OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 8 July 1992 *

Mr President,
Members of the Court,

1. The Court of Appeal, Queen's Bench Division, of the Supreme Court of England and Wales has referred a number of questions to the Court of Justice on the compatibility with Articles 30 and 36 of the EEC Treaty of a practice of the British competent authorities based on the Patents Act 1977 in connection with the conditions under which the holder of a licence under a patent endorsed 'licences of right' may import from non-member countries goods protected by the patent in question.

The questions arose in a dispute between Generics (UK) Limited ('Generics') and Harris Pharmaceuticals Limited ('Harris'), on the one hand, and, on the other, Smith Kline and French Laboratories ('SKF'), which holds two United Kingdom patents endorsed 'licences of right' in respect of the pharmaceutical product Cimetidine. The origin of the dispute lies in a request by the first two companies to obtain from the Comptroller General of Patents (hereinafter referred to as 'the Comptroller') authorization to import into the United Kingdom as licensees Cemetidine manufactured in non-member countries and in Spain and Portugal. For a proper understanding of the dispute I shall first refer to the relevant provisions of the Patents Act 1977.

The relevant provisions of the Patents Act 1977

2. The Patents Act 1977 extended the period of validity of United Kingdom patents from 16 to 20 years. Transitional rules apply to some patents granted before the Act entered into force. As in the case of new patents, the period of validity of the patents in question is 20 years, but after 16 years they were to be endorsed 'licences of right' automatically, that is to say even against the will of the patent proprietors.

Under section 46 of the Patents Act 1977 the endorsement 'licences of right' results in any person's being entitled as of right to a licence under the patent on such terms as might be settled by agreement or, in default of agreement, by the Comptroller.

According to the case-law of the House of Lords, [1] the Comptroller General of Patents may, in settling terms for licences of right, take into account provisions governing the grant of compulsory licences, in particular sections 48(3)(a) and 50(1)(c) of the Patents Act 1977.

* Original language: Dutch.

1 — *Allen and Hanburys Ltd* v *Generics (UK) Ltd and Gist Brocades NV and Others and the Comptroller General of Patents* [1986] RPC 203, esp. 248 and 249.

Under section 48(3)(a) of the Patents Act 1977, the Comptroller may grant a compulsory licence after the expiration of three years from the date of the grant of a patent *inter alia* on the following ground:

'(a) where the patented invention is capable of being commercially worked in the United Kingdom, that it is not being so worked or is not being so worked to the fullest extent that is reasonably practicable'.

Under section 50(1)(c) of the Patents Act 1977 the Comptroller is to exercise his powers under section 48 in such a way:

'(c) that the interests of any person for the time being working or developing an invention in the United Kingdom under the protection of a patent shall not be unfairly prejudiced.'

Those provisions of the Patents Act 1977 authorize the Comptroller to prohibit a licensee under a licence of right from importing the product covered by the patent where the patent proprietor manufactures the product within the United Kingdom.

3. The Court has on two occasions had to consider the relevant provisions of the Patents Act 1977. By judgment of 3 March 1988 in the *Allen and Hanburys* case [2] the Court ruled that Articles 30 and 36 of the EEC Treaty:

'must be interpreted as prohibiting the competent administrative authorities from imposing on a licensee terms impeding the importation from other Member States of a product covered by a patent endorsed "licences of right" where those authorities may not refuse to grant a licence to an undertaking which would manufacture the product in the national territory and market it there'.

Since the Court's judgment in *Allen and Hanburys* it is beyond any doubt that the Comptroller may not prohibit a licensee from importing from other Member States the product covered by the patent, not even where the patent proprietor manufactures the patented product in the United Kingdom. However, the Comptroller's practice with regard to the exercise of his discretion in the case of imports from non-member countries continues to be based on sections 48(3)(a) and 50(1)(c) of the Patents Act 1977: importation from non-member countries is prohibited where the patent proprietor manufactures the patented product in the United Kingdom, but authorized where it is manufactured in another Member State.

Whereas the judgment in *Allen and Hanburys* was known to the referring court and to the parties to the main proceedings at the time when the preliminary questions now before the Court arose, that was not so in the case of the recent judgment of 18 February 1992 in *Commission* v *United Kingdom*. [3] In that judgment the Court held that the provisions of the Patents Act 1977 relating to compulsory licences were incompatible with Articles 30 and 36 of the EEC Treaty in so far as they made it possible for a compulsory

2 — Case 434/85 *Allen and Hanburys* v *Generics* [1988] ECR 1245.

3 — Case C-30/90 [1992] ECR I-829

licence to be granted where demand for the patented product was satisfied on the domestic market by imports from other Member States. I shall be returning to that judgment later.

The dispute in the main proceedings and the questions referred for a preliminary ruling

4. The dispute in the main proceedings is concerned with the rights in respect of the pharmaceutical product 'Cimetidine', which is used worldwide in the treatment of gastric and duodenal ulcers. It appears from the documents before the Court that a subsidiary of SKF manufactures the raw material for that product in Ireland. The raw material is then imported into the United Kingdom where SKF makes it up into tablet and syrup dosage forms and packages it.

At the time of the order for reference SKF was the proprietor of one or more patents in most Member States protecting it against copying of Cimetidine. In the United Kingdom it obtained two patents on 9 March 1972. As a result of the transitional rules contained in the Patents Act 1977 for patents granted before it entered into force, both those patents were endorsed 'licenses of right' with effect from 9 March 1988 until the validity of the two patents expired on 9 March 1992.

Generics and Harris wish to have licences of right *inter alia* to import the raw material Cimetidine into the United Kingdom from non-member countries and from Spain and Portugal. Since no agreement was reached with SKF, they applied to the Comptroller to settle the terms of the relevant licences of right.

5. By decisions dated 15 March and 8 April 1988 the superintending examiner, acting for the Comptroller, authorized Generics and Harris to import Cimetidine, whether in the form of raw material or of formulated product, into the United Kingdom, and at the same time fixed the rate of royalty payable to SKF. The rate of royalty is not at issue in this case and I shall therefore not discuss it further.

SKF appealed against those decisions to the Patents Court. By judgments of 1 and 2 March 1989 the Patents Court authorized the importation of Cimetidine in the form of raw material but prohibited importation of the product in formulated form from countries outside the Community and from Spain and Portugal on the ground that SKF manufactured Cimetidine in the United Kingdom as a formulated product but not the raw material, which was imported from Ireland.

Generics and Harris have challenged the latter prohibition laid down by the Patents Court in the Court of Appeal. For its part, SKF appealed against the possibility given to the licensees to import Cimetidine in the form of raw material from non-member countries and from Spain and Portugal. In the course of those proceedings, the Court of Appeal decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it compatible with Articles 30 and 36 of the EEC Treaty for a competent authority charged with settling the terms of a licence under a patent compulsorily endorsed "licences of right" to rely upon the provisions of sub-sections 48(3)(a) and 50(1)(c) of The Patents Act

1977 in determining whether or not to include as a term of such a licence the right to import patented products from outside the EEC? Is it contrary to Articles 30 and 36 for it normally to apply sub-sections 48(3)(a) and 50(1)(c) as requiring it to refuse a licence to import from another country when the patentee works the patent by manufacture in the United Kingdom but to grant a licence to import from a non-member country where the patentee works the patent by importation of products manufactured in other Member States of the EEC?

(2) (a) Is the answer to the previous question affected by the fact that sub-sections 48(3)(a) and 50(1)(c) of The Patents Act 1977 apply to the grant of compulsory patent licences and provide that a compulsory licence may be granted in respect of a patent if the same is not being worked in the United Kingdom?

(b) Is the answer to the previous question affected if, in exercising its discretion as to whether or not to permit importation from a third country, the competent authority places reliance upon sub-sections 48(3)(a) and 50(1)(c) of The Patents Act 1977 in ascertaining what factors are relevant to take into account?

(3) Having regard to the provisions of the Treaties of Accession of Spain and Portugal to the EEC and the judgment of the Court of Justice in Case 434/85 (*Allen and Hanburys Limited* v *Generics (UK) Limited* [1988] ECR 1245) is it contrary to Articles 30 and 36 of the EEC Treaty for the competent authority in settling the terms of a licence of right in respect of a patent for a pharmaceutical product to include a term restricting importation of that product from Spain or Portugal?'

The questions raised under (1)

6. The national court raises two different questions under (1). First, it wishes to establish whether Articles 30 and 36 of the EEC Treaty prevent a national authority charged with settling the terms of a licence of right from being empowered to authorize or not to authorize the importation of the patented product from non-member countries. It comes down essentially to establishing whether Articles 30 and 36 of the EEC Treaty are applicable to restrictions on trade with non-member countries. The national court's second question assumes that Articles 30 and 36 of the EEC Treaty leave the relevant national authority with a discretion to impose terms for the licence which restrict trade with non-member countries. More specifically, the second question seeks to establish whether the power may be exercised so that importation from non-member coun-

tries is prohibited where the patent proprietor manufactures the product in the United Kingdom but authorized where it manufactures the product in other Member States and then imports it into the United Kingdom.

(i) The first question under (1)

7. In the judgment in *EMI Records*, [4] to which SKF, Generics and the United Kingdom refer in their observations, the Court explained the territorial scope of Articles 30 and 36 of the EEC Treaty. The Court stated (in paragraph 8) that Article 30 provided that quantitative restrictions and measures having equivalent effect were prohibited 'between Member States'. It went on to say (in paragraph 9) that according to the last sentence of Article 36 restrictions on imports justified *inter alia* on grounds of protection of industrial and commercial property must in no instance constitute a means of arbitrary discrimination or disguised restriction on trade 'between Member States'. The Court inferred from this (in paragraph 10) that:

'the exercise of a trade-mark right in order to prevent the marketing of products coming from a third country under an identical mark, even if this constitutes a measure having an effect equivalent to a quantitative restriction, does not affect the free movement of goods between Member States and thus does not come under the prohibitions set out in Article 30 et seq. of the Treaty.'

The Court's judgment in the *EMI Records* case establishes that the prohibition laid down in Article 30 of the EEC Treaty of measures having an effect equivalent to a quantitative restriction on imports is not applicable in trade with non-member countries. [5] Without prejudice to the Community's international obligations — not, however, in point here — Articles 30 and 36 of the EEC Treaty consequently do not preclude a national authority charged with settling the terms of a licence of right from being given the power to authorize or not to authorize importation of the patented product from non-member countries.

As may be inferred from the passage quoted above from the *EMI Records* judgment, Articles 30 and 36 of the EEC Treaty are, however, applicable where a national authority exercises its powers with regard to trade with non-member countries in such a way that the free movement of goods between Member States is affected. I shall consider when I answer the second question under (1) whether or not the practice adopted by the Comptroller in his decisions relating to importation from non-member countries affects intra-Community trade in goods.

(ii) The second question under (1)

8. In its second question under (1), the national court seeks to establish whether a national authority charged with settling the terms of a licence of right may exercise its

4 — Case 51/75 *Emi Records* v *CBS United Kingdom* [1976] ECR 811.

5 — See also the judgments in Case 225/78 *Bouhelier* [1979] ECR 3151, paragraph 6, and in Case 270/80 *Polydor* [1982] ECR 329, paragraph 18.

discretion so that importation from non-member countries is prohibited where the patent proprietor manufactures the patented product domestically but authorized where it manufactures the product in another Member State. This question is of decisive importance in the main proceedings. On the basis of sections 48(3)(a) and 50(1)(c) of the Patents Act 1977, the Comptroller, and in the event of a dispute the United Kingdom courts, usually exercise their discretion in that way. Since SKF has the raw material for the patented product Cimetidine manufactured in Ireland, the upshot of an affirmative answer would therefore be that the licensees, in accordance with the established practice, would be authorized to import Cimetidine in the form of raw material from non-member countries.

9. In the judgment in *Commission* v *United Kingdom* (cited above, paragraphs 16 to 21), as in the judgment in *Commission* v *Italy* [6] given on the same day (paragraphs 12 to 17), the Court delineated the framework within which this question must be considered:

'As Community law stands the provisions on patents have not yet been the subject of unification at Community level or in the context of approximation of laws. In that respect, it must be pointed out that, as stated above, the Community Patent Convention has not yet entered into force.

In those circumstances it is for the national legislature to determine the conditions and rules regarding the protection conferred by patents.

However, the provisions of the Treaty, and in particular Article 222 according to which the Treaty in no way prejudices the rules in Member States governing the system of property ownership, cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the Common Market as provided for and regulated by the Treaty.

First, the prohibitions and restrictions on imports justified on grounds of the protection of industrial and commercial property are allowed by Article 36 of the Treaty only subject to the express proviso that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Secondly, as the Court has consistently held, Article 36 only admits derogations from the fundamental principle of the free movement of goods within the Common Market to the extent to which such derogations are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property (Case C-10/89 *CNL-SUCAL* v *HAG* [1990] ECR I-3711, paragraph 12).

6 — Case C-235/89 *Commission* v *Italy* [1992] ECR I-777.

In the case of patents, the specific subject-matter of the industrial property is, in particular, the exclusive right for the patent proprietor to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements (Case 434/85 *Allen and Hanburys* v *Generics* [1988] ECR 1245, paragraph 11).'

It must further be observed — see also *Allen and Hanburys*, paragraphs 12 and 13, — that in the case of a patent endorsed 'licences of right' the substance of the patent proprietor's exclusive right is particular. It is clear from the provisions of the Patents Act 1977 that in the United Kingdom the proprietor of such a patent cannot oppose the grant of such a licence to a third party who pays a fair return for it. However, it likewise appears from the abovementioned case-law of the House of Lords and from the way in which the Comptroller exercises his discretion on the basis of that case-law that the patent proprietor can nevertheless oppose the importation by the licensee of the patented product from outside the Community where the patent proprietor manufactures the product in the United Kingdom.

In the light of this reference framework I shall now consider whether the practice adopted by the Comptroller in exercising his discretion is compatible with Articles 30 and 36 of the EEC Treaty.

10. Under the practice adopted by the Comptroller, the protection afforded the rights of the proprietor of a patent endorsed 'licences of right' who works the patent by importation into the country from other Member States can be limited. Unlike in the case of a patentee who manufactures the patented product domestically, he cannot oppose the importation by the licensee of that product from non-member countries.

A patentee who does not wish to run the risk of seeing the protection afforded his rights diminished in that way — for instance because he takes the view that he would be unduly compensated by the return payable by the licensee — is encouraged to manufacture the patented product in the territory of the State where the patent has been granted rather than to import it from other Member States (cf. paragraph 24 of the judgment in *Commission* v *United Kingdom*, cited above). Furthermore, it is clear that where a licence to import from non-member countries is granted to the licensee, the products imported from non-member countries compete in the State in which the patent was granted with the products imported from other Member States. The competition — which because of the practice adopted by the Comptroller in exercising his discretion would not exist if the patentee were to manufacture the products domestically — necessarily reduces imports of the patented product from other Member States and thus adversely affects intra-Community trade (cf. paragraph 26 of the judgment in *Commission* v *United Kingdom*).

In the words used in the judgment in *Dassonville*, [7] all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered

7 — Judgment in Case 8/74 *Dassonville* [1974] ECR 837.

as measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty. Consequently, the practice adopted by the Comptroller falls within the scope of Article 30 of the EEC Treaty.

11. That infringement of the principle of the free movement of goods cannot be justified under Article 36 of the EEC Treaty on grounds of protection of industrial and commercial property or on any other proper ground. The specific subject-matter of the patent is indeed not protected by a discriminatory practice adopted in exercising a discretion under which imports from non-member countries are prohibited where the patented product is manufactured domestically but permitted where the patented product is manufactured in another Member State. As is clear from the judgments of both the Patents Court and the Court of Appeal in the main proceedings, such discrimination is not designed to protect industrial and commercial property but to foster domestic production. Such a consideration, the Court held in *Commission* v *United Kingdom* (paragraph 30),

'frustrate [s] the objectives of the Community as laid down in particular in Article 2 and specified in Article 3 of the Treaty [and] cannot be accepted as a justification for a restriction on trade between Member States'.

In view of the foregoing I have reached the following conclusion: it is contrary to Articles 30 and 36 of the EEC Treaty for a national authority in settling the terms of a licence under a patent endorsed 'licences of right' normally to prohibit a licensee from importing the patented product from non-member countries where the patentee manufactures the product in the Member State concerned but to authorize importation from non-member countries where the patentee manufactures the product in another Member State.

That view does not mean that the competent national authority must always refuse to authorize importation from outside the Community where the patentee manufactures the patented product in a Member State. In compliance with the Community's international obligations, it may either authorize or prohibit importation from outside the Community. In no event, however, may it employ a discriminatory criterion so that imports from non-member countries are prohibited where the patentee manufactures the patented product domestically but authorized where the patentee manufactures it in another Member State.

The questions under (2)

12. The difference between questions 2(a) and 2(b) is not plain to me. Furthermore, I cannot quite see what those questions add to the questions raised under (1). They are possibly prompted by the argument raised by SKF in the main proceedings to the effect that sections 48(3)(a) and 50(1)(c) of the Patents Act 1977 are incompatible with Community law in so far as they authorize the

grant of a compulsory licence where domestic demand for the patented product is met by importation from other Member States but do not authorize such a grant where the product is manufactured domestically.

In the meantime the Court has held in the aforementioned judgment in *Commission* v *United Kingdom* that that argument of SKF is well-founded. I therefore propose that the questions under (2) should be answered in accordance with that judgment, more specifically in the following terms: a national rule under which a compulsory licence may be granted for insufficiency of exploitation of a patent where demand for the patented product is satisfied on the domestic market by imports from other Member States is contrary to Articles 30 and 36 of the EEC Treaty.

Question (3)

13. The origins of question (3) lie in the application made by Generics and Harris to the Comptroller for authorization to import Cimetidine from (*inter alia*) Spain and Portugal. To date it has not been possible to obtain a patent in Spain or Portugal for a pharmaceutical product. [8]

8 — The Spanish Government states in its observations to the Court that pharmaceutical products will be patentable in Spain as of 7 October 1992.

The superintending examiner authorized the licensees to import Cimetidine from Spain and Portugal. On the basis of the Court's judgment in *Allen and Hanburys* he took the view that he was not entitled to restrict imports from a Member State. The Patents Court overturned that decision in the light of Articles 47 and 209 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties ('the Act of Accession'). It was held in the Patents Court that those provisions placed importation of pharmaceutical products from Spain and Portugal in the same position as that of importation of such products from non-member countries. In the Court of Appeal Nicholls LJ disagreed with that interpretation of the relevant provisions. In his closely reasoned judgment he took the view that it would nevertheless be sensible to seek a ruling from the Court of Justice on this matter together with the ruling on the questions on the lawfulness of the practice adopted by the Comptroller in exercising his discretion with regard to importation from non-member countries which have already been discussed.

14. Article 47 (in the case of Spain) and Article 209 (in the case of Portugal) of the Act of Accession derogate from Article 42 (Spain) and Article 202 (Portugal) of that Act, which provide that quantitative restrictions on imports and exports and any measures of equivalent effect are to be abolished on 1 January 1986 between the Community and the two new Member States. The derogation reads as follows:

'1. Notwithstanding Article [42] (or) [202] the holder, or his beneficiary, of a patent for

a chemical or pharmaceutical product or a product relating to plant health, filed in a Member State at a time when a product patent could not be obtained in [Spain] (or) [Portugal] for that product may rely upon the rights granted by that patent in order to prevent the import and marketing of that product in the present Member State or States where that product enjoys patent protection even if that product was put on the market in [Spain] (or) [Portugal] for the first time by him or with his consent.

2. This right may be invoked for the products referred to in paragraph 1 until the end of the third year after [Spain] (or) [Portugal] has made these products patentable.'

All the parties rightly point out that the origin of those provisions of the Act of Accession is to be found in the established case-law of the Court on the exhaustion of patent rights, in particular the judgment in *Merck*. [9]

15. Generics and Harris, the United Kingdom and Spain, together with the Commission, agree with Nicholls LJ in the Court of Appeal that Articles 47 and 209 of the Act of Accession do not permit the competent national authority to prohibit importation from Spain and Portugal in the present situation. They point out that what is involved here is a patent endorsed 'licences of right'. They go on to argue that in the judgment in *Allen and Hanburys* (paragraph 13) the Court of Justice stated that it was clear from the national court's analysis of the Patents Act 1977 that the proprietor of such a patent 'in contrast to the proprietor of an ordinary patent ... cannot oppose the grant of such a licence to a third party who applies for a licence in order to manufacture and market the product in question in that Member State but he retains the right merely to obtain a fair return'. They infer from this, in common with Nicholls LJ, that the rights of a proprietor of a patent endorsed 'licences of right' extend no further than receiving a fair return for the use of the patent and that, in view of the limited extent of his right, the patentee cannot rely on Articles 47 and 209 of the Act of Accession, which are intended for a different situation.

16. According to their wording, Articles 47 and 209 of the Act of Accession protect only the rights granted by the patent in question, which are plainly the rights to which the patentee can lay claim under the legislation of the State in which the patent was granted. Consequently, those articles authorize the patentee to prevent the importation of a pharmaceutical product from Spain or Portugal *in so far* as the right to do so constitutes part of the relevant patent protection. If this is applied to the present case and on the assumption that under the relevant national law the proprietor of a patent endorsed 'licences of right' is entitled merely to claim a fair return, as Generics and Harris maintain on the basis of the judgment in

9 — Judgment in Case 187/80 *Merck* v *Stephar and Exler* [1981] ECR 2063.

Allen and Hanburys, such a patentee can rely on Articles 47 and 209 of the Act of Accession *only* in order to ensure that it obtains a fair return from the licensee wishing to import the patented pharmaceutical product from Spain or Portugal.

For the sake of clarity, I shall be more specific. As is clear from paragraph 13 of the judgment, the Court expressly based its ruling in *Allen and Hanburys* with regard to the extent of the patentee's rights under the relevant national law, not on its own analysis, but on the national court's analysis of the Patents Act 1977. It is not for the Court of Justice to interpret the national law of the Member States. In the present case, SKF claims that the proprietor of a patent endorsed 'licences of right' has the *right* under the Patents Act 1977 to oppose importation from non-member countries. As has been explained above in considering the second question under (1), it is for the competent national authority — and, in the event of a dispute, the national courts — to assess how the discretion which that authority has under the Patents Act 1977 and Community law is to be exercised with regard to importation from non-member countries, on the understanding that no discriminatory criterion may be employed (paragraph 11 above). It is in the present case for the national court, regard being had to the latter reservation, to decide whether or not under the Patents Act 1977 SKF has, in addition to a claim for a fair return, the *right* to oppose importation from non-member countries.

Only if the national law confers such a right on the patentee as SKF claims can it rely on Articles 47 and 209 of the Act of Accession in order to prevent importation from Spain and Portugal during the period laid down in those articles, that is to say until the end of the third year after those Member States have made pharmaceutical products patentable.

17. I propose that the Court should answer the national court's questions as follows:

(1) Articles 30 and 36 of the EEC Treaty do not preclude a national authority charged with settling the terms of a licence under a patent endorsed 'licences of right' from being given the power to authorize or not to authorize importation of the patented product from non-member countries.

(2) It is contrary to Articles 30 and 36 of the EEC Treaty for a national authority in settling the terms of a licence under a patent endorsed 'licences of right' normally to prohibit a licensee from importing the patented product from non-member countries where the patentee manufactures the product in the Member State concerned but to authorize importation from non-member countries where the patentee manufactures the product in another Member State.

(3) A national rule under which a compulsory licence may be granted for insufficiency of exploitation of a patent where demand for the patented product is satisfied on the domestic market by imports from other Member States is contrary to Articles 30 and 36 of the EEC Treaty.

(4) Under Article 47 or Article 209, as the case may be, of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, the proprietor of a patent relating to a pharmaceutical product which has been endorsed 'licences of right' may prevent the importation of that product from Spain and Portugal until the end of the third year after Spain or Portugal, as the case may be, made pharmaceutical products patentable *only in so far, however,* as such a prohibition forms part of the rights to which the patentee can lay claim under the legislation of the Member State importing the product where the patent was granted.