JUDGMENT OF THE COURT
29 FEBRUARY 1968[1]

Parke, Davis & Co. v Probel, Reese, Beintema-Interpharm and Centrafarm[2] (Reference for a preliminary ruling by the Gerechtshof, The Hague)

Case 24/67

Summary

1. *Policy of the EEC — Rules on competition — Cartels — Prohibitions — Restrictive nature (EEC Treaty, Article 85(1))*

2. *Policy of the EEC — Rules on competition — Patents — Prohibitions in Articles 85 and 86 of the EEC Treaty — Not applicable to patents as such — Possible applicability to cases of improper use*

3. *Policy of the EEC — Rules on competition — Patents — Use — Sale price of the patented product — Higher price as compared with the unpatented product — Such difference not necessarily improper (EEC Treaty, Article 85)*

1. The restrictive nature of Article 85(1) is incompatible with any extension of the prohibition for which it provides beyond the three categories of agreement exclusively enumerated therein.
2. The existence of the rights granted by a Member State to the holder of a patent is not affected by the prohibitions contained in Articles 85(1) and 86 of the Treaty. The exercise of such rights cannot of itself fall either under Article 85(1), in the absence of any agreement, decision or concerted practice prohibited by this provision, or under Article 86, in the absence of any abuse of a dominant position.
3. A higher sale price for the patented product as compared with that of the unpatented product coming from another Member State does not necessarily constitute an abuse of a dominant position.

In Case 24/67

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Gerechtshof (Court of Appeal), The Hague, for a preliminary ruling in the action pending before that court between

PARKE, DAVIS AND CO.

1 — Language of the Case: Dutch.
2 — CMLR.

and

PROBEL, REESE, BEINTEMA-INTERPHARM AND CENTRAFARM

on the interpretation of Articles 85(1) and 86 of the Treaty establishing the EEC —considered in conjunction with the provisions of Articles 36 and 222 thereof— concerning the rights which the holder of a patent granted in a Member State may request the courts to enforce,

THE COURT

composed of: R. Lecourt (Rapporteur), President, A. M. Donner and W. Strauß, Presidents of Chambers, A. Trabucchi and R. Monaco, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

Parke, Davis & Co., whose registered office is in Detroit (United States), is the holder of Netherlands patents Nos 69, 156 (issued on 17 November 1961) and 70 832 (issued on 16 August 1952) which relate to a microbiological preparation and a chemical antibiotic preparation process called chloramphenicol.

The Probel, Interpharm and Centrafarm companies marketed or resold and delivered chloramphenicol in the Netherlands without the permission of Parke, Davis & Co.

On 15 January 1958 Parke, Davis & Co. brought an action against Probel, Interpharm and Centrafarm before the Arrondissementsrechtbank, Rotterdam, for breach of patent and sought damages and an order requiring them to refrain from any further infringement. In particular Parke, Davis & Co. alleged that the chloramphenicol in question had been made by one of the processes for which it held a patent in the Netherlands and furthermore that it was not only entitled to intervene in the matter but was even under an obligation to do so because of the licence which it had granted to Koninklijke Nederlandse Gist- en Spiritusfabriek N.V. at Delft for the exploitation of these patents.

The three defendants opposed this claim first for reasons concerning both the facts and the interpretation of Netherlands patent law. It was only during the proceedings before the Gerechtshof, The Hague, that Centrafarm alleged that Parke, Davis & Co. was acting in disregard of Articles 85 and 86 of the EEC Treaty in using its Netherlands patent to prevent the importation into the Netherlands of chloramphenicol produced and freely sold in Italy. It is a fact that under Italian patent law no patent can be granted for medicaments and processes for their preparation. Centrafarm stated that it had bought chloramphenicol from Carlo Erba at Milan.

In its judgment of 30 June 1967 the Gerechtshof, The Hague, reached decisions on most of the points at issue. In particular it

declared that the practices of which complaint was made against these three companies were illegal, and ordered them to cease forthwith from infringing the two patents concerned in any way, and threatened them with periodic penalty payments for non-compliance with the order. But this order was made 'except as regards products from Italy'. The Gerechtshof reserved its decision as regards the imports from Italy, and in accordance with Article 177 of the Treaty it referred a question relating to the interpretation of the Treaty to the Court of Justice, wording it in the following terms:

'1. Do the prohibitions contained in Articles 85(1) and 86 of the Treaty establishing the European Economic Community, possibly considered in conjunction with the provisions of Articles 36 and 222 of that Treaty, concern or not concern the holder of a patent issued by the authorities of a Member State when, in reliance on that patent, he claims that the courts should prevent in the territory of that State any circulation, sale, hire, delivery, storage or use of some product from another Member State, if the latter State does not grant an exclusive right to manufacture and sell that product?

2. Is the answer to Question 1 different if the price at which the patent-holders offers the product on the market in the territory of the first Member State is higher than the price asked of the consumer in that same territory for the same product when it comes from the second Member State?'

The judgment of the Gerechtshof, The Hague, was received at the Registry of the Court of Justice on 6 July 1967 having been sent from the Registry of the former court to the Registry of the latter.

In accordance with Article 20 of the Statute of the Court, Parke, Davis & Co. (Advocates: L. D. Pels Rijcken and A. Deringer), Probel and Centrafarm (Advocate: P. H. M. Hoogenbergh), the Commission (Agent: R. C. Fischer), the Governments of the French Republic (Agents: Messrs Paris and de Bresson) and of the Kingdom of The Netherlands and of the Federal Republic of Germany (Agents: Messrs Everling and Peters) submitted written observations.

At the hearing on 16 January 1968 the abovementioned companies, the Commission, the Governments of the French Republic and the Federal Republic of Germany presented oral argument.

The Advocate-General delivered his reasoned, oral opinion at the hearing on 7 February 1968.

II — Observations submitted pursuant to Article 20 of the Statute of the Court

In its written observations *Parke, Davis & Co.* successively examined the following series of arguments:

As regards the consequences of the fact that there are no patents for pharmaceutical products in Italy, Parke, Davis & Co. points out that the effect of this strange state of affairs is the development of an industry in medicaments in Italy which can profit from inventions made elsewhere in the world in the pharmaceutical sector, without that industry's carrying out any appreciable research of its own.

It is asserted that the Italian industry in pharmaceuticals is not in a position to invest the considerable sums of money necessary for the development of new products. It confines its activities to learning about inventions patented in other countries and published in patents registers, so that it can use them in its manufacturing activities, without any indemnity or sanction, and freely market the products thus produced in its own country.

The countries of western Europe are being flooded, so it is said, with these Italian products 'in breach of the patents issued in these countries, which forces the holders of those patents to bring large numbers of actions for infringement of patents in order to protect their rights against this illegal importation'.

Parke, Davis & Co. stresses the consequences which would follow if the Court of Justice were to give an affirmative answer to the questions referred by the Gerechtshof, The Hague. It says that the Italian pharmaceuticals industry, which is already profiting 'with impunity' from inventions patented elsewhere, would continue to occupy a privileged position in the other Member States. This would completely distort the normal conditions of competition in the

market concerned, and the consequences of this would be to strip patents granted for pharmaceutical products of all their value in the countries of the EEC and to create utter havoc in the common market in medicaments. This would be contrary to the 'harmonious development of economic activities' throughout the Community, which is one of the objectives laid down by Article 2 of the Treaty.

Parke, Davis & Co. demonstrates by a series of examples that the importance of the decision to be taken by the Court of Justice in this case is not limited to pharmaceutical products. It says that this decision has consequences for all branches of commerce and industry. An affirmative answer to the questions referred by the Gerechtshof, The Hague, would bring about an upheaval in every branch of business life with unforeseeable consequences.

Parke, Davis & Co. recalls the theoretical discussions which have occurred on the more limited subject of 'parallel patents'. The question could be asked whether 'patented products, made and duly marketed in one country by the holder of a patent or under licence from him' could 'then be imported and sold without the patent holder's authority in another country in which a patent has also been issued to him'. National patent law in various countries, for example in the Netherlands and in Germany, would not permit this. However the problem of parallel patents remains outside the scope of the questions referred by the Gerechtshof, The Hague, on the subject of Article 85(1) of the EEC Treaty. Parke, Davis & Co. is of the opinion that this provision of the Treaty cannot be applied to the problem raised which has no direct relationship with 'agreements between undertakings' or 'decisions by associations of undertakings' or 'concerted practices' as prohibited by Article 85(1).

On the contrary, the reply to the questions referred should be given in the light of Article 86, which is itself to be interpreted with regard to other provisions of the Treaty, so as to define the scope of the prohibition on the abuse of a dominant position. In particular it should be asked what is meant by 'a dominant position within the Common Market or in a substantial part of it' and by 'abuse' of such dominant postion. It is argued that for the purposes of Article 86 a dominant position connotes an economic concept. In order to discover whether an undertaking is in a dominant position, it is necessary to examine whether the undertaking is protected or substantially protected against any competition within the Common Market or in a substantial part of it so that it can impose its own conditions.

Parke, Davis & Co. says that the exclusive rights enjoyed under patents do not of themselves create a dominant economic position within the meaning of Article 86. It is only when a given sector of economic life is limited exclusively or mainly through the patented products that the exclusive rights of the holder of the patent may also bring about a dominant economic position.

It is also argued that there cannot be any question of a dominant economic position in any of the following examples: first, when apart from the patented product there are other products on the market which have the same effect or are intended for the same use and which, therefore, are in competition with the patented product; secondly, when licences are granted to different licensees which compete *inter se* as regards the patented product; thirdly, when a product manufactured according to a patented process can also be manufactured by one or more other processes. It is asserted that the first and the last of these examples applies as regards the patents in question in the present case.

Parke, Davis & Co. also examines the concept of 'abuse' within the meaning of Article 86. In this connexion the four versions of the Treaty employ pejorative expressions. It is argued that Article 86 does not prohibit the use of a dominant economic position. The Treaty is only infringed when this use becomes an abuse. The questions referred to the Court of Justice are about protecting patents and obtaining an injunction from the courts which is the most natural method of exercising rights conferred by patents. This cannot be described as an abuse. Therefore Article 86 cannot be applicable to this.

Moreover, it may be concluded from Article 36 that the Treaty is certainly not intended to prevent the normal exercise of patent

rights. This article states that the provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of the protection of industrial and commercial property. Thus, according to this wording, Article 36 is not directly applicable to the situations referred to in Article 86(1). However, this is no obstacle to finding in Article 36 a clear indication in favour of the point of view adopted by the Treaty as regards industrial property rights. For it appears from Article 36, which specifically says that it respects industrial property rights, that the existence of national patents, with their effects limited to the territory for which they have been granted, is of itself compatible with the Common Market which the Treaty is designed to establish. From this it necessarily follows that the normal exercise of patent rights cannot be incompatible with the Treaty, even with Articles 85 and 86.

It is argued that this line of reasoning is corroborated by Article 222 of the Treaty according to which the rules in Member States governing the system of property ownership are not to be prejudiced. It is argued that this 'system of property ownership' also includes industrial property rights. If this were not so, the reference to Article 222 in the grounds of judgment in the *Grundig* case would be superfluous and irrelevant. It appears from other passages of that judgment that not every exercise of industrial property rights is necessarily compatible with Community law. However, the right to obtain an order from the courts in order to enforce the temporary monopoly given to the holder of a patent is inherent in patent law. If the most ordinary exercise of this right were to be prevented, the right itself would be extinguished and, in fact, 'expropriated'.

Parke, Davis & Co. then devotes some arguments to Regulation No 17 and to the declarations of the Commission of the EEC concerning cartel law. Agreements concluded between two undertakings, having as their effect the imposition of restrictions on the exercise of industrial property rights on the assignee or user of such rights, need to be notified because subparagraph (2)(b) of Article 4(2) so provides. This appears from the 'practical guide' prepared by the Commission on Regulation No 17, from the Commission's notice of 24 December 1962 (Official Journal of the same date) and from a reply given on 18 January 1963 to Mr Blaisse, a Member of the European Parliament (Official Journal of 26 January 1963). Whilst all these clarifications related to the application of Article 85(1) of the Treaty, they are also of interest for the application of Article 86. For they are based on the fact that the existence of patent rights granting limited territorial protection is compatible with the Treaty. Once it is admitted that the grant of an exclusive licence does not have an improper influence on competition, it is impossible to conceive how the normal protection of patent rights could do so.

Parke, Davis & Co. goes into the grounds of the judgment delivered by the Court of Justice in *Grundig-Consten* (Joined Cases 56 and 58/64), and emphasizes the differences between the situation existing in those cases and in this one. First, Parke, Davis & Co. is not basing its right on any agreement. Secondly, this is a case about patents, not about trade marks. Thus, in examining a case such as this one in the light of the *Grundig* judgment, it is necessary to keep in mind the fact that trademark law and patent law do not fulfil either the same needs or the same objectives.

As for the second question referred to the Court of Justice, Parke, Davis & Co. emphasizes that in its opinion the Gerechtshof, The Hague, was probably thinking of Article 86(a) of the Treaty. It is argued that Article 86(a) would only be applicable if there were a dominant position, which is not the case here. Even if there were a dominant position, this would have to result in 'inequitable' purchase or sale prices, in that they could not reasonably be justified from the economic point of view. In the present case the prices can obviously be justified. Burdensome research is necessary for patented inventions. It is asserted that Parke, Davis & Co. devotes 35% of its turnover to such research and to the costs of advertising its products. As regards the patents in question, it is alleged that this research has been carried out in the areas of biology, chemistry and therapeutics, which in this case took place at Parke, Davis &

Co.'s research centre with the help of laboratories and scientific collaborators at various American universities. 'The Italian industry, which copies a new product by applying the specifications published in the patent registers of other countries concerning the means of preparation, does not have to bear all these costs.' Thus it is evident, continues Parke, Davis & Co., that the Italian industry is in a position to sell the product in the Netherlands at prices so low that they no longer enable the licensee to sell the product at a profit.

It is argued that the differences in price of the kind mentioned in the second question referred by the Gerechtshof, The Hague, could also be explained by differences in quality or by preferences of the public towards a given brand. 'Thus the Court of Justice could only give an affirmative answer to this question if the mere existence of these differences, quite apart from their importance or their causes, were of itself a sufficient reason for finding that a dominant economic position was being abused. The consequence would be that dealings in every product could only take place in the Common Market at uniform prices. It is obvious that in these circumstances differences in quality would also be practically non-existent.'

Articles 100 and 101 of the Treaty indicate the procedure to be followed for reaching a closer approximation of national laws on the subject of patents. Since this approximation has not yet been brought about along the lines laid down in the Treaty, the court must base its decision on the legal situation as it exists at present.

During the oral procedure Parke, Davis & Co. emphasized that the reply to the questions asked must be given within the context of the decision to refer the questions, and that the reply must only answer a theoretical case of which the present example is an illustration.

Parke, Davis & Co. described the Netherlands market in medicaments and emphasized that in the Netherlands pharmaceutical products packed in large quantities, supplied to wholesalers and carrying a generic name, are not subjected to the quality control required by law for products bearing a trademark, which are necessarily more expensive. Thus there is a loophole in Netherlands legislation of which undertakings such as Centrafarm and others would like to take advantage. It is asserted that case-law evolved in the Netherlands makes it possible to protect holders of pharmaceutical patents against imitations from abroad which use the opportunities provided by the said legislation. The counterfeiters and the importing undertakings which obtain supplies from them are trying to combat this case-law by means of an incorrect application of Community law. As regards chloramphenicol, the quality of the products bearing a trademark is higher than the quality of the mass-produced products made by the counterfeiters. In addition, there are antibiotics which can compete with chloramphenicol from the medical point of view.

Finally, Parke, Davis & Co. argues that as regards barriers to trade between Member States the legislation on patents may be compared with security rules found in each country concerning certain types of apparatus. Respect for such legislation or for such rules cannot normally be rendered nugatory by the rules of the Common Market. The principle that patents have territorial effect has not been set at nought by the rules of the Treaty.

Centrafarm sets out Netherlands and Italian patent law in detail, and also states the previous case-law of the Court (the judgments in *Bosch*, Case 13/61 of 6 April 1962, *Van Gend en Loos*, Case 26/62 of 5 February 1963, *Costa*, Case 6/64 of 15 July 1964, *Technique Minière*, Case 56/65 of 30 June 1966, and *Grundig*, Joined Cases 56 and 58/64 of 13 July 1966). It states that these five judgments have thrown light on the scope of the Treaty. According to this case-law the Community is a new legal order in its own right. It follows from this that a limitation is placed on national sovereignty. Community law is binding in the Member States and creates rights for individuals. The rules relating to competition are of direct effect and have applied since the Treaty entered into force. National monopolies of a commercial character are to be adjusted before the end of the transitional period so as to ensure that no discrimination regarding the conditions under which goods

are procured and marketed exists between nationals of Member States. The creation of new commercial monopolies is prohibited by virtue of Article 37(2). The application of competition law does not of itself affect the existence or acquisition of industrial property rights, but only limits the exercise of them. It can be concluded from these facts, drawn from the case-law, that the possession of a patent certainly confers a dominant position on the holder of the patent, who is the only person to possess a right in the territory of the State which has granted this patent. There is nothing abnormal about subjecting patent law to restrictions. There are precedents for this (Articles 5, A, II, of the Paris Convention for the Protection of Industrial Property; Article 34 of the Law on Patents and Article 17 of the Law on Competition in the Netherlands). On this subject it is interesting to consider the reasons for the directive of the Council of the Communities on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (Official Journal of 9 February 1965, p. 369). The provisions relating to compulsory licences are not applied in the Netherlands. The legislative provisions relating to proprietary products have not been adapted to the directives of the Council. In the Netherlands the dominant position of the holder of the patent has, up till now, remained unlimited from the national point of view.

According to Centrafarm both Article 86 of the EEC Treaty and Article 1 of Regulation No 17 prohibit the abuse of a dominant position without a prior decision to this effect being necessary. Thus reliance on a national patent, intended to prevent traders other than the holder of the patent from marketing their products, and thus to prevent them from competing, is in contradiction with the spirit and the letter of the Treaty, the very object of which is to eliminate the existing divisions, not to maintain them. Such uses of national patents certainly fall under the prohibition in Article 86 and are thus prohibited *ipso facto*. Amongst the examples given in the second paragraph of Article 86 one, concerning prices, is applicable here, because by unfair purchase prices there must be understood a price which is not exactly referable to the goods delivered. The comparison between the prices of the patented medicaments with those for which wholesalers could sell the same medicaments if their sale were authorized proves that using patents in a certain way does indeed correspond to this example.

Moreover, subparagraph (b) of the second paragraph of Article 86, which mentions by way of example the practice of limiting production, markets or technical development to the prejudice of consumers, may also apply to the activities of the holder of a patent who prevents the consumer from choosing amongst other unpatented medicaments which are nevertheless of the same kind and may be of a better quality than the patented medicament.

Thus, according to Centrafarm, an affirmative answer should be given to the two questions referred by the Gerechtshof, The Hague. The first question should be answered in the affirment on the following grounds: first because the setting up of barriers to the marketing of the product falls within the definition of the prohibition in Article 86, secondly because the obtaining of an injunction from the courts would set up a barrier to the marketing of the product even though the unpatentable product was freely put into circulation on a part of the markets concerned, and thirdly because the obtaining of an injunction from the courts on the basis of the patent would thus be an act setting up a barrier to marketing. A distinction must be made between products for which there are parallel patents and products which are not patentable. When the holder of a patent puts a patented product lawfully in circulation on one of the markets of the Member States, the product becomes 'free' to be sold on this market, because patent law has been 'exhausted'. The product which has thus become 'free' must also be freely negotiable on the other markets of the EEC in accordance with the rules on competition provided for by the EEC Treaty. The sale of a product which has become 'free' cannot be impeded by a parallel patent existing in one of the other Member States. A non-patentable product has always been 'free' and its sale cannot be

impeded for the same reasons as those stated above.

According to Centrafarm the second question must also be answered in the affirmative, because the protection inherent in the patent uselessly maintains high prices and makes it possible to depart to a large extent from the reasonable prices for which producers and dealers can deliver products at a reasonable profit. It is alleged that this is proved by price comparisons made by specialists. In the case of chloramphenicol, imports seem to have reduced the price of a thousand pills of this product from Fl. 600 to Fl. 30 since 1957.

Finally Centrafarm asserts that the arguments relating to research costs is not decisive, because it cannot make the provisions of the Treaty on competition ineffective. The supranational rules on competition, applied within the Common Market, should be applied in such a way that the free movement of pharmaceutical products on this market cannot be impeded in any way whatsoever by patents.

During the oral proceedings Centrafarm stated that the Italian company Carlo Erba was manufacturing chloramphenicol under a licence granted by Parke, Davis & Co. Centrafarm pointed out that in various areas the exceptions have been made to competition rules on the basis of the Community regulations themselves. It is asserted that in the absence, at present, of rules on patents, the rules on competition in Articles 85 and 86 apply without restriction. Thus for a finding against Centrafarm, it would be necessary to prove that in the legal and economic context there is an abuse of its position and an unfavourable influence on trade between Member States as a result of the setting up of a protected market. In view of the present organization of the market or markets in medicaments in the Community and the non-observance of the directive of the Council of 29 January 1965 by the Member States, activities such as those carried on by Centrafarm are perfectly legal.

Probel states that the chloramphenicol which it imported from Belgium to the Netherlands originated in Italy and that it stopped these imports in 1958, under threat of a court action. Probel relies on the wisdom of the Court and asks not to be ordered to pay costs.

The *Commission* analyses the scope of the questions referred and observes that the Gerechtshof, The Hague, limits itself to asking whether, in the present case, the fact of asking the courts for an injunction is contrary to Article 85(1) or Article 86. The main question is whether these articles imply that the courts are forbidden to order such an injunction. Thus the subject-matter of the questions referred is how far Articles 85 and 86 limit the rights of the holder of a patent obtained by virtue of the legislation of one of the Member States in a case such as the present one. In support of the general considerations put forward by the Commission as regards the questions referred, the Commission expresses the opinion that the relationships between national laws on patents, on the one hand, and the rules on competition set out in Articles 85 to 90, on the other, must be determined in accordance with the Treaty. Since the Treaty does not expressly lay down these relationships and since Articles 85 and 86 are directly applicable in their entirety in every Member State, the national court must itself decide upon the field of application of these provisions with regard to national 'patent' law and, where applicable, do so on the basis of an interpretation given by the Court.

Since the Gerechtshof, The Hague, has also mentioned Articles 222 and 36 in its questions, regard should be had to the judgment of the Court of Justice of 13 July 1966 in Joined Cases 56 and 58/64 in which trademarks were more particularly at issue. The Court of Justice declared in particular that these two provisions do not mean that there can be no application of Community law to the exercise of national industrial property rights. Article 36 only limits the field of application of Articles 30 to 34, and not the rules on competition. This provision also shows that the Treaty recognizes that the establishment of the Common Market cannot fail to affect national patent law to a certain extent. This article does indeed make an exception to Articles 30 to 34 as regards prohibitions or restrictions on imports, exports or goods in transit so as to protect industrial and commercial property, but only in so far as they do not 'constitute a means of arbitrary discrimination or a

disguised restriction on trade between Member States'.

Article 222, which appears in that part of the Treaty devoted to general provisions, merely states that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. It may be doubted whether this provision really applies to the system of commercial and industrial property ownership. It is mainly intended to state that the Treaty leaves to Member States the freedom to decide, so far as regards observance of the obligations imposed on them by the Treaty, between a system of private property and a system of public property. It certainly does not prevent Community law from limiting the exercise of rights referable to property in certain cases. For example this can happen when Articles 85, 86 and 92 and provisions laid down on the basis of Articles 43 and 75 are applied. However, if it were to be admitted that Article 222 also applies to the system of industrial and commercial property ownership, the said system is in no way prejudiced when the exercise of rights arising under a patent is limited, without the existence of this right as such being abolished. The Court so held as regards trademark law in its aforementioned judgment of 13 July 1966. More particularly, as regards patent law, the Treaty does not say that in case of conflict between the rules on competition of the Treaty and patent law the latter prevails. Moreover, the fact that Community law can impose limitations on the exercise of a right conferred by a patent is not surprising in any way. Even under national law, the exercise of rights and the use of opportunities arising under a patent by the holder thereof can be limited by other rules and, in particular, by provisions relating to cartels and to the protection of prices. It can be stated as a premise that patent law must be governed by the principle which the Court has already recognized in respect of trademark law. This principle is that the nature and the function of Community law on competition do not permit rights arising under national patent law to be improperly exercised so as to render Community law on cartels ineffective (aforesaid judgment of 13 July 1966, Rec. 1966, p. 500). However, in drawing the consequences from this principle, it must not be forgotten that patent law does not fulfil the same function and does not have the same effect on the freedom of competition as does trademark law. This is why it is necessary to examine the objectives of Community law on competition and those of national patent law before determining the relationship between them more precisely. From this it can be concluded 'that Community law on competition permits a restriction on freedom of competition which, on the one hand, is necessary for achieving the particular objective of patent law and which, on the other hand, does not form an obstacle to the final objective of the Treaty, namely the establishment of a free and common market between Member States'.

A conflict between national patent law and Community law on competition can arise particularly when the holder of a patent uses his right to prevent any importation of the patented product from another Member State. In such a case, this right is not being used with a view to its classical objective, namely in order to reward the inventor and to stimulate scientific investment, but with a view to a protectionist result, contrary to the 'system of free and undistorted competition' of the Common Market. All the Member States recognize, whatever the theoretical basis on which they do so, that the protection granted by a patent is exhausted when the patented product is put on the market. The justification for this legal consequence is to be found in the fact that the holder of the patent has been able to benefit from his monopoly over the product so put on the market. When he grants a licence, he receives this benefit in the form of royalties. Thus the reasons for limiting freedom of competition amongst persons acquiring the product and for continuing to protect this product from being freely circulated on the market disappear. Therefore patent law does not protect the holder of a patent or his licensees against the competition of persons buying from them.

The patent is naturally limited to the territory of the Member State which has granted it. However, the 'territorial' principle, as recognized by national systems of law, must undergo certain qualifications within the context of the Common Market. Thus to use

parallel patents in a certain way and the partitioning off of various protected markets which results from this is contrary to the most fundamental objective of the Treaty, namely the establishment of a free and common market between Member States.

The abolition of the partitioning off of markets does not affect the exclusive right of the holder of a patent in each of the national markets. The possibility must be accepted that the potential profits in the Common Market are not identical with those obtained previously when there were separate protected markets. For patent law does not guarantee the making of a particular profit with certainty, but only the possibility of making a profit. As regards this, the situation on the market is in fact influenced by national and Community measures, for example the lowering of customs duties on alternative products, in such a way that the previous monopoly position of the holders of patents or licences changes in any case. An undertaking which, on the basis of parallel patents, has granted licences in different Member States, and uses rights granted to it under these patents in order to prevent trade in the patented products between the Member States concerned, may be committing an infringement of Article 85(1). The same is true if the holder of a patent enters into commitments with his concessionnaires that he will use his rights under the patent in this way, or if the concessionnaires themselves take advantage of a prohibition on imports based on patent law.

The Commission argues that there may be infringement of Article 86 where the undertaking in question itself uses these parallel patents and occupies a dominant position within the Common Market or in a substantial part of it. The patent does not of itself confer such a dominant position, but it may do so. This depends in particular on the question whether and how far the patented product is in competition with other products whether patented or not. The question whether parallel patents exist may depend on the legal relationships existing between various undertakings which might be in a position to possess parallel patents, and on the particular circumstances of the markets to be taken into consideration.

The questions asked here, which refer to the case where a product, originating in a Member State where no patent protection is granted, is exported to a Member State where a patent has been granted, do not directly concern the effects of parallel patents. In fact, the protection granted by patents is not being used here with a view to dividing up and partitioning off markets on which patent protection already exists. On the contrary, it is fulfilling its primary function which is to guarantee that the holder of a patent shall be in a position to exploit his monopoly, by putting him in a position to oppose the entry of products for which he has not been able to receive any benefits from his monopoly, by reason of the very fact that the Member State concerned does not grant any patent for the same product. In a case such as this, therefore, the holder of a patent may, without committing an infringement of Article 85(1) or of Article 86, use his rights under the patent to prevent imports from the Member State in question. The same is also true for products originating with organizations which are holders of a patent or from licensees, unless these organizations have been able to benefit from the patent for these products in one of the Member States. This may, for example, be the case when the products in question have already been duly put on the market previously in one of the Member States where the holder of the patent also holds a patent. On the basis of the above considerations, the Commission suggests that the following reply should be given to the two questions referred:

'1. (a) Article 85(1) and Article 86 of the EEC Treaty do not prohibit the holder of a patent granted in one of the Member States or his licensee from using his patent rights with a view to preventing the patented product or the substance made by means of the patented manufacturing process from being put on the market from a Member State in which the said product or the said manufacturing process is not patentable;

(b) However, this rule is not applicable if, as regards the product or the substance in question, the holder of the patent has been able, in some manner, directly or indirectly to obtain a benefit from this patent in one of the Member States. Such is the case in particular when the product or substance has been lawfully put into circulation in one of the Member States where the holder of the patent also possesses a patent for the said product or for the process by means of which the said substance has been manufactured.

2. The fact that in the Member State in which the said holder possesses a patent the holder of a patent, or his licensee, offers the said product or substance at a higher price than the one at which this product or substance originating in another Member State is offered is not relevant from the legal point of view for the purposes of the question considered at 1 above. However, this difference in price may have importance in fact, when enquiries are made as to whether there exists an agreement within the meaning of Article 85(1) or a dominant position within the meaning of Article 86. Moreover, the fact that the holder of a patent, or his licensee, occupying a dominant position within the meaning of Article 86, charges excessive prices may constitute an abuse within the meaning of the said article.'

During the oral procedure the Commission declared in its reply that it would be possible to quote the case of parallel patents or a comparable situation in a case where, for example, an undertaking such as Probel made cheaper purchases of chloramphenicol 'from holders of licences granted by Parke, Davis & Co.'.

The *Government of the French Republic* emphasizes that the problem presented by the first question is whether Article 85(1) and Article 86 of the EEC Treaty, taking into account Articles 36 and 222, can adversely affect the right possessed by the holder of a patent to require the courts to prohibit all infringements of the patent in the territory covered by it. In other words, since this right constitutes one of the basic elements of the system of protection of industrial property organized by national patent law, the problem presented amounts, in short, to whether national patent law is compatible with the objectives and the rules of the EEC Treaty. It appears to the French Government that national laws for the protection of industrial property are recognized as legitimate by the Treaty both in principle and with regard to their effects on intra-Community trade.

As a matter of principle, Article 222 of the EEC Treaty stipulates that the said Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. Since industrial property constitutes one of the elements of the system of property ownership in each of the Member States, this provision of itself means that, in the absence of any stipulation to the contrary on this point in the Treaty, national law on this subject is to be recognized and upheld.

As regards the restrictive effects on trade between Member States, and in particular the partitioning of markets which national industrial property rights necessarily involve, these are provided for and authorized by Article 36 of the Treaty.

On this point the French Government cites the position taken by the Commission of the EEC and confirmed by the Court of Justice in Joined Cases 56 and 58/64. It is argued that on this occasion the Court only condemned the 'improper use' of rights under one or other national systems of trademark law in order to render Community law on cartels ineffective (Rec. 1966, p. 500). It did not throw doubt on the principle and the means 'of exercising these rights' and did not order the suppression of 'state prohibitions' which follow from this and which are provided for in Article 36.

The fact that the product in question comes from a Member State which does not grant an exclusive right to sell this product, in the particular context of pharmaceutical products, does not alter this reply in any way. The only effect of this is that manufacture and sale in the territory of this Member State are free. However, this freedom stops at the frontiers of this State. The absence of protection in this Member State in this way

makes it possible for manufacture to take place more cheaply, but the introduction of a product thus made on the territory of another Member State would ruin the protection granted by that State.

The French Government is of the opinion that Article 85 is only directed at restrictions on competition which result from a contractual commitment under private law between several 'undertakings' belonging to Member States of the Community. Thus there is no point in examining this article when considering the compatibility with and effects of national industrial property law emanating from provisions made at the level of the State with the objectives and relevant provisions of the Treaty of Rome.

The French Government is of the opinion that Article 86, which declares that an abuse of a dominant position is incompatible with the Common Market, might in some cases be applicable to privileged and monopolistic situations granted by national industrial property law to holders of patents. However, at all events, such application could only relate to the effects of the said national legislation. Article 86 would only apply in this way first if the conditions laid down by the Treaty were fulfilled, even though the natural effects of national legislation on industrial property, which are accepted by the Treaty, are precisely to affect trade between Member States and to create a dominant position in a substantial part of the Common Market. Secondly, it would only apply if it were possible on that occasion to carry out a comparison between situations of the same kind. The possible recognition of an abuse, caused by the privileged situation which protection granted by the State in matters of industrial property confers, could only arise in so far as there were available within the Common Market identical elements of comparison for the product concerned between several national markets equally protected. The provisions of Article 86, the application of which would in any event be limited to suppressing certain effects of rights recognized as belonging to holders of patents, could not in any way adversely affect the rights of those patent-holders to call upon the courts to prohibit all acts of infringement in the territory covered by their patents.

As regards the second question, the French Government is of the opinion that the mere fact the price demanded by the holder of the patent in the protected territory is higher than the price demanded in the same territory for an article produced by a person infringing the patent does not matter. The latter has not had to undertake the research which has led to the patent or, where necessary, to pay royalties for the use of the patent. Even supposing for the sake of argument that Article 86 did apply and that there was an abuse of a dominant position on the market within the meaning of this article, the answer would still be the same. In this case, without going into the solutions which can be found in the internal legislation of the States, it would be for the Member States and the Commission (Articles 88 and 89 of the Treaty, Regulation No 17 of 6 February 1962, especially Article 9(3)) to take the necessary measures within the context of the Treaty to bring the abuse to an end. This would not in any way result in giving any rights to the person infringing the patent nor would it result in any limitation on the right of the holder of the patent to take all proceedings against those directly or indirectly responsible for infringements. During the oral procedure the French Government emphasized that it was necessary for the Court to limit itself to replying to the questions asked by the Gerechtshof, The Hague, in the context of the present case.

The *Government of the Kingdom of the Netherlands* draws the attention of the Court to certain special aspects of the question put by the Gerechtshof, The Hague.

Six national legal systems concerning patents for inventions exist within the territory of the EEC. It follows from this that, in order to obtain protection throughout this territory for one and the same invention, a patent must be applied for and obtained in each of the six countries. Thus six national patents could be granted for the same invention, each granting an exclusive right to the holder of the patent for its territory exclusively. This exclusive right means, in principle, that it is only the holder of the patent who can profit from the

invention, which means in effect that he alone may manufacture or sell the patented product or apply the process or sell the product manufactured by means of that process.

Thus the holder of the patent can prohibit anyone else from manufacturing or selling the patented product without his permission. Statute and case-law in the six countries of the EEC all state that the holder of a patent can no longer enforce his rights in the country which granted the patent as regards products which he himself has put on the market therein, or which have been put on the market, with his permission, under licence. These products are thus 'put into lawful circulation' and 'the patent rights are exhausted as regards them'. Once the products are put into lawful circulation any person may freely sell them thereafter. This principle that the rights of the holder of the patent may be exhausted constitutes a restriction on the exclusive rights granted. This restriction arises under national law. This exhaustion of rights, just as the rights themselves, is thus limited in its effects to the territory for which the exclusive rights are granted.

This territorial limitation means, therefore, that the holder of the patent for a given product can prevent the importation of the patented product from other countries, even if this product has been duly placed on the market there by the said holder. There is, here, a conflict between the national monopoly of the holder of the patent, derived from national patent law, and the aims pursued by the EEC, in particular the aim of creating a free market within which goods can be sold from one country to another without any obstacle.

Three factors are to be taken into consideration in this case: the intention behind patent law, namely the encouragement of research and industrial development, the interests of the holder of the patent himself, namely a guarantee of protection which belongs to the holder or which he can grant to another by an agreement, finally the interests of the Community and the free circulation of goods. These factors may combine differently or conflict with each other according to the precise case being considered.

Three categories should be distinguished. In the first category, which occurs most frequently, the holder of the patent, to whom the said patent has been issued in several countries, himself produces and sells the goods in one of those countries, and these goods are later imported into other countries of the EEC. In the first country the holder of the patent has obtained the protection which belongs to him by virtue of his patent rights. The answer to the question whether he should again benefit from protection in other countries does not affect the fundamental principle of patent law in any way: this reply could simply be given on the basis of an assessment of the objectives of the holder of the patent compared with the objectives of the EEC Treaty. According to the Government of the Netherlands, this does not mean that in such a case the private interest is always opposed to the public interest. It is not impossible that the objectives of the holder of the patent might run parallel to those of the public interest. The same is true of the case in which the holders of the patent are for legal or economic reasons one entity in two countries, and perhaps also in the case where there really are two distinct holders of the patent, but where their patents are based on the same invention and therefore have the same origin.

In the second category of cases, the holder of the patent has not obtained the patent in all the countries of the EEC and must face imports from a country where the patent has not been granted to him. This may be the case when a patent for his invention cannot be issued to him in the latter country or when the protection granted by the patent in that country is not sufficiently worthwhile to him. Competitors are free to manufacture the products in question and to put them in circulation in the countries for which the holder of the patent does not possess exclusive rights. In such a case, the putting of the products in circulation in this country is not illegal. No one can deny this. If, however, this character of 'non-illegality' were to be extended to the whole territory of the EEC, which means also to countries where the holder of the patent has obtained exclusive rights, the fundamental principle of patent law would be affected, and this law would be drained of its substance to such a

point that its objectives would be seriously jeopardized.

In the third category, which includes cases of the kind now before the Gerechtshof, The Hague, are holders of national patents granted in the various Member States, who have found it impossible to obtain a patent in a Member State because the law of that State does not make provision for the granting of patents for pharmaceutical products. Thus, since Italian law intentionally makes no provision for protecting pharmaceutical products by a patent, a manufacturer of medicaments who has patented his product or the process of its manufacture in the Netherlands cannot protect his invention in Italy. The advantage which the Italian manufacturer of medicaments possesses in Italy cannot be criticized, at least in so far as the sale of medicaments manufactured in Italy is limited to Italy itself. However it is different if the pharmaceutical products are imported into another country from Italy, in this case the Netherlands, in infringement of the patent issued in the latter country, when the manufacture of the products in question was based on knowledge obtained from the said patent. If the products were allowed to enter the country where the patent has been taken out without the holder's being in a position to enforce his rights, the producer or seller of the products originating in the country where the law does not make provisions for the issue of patents for pharmaceutical products would have an advantage over the holder of the patent. This would mean that such a producer or seller would, at no expense to himself, have the benefit of research carried out by the holder of the patent, which would not only be unjust, but would jeopardize the fundamental principle of patent law, and its proper functioning, and also undermine the hopes which the inventor entertained on the basis of the law. Furthermore it would undermine respect for this law by his competitors.

According to the Netherlands Government, it may be asked whether the provisions of the EEC Treaty affect the territorial nature of patent protection to such an extent that the countries of the EEC should be considered as just one territory for the application of the rule relating to the free movement of goods lawfully put into circulation. In a certain number of cases the fundamental principle of patent law is not basically affected by the answer to this question. Nevertheless an affirmative answer to this question would seriously jeopardize the fundamental principle of patent law in cases such as those with which the judgment of the Gerechtshof, The Hague, is concerned, especially in cases where the holder of the patent must face imports of the product in question into a country of the EEC from another country of the EEC where the product is not protected by a patent. This answer would mean that in countries which do give patent protection to the product the issue of a patent would no longer be of any use, with the result that industry would be less interested in doing intensive research in the technical fields concerned (in this case pharmaceuticals) and would tend to fall back on other less effective means of protecting inventions and thus be able to recover research and development costs. The only alternative course of action which could be taken into consideration in such circumstances would be not to apply for a patent and to keep secret the inventions resulting from research. Obviously this would not favour the development of industrial cooperation in the field of technology.

The *Government of the Federal Republic of Germany* is of the opinion as to the first question that in so far as the Gerechtshof in asking whether Article 85 can prevent rights arising under a patent from being exercised, the answer is given by the very wording of that article. Article 85(1) presupposes agreements between undertakings, decisions by associations of undertakings and concerted practices. Thus it can only be applied if at least two undertakings voluntarily combine their efforts. This is not the case when the holder of a patent enforces the rights arising under his patent as regards third parties. Here, what occurs is the opposite of voluntary cooperation, for a unilateral action is being taken and thus Article 85(1) is not applicable.

In order to answer the question referred, Article 86 must also be interpreted. The

point to be considered is whether Article 86 is applicable when the holder of a patent asks the courts to prohibit the sale of products originating in a territory which does not grant exclusive selling rights in a territory where the patent has been granted. This question must also be answered in the negative for several reasons.

The position which the holder of a patent has by reason of his patent is not to be considered simply as identical with a dominant position. The distinctive traits of this position consist rather in the fact that it is the patent-holder alone who has the right to use a patented invention or a patented process. This legal position of the holder of a patent does not determine his position on the market, as particularly appears from the fact that there are patents which are commercially unusable. Furthermore Article 86 does not prohibit all actions of an undertaking which has a dominant position, but only the 'abuse' of that position within the Common Market or in a substantial part of it. This means that it is the dominant position itself which must be used as a means for making profits. On the other hand, Article 86 does not prohibit measures taken by an undertaking having a dominant position when it does not take advantage of this position and when the success of these measures does not depend on the said position.

Thus, in legal proceedings it is at least necessary to ask whether actions taken on the basis of a patent can be considered as an 'abuse' of a dominant position. In any event, there is no 'abuse' of a dominant position when the holder of a patent granted by a Member State enforces the rights arising under his patent before an ordinary court of law in order to stop his patent being infringed by the importer. As distinct from the facts which were the basis of the judgment of the Court of Justice of 13 July 1966 in Joined Cases 56 and 58/64, the actions taken by a patent-holder are not intended to divide up the Common Market or parts of it into territorially determined sales areas for one and the same producer. According to the jugdment whereby the court at The Hague referred the case, the actions taken by the holder of the patent are only intended to protect his rights against third parties who might freely use the patented process in another Member State where it is not patented. Thus this is not a case of dividing up and monopolizing regional markets within the Community with the help of industrial property rights. What is asked for here is that preference be given to a patent in a Member State over imports of products made without a patent in a country on the basis of the patented process. This is one of the normal uses of a patent, and in itself it is not an abuse.

It follows from the autonomy of national legislation on patents, which arises from the territorial principle, and from the variable degree of protection given by patents that each patent is valid on the territory of the State which has issued it, notwithstanding the protection granted for the same invention outside that territory. For this reason the patent-holder can prohibit third parties from selling the patented products or the products made by means of the patented process within the territory of the State which has issued the patent, even when these products have been lawfully made and placed on the market outside the State which has issued the patent.

When the EEC Treaty was signed, the government acted with this point in mind and recognized the autonomy of national patents in Article 222, at least for as long as the law on patents within the Community has not been harmonized. Furthermore, in Article 36 of the Treaty the Member States expressly accepted the repercussions of the freedom of national patent legislation on the free movement of goods within the Community.

This situation led the governments of the States to start work on a uniform European law of patents as from 1959. The object of this work is to produce a set of rules which reflect the circumstances created by the Common Market and which contain a solution to the problem of limiting the right to have one's products protected. Thus there can be no question of an abuse of any dominant position within the Common Market or in a substantial part of it by the holder of a patent when he asserts his rights as against persons infringing them before the courts of the Member State which has issued the patent to him, in order to prevent

his patent from being infringed by the importation of products from another Member State. The contrary view would result in distorting competition and granting an unjustified advantage to undertakings which carry on business in the Member State where the number of products for which applications for patents may be made is smallest. Undertakings in that State could freely imitate patented processes in other Member States and sell the products manufactured by means of these processes in the whole of the Common Market, and do so at lower prices because they would not have had to bear the costs of developing those processes. Thus the protection of the patent would be almost entirely ineffective within the EEC.

Another undesirable consequence of the hypothesis refuted here would be the necessity of obtaining patents in every Member State for any invention even if it was only intended to use it in just one Member State. This would mean, on the one hand, that inventors would be burdened with greater costs and, on the other, that national patent offices would be overburdened with applications.

As to the second question, the Federal Government makes the following observations. In so far as the applicability of Article 85 of the Treaty is concerned, it makes no difference that the products manufactured under the patent are more expensive than identical products manufactured in a foreign country where it is not necessary to take out a patent.

As regards the applicability of Article 86 of the Treaty, the mere fact that the prices of the patented product are higher than those of identical products originating in a country where a patent is not necessary does not of itself lead to the conclusion that a holder of a patent is abusing any dominant position which he may hold. Patent rights give the holder of a patent the possibility, by means of fixing his prices, of recouping the heavy costs which he normally has to bear in research and development, particularly in the pharmaceutical field. Furthermore, Article 86 does not prohibit dominant positions as such but only their abuse. Thus the prohibition does not apply to dominant positions which may result from a patent, or to actions for infringements which are concomitant with the existence of the patent. Even when a holder of a patent exploits a dominant position by manifestly overcharging for the patented products, it is the overhigh prices which are prohibited under Article 86, not the patent and the right to bring actions for infringement, which goes with it. Accordingly, in the opinion of the German Government, the answers which should be given to the questions asked by the Gerechtshof, The Hague, are as follows:

'The holder of a patent issued by a Member State infringes neither Article 85 nor Article 86 of the EEC Treaty when in reliance on his patent he obtains a judgment from a court prohibiting the importation of products from a Member State which does not grant exclusive rights with regard to those products;

This is also true in cases in which the prices of the patented products are higher than those of the imported products.'

Grounds of judgment

In a judgment dated 30 June 1967, which reached the Court on 6 July, the Gerechtshof, The Hague, under Article 177 of the Treaty establishing the EEC, put to the Court two questions on the interpretation of Articles 85(1) and 86. It appears from the facts given by the court making the reference that the questions put concern the exercise of rights attaching by Netherlands law to a patent which protects a proprietary medicinal product in the Netherlands as regards the introduction into that State of a similar product manufactured in another Member State where proprietary medicinal products are not patentable.

In the first question the Court is asked to rule whether the concept of practices prohibited under Articles 85(1) and 86, possibly considered with Articles 36 and 222 of the Treaty, includes the action of the holder of a patent issued in a Member State when, by virtue of that patent, he requests the national courts to prevent all commercial dealing in the territory of that State in a product coming from another Member State which does not grant an exclusive right to manufacture and sell that product.

In the second question the court making the reference asks whether the possible application of the abovementioned articles may be affected by the fact that the assign of the patent-holder offers the patented product at a price higher than that of a similar unpatented product coming from another Member State.

The national rules relating to the protection of industrial property have not yet been unified within the Community. In the absence of such unification, the national character of the protection of industrial property and the variations between the different legislative systems on this subject are capable of creating obstacles both to the free movement of the patented products and to competition within the Common Market.

As regards the provisions relating to the free movement of products, prohibitions and restrictions on imports may be justified under Article 36 on grounds of the protection of industrial property, but subject to the expressly stated reservation that these 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. For similar reasons, the exercise of the rights arising under a patent granted in accordance with the legislation of a Member State does not, of itself, constitute an infringement of the rules on competition laid down by the Treaty.

Under Article 85(1) of the Treaty, 'all agreements between undertakings, decisions by associations of undertakings and concerted practices' which may affect trade between Member States and which have as their object or effect an interference with competition are prohibited as incompatible with the Common Market. Although the generality of the words used is evidence of an intention to include without distinction all the categories of agreement described in this provision, the restrictive nature of the said provision is incompatible with any extension of the prohibition for which it provides beyond the three categories of agreement exclusively enumerated therein.

A patent taken by itself and independently of any agreement of which it may be the subject, is unrelated to any of these categories, but is the expression of a legal status granted by a State to products meeting certain criteria, and thus exhibits none of the elements of contract or concerted practice required by Article 85(1). Nevertheless it is possible that the provisions of this article may apply if the use of one or more patents, in concert between undertakings, should lead to the creation of a

situation which may come within the concepts of agreements between undertakings, decisions of associations of undertakings or concerted practices within the meaning of Article 85(1).

However, notwithstanding the allusions made during these proceedings to such a situation, which it is for the Gerechtshof, The Hague, alone to assess, the wording of the questions referred and the contents of the file do not enable the Court to take this possibility into account.

Under Article 86 of the Treaty: 'Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may a affect trade between Member States'. For this prohibition to apply it is thus necessary that three elements shall be present together: the existence of a dominant position, the abuse of this position and the possibility that trade between Member States may be affected thereby. Although a patent confers on its holder a special protection at national level, it does not follow that the exercise of the rights thus conferred implies the presence together of all three elements in question. It could only do so if the use of the patent were to degenerate into an abuse of the abovementioned protection.

Moreover, in a comparable field, Article 36 of the Treaty, after providing that Articles 30 to 34 shall not preclude restrictions on imports or exports justified on grounds, *inter alia*, of the protection of industrial and commercial property, expressly states, as has already been observed, that such restrictions 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

Accordingly, since the existence of patent rights is at present a matter solely of national law, the use made of them can only come within the ambit of Community law where such use contributes to a dominant position, the abuse of which may affect trade between Member States.

Although the sale price of the protected product may be regarded as a factor to be taken into account in determining the possible existence of an abuse, a higher price for the patented product as compared with the unpatented product does not necessarily constitute an abuse.

It follows from all the above: first, that the existence of the rights granted by a Member State to the holder of a patent is not affected by the prohibitions contained in Articles 85(1) and 86 of the Treaty; secondly, that the exercise of such rights cannot of itself fall either under Article 85(1), in the absence of any agreement, decision or concerted practice prohibited by that provision, or under Article 86, in the absence of any abuse of a dominant position; finally, that a higher sale price

for the patented product as compared with that of the unpatented product coming from another Member State does not necessarily constitute an abuse.

Costs

The costs incurred by the Commission of the EEC and the Governments of the Kingdom of the Netherlands, the Federal Republic of Germany and the French Republic, all of which have submitted their observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Gerechtshof, The Hague, the decision as to costs is a matter for that court;

On those grounds,

Upon reading the pleadings;
Upon hearing the Judge-Rapporteur;
Upon hearing the observations of the Commission of the EEC, the Governments of the Kingdom of the Netherlands, the Federal Republic of Germany and the French Republic, intervening under Article 20 of the Statute of the Court;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 30 to 34, 36, 85, 86, 177 and 222 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Gerechtshof, The Hague, by judgment of that court of 30 June 1967, hereby rules:

1. **The existence of the rights granted by a Member State to the holder of a patent is not affected by the prohibitions contained in Articles 85(1) and 86 of the Treaty;**

2. **The exercise of such rights cannot of itself fall either under Article 85(1), in the absence of any agreement, decision or concerted practice prohibited by this provision, or under Article 86, in the absence of any abuse of a dominant position;**

3. **A higher sale price for the patented product as compared with that of the**

unpatented product coming from another Member State does not necessarily constitute an abuse;

and declares:

It is for the Gerechtshof, The Hague, to make an order as to the costs of the present proceedings.

Lecourt Donner Strauß

Trabucchi Monaco

Delivered in open court in Luxembourg on 29 February 1968.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 7 FEBRUARY 1968[1]

Mr President,
Members of the Court,

In a reference made by the Gerechtshof, The Hague, you are once again called upon to consider the competition law of the EEC Treaty. We must start with the facts, which have attracted wide attention because of the nature of the questions asked on this occasion.

The American company Parke, Davis & Co., whose registered office is in Detroit, is the holder of two Netherlands patents for the biological and chemical manufacture of the antibiotic 'chloramphenicol'. It has granted licences to a Netherlands undertaking established in Delft and it is a term of the license agreement that the licensor must enforce the patent rights in the Netherlands on behalf of the licensee.

I would point out in this connexion that although, under Netherlands law, medicinal preparations are not themselves patentable the holder of a patent for a manufacturing process nevertheless has the exclusive right to market a product manufactured by the patented process. Furthermore, in an action for infringement of patent, when the products in question are 'new' under the Law of 7 November 1910, those marketed without the permission of the holder of the patent are presumed to have been manufactured by the protected process, unless the person presumed to be infringing the patent rebuts this presumption.

It seems that patent rights of Parke, Davis & Co. have been infringed by the marketing by a Belgian company (Probel of Brussels) and two Netherlands companies (Reese en Beintema-Interpharm, a limited company, and Centrafarm, a partnership, both of Rotterdam) in the Netherlands of chloramphenicol from various countries of Europe, without the permission of the company holding the patent or of the undertaking holding the licence. This led to the bringing of proceedings in 1958 in Rotterdam during which Parke, Davis & Co. claimed damages for infringement of its patent rights from the three companies in question and an injunction, under threat of periodical penalty payments, against any

1 — Translated from the French version.