statement of intention could not be guaranteed. Customers having failed to express such an intention would open themselves to the possibility of not receiving all the quantities ordered.

  - Such a rule would also lead to absurd conclusions: absent essential facilities claims, it would be lawful to refuse to supply a company supplying products only in country A, but unlawful to refuse to supply the exact same products and quantities to a company from country B that wished to export to country A. Yet in both cases, the economic effect of the dominant firm's decision would be the same.