

Case C-392/97

Proceedings brought by Farmitalia Carlo Erba Srl

(Reference for a preliminary ruling
from the Bundesgerichtshof)

(Proprietary medicinal products — Supplementary protection certificate)

Opinion of Advocate General Fennelly delivered on 3 June 1999 I-5555
Judgment of the Court (Fifth Chamber), 16 September 1999 I-5572

Summary of the Judgment

1. *Approximation of laws — Uniform laws — Industrial and commercial property — Patent law — Supplementary protection certificate for medicinal products — Protection conferred by the certificate — Scope*
(Council Regulation No 1768/92, Art. 3(b))
2. *Approximation of laws — Uniform laws — Industrial and commercial property — Patent law — Supplementary protection certificate for medicinal products — Condition for obtaining such a certificate — Product covered by a basic patent in force — Assessment under the relevant rules*
(Council Regulation No 1768/92, Art. 3(a))

1. On a proper construction of Regulation No 1768/92 concerning the creation of a supplementary protection certificate for medicinal products and, in particular, Article 3(b) thereof, where a product in the form referred to in the marketing authorisation is protected by a basic patent in force, the supplementary protection certificate is capable of covering the product, as a medicinal product, in any of the forms enjoying the protection of the basic patent. A different interpretation would frustrate the fundamental objective of the Regulation, which is to provide for sufficient protection to encourage research in the pharmaceutical field, which plays a decisive role in the continuing improvement in public health.
2. As Community law now stands, the provisions concerning patents have not yet been made the subject of harmonisation at Community level or of an approximation of laws.

Accordingly, in order to determine — in connection with the application of Regulation No 1768/92 concerning the creation of a supplementary protection certificate for medicinal products and, in particular, Article 3(a) thereof, under which a certificate will be granted only if the product is protected by a basic patent in force — whether a product is protected by a basic patent, reference must be made to the rules which govern that patent.