OPINION OF ADVOCATE GENERAL JACOBS
delivered on 9 March 1995 *

1. In these proceedings the Kingdom of Spain seeks the annulment of Council Regulation (EEC) No 1768/92 concerning the creation of a supplementary protection certificate for medicinal products (hereafter referred to as 'the Regulation'). [1] The Regulation provides for a longer period of patent protection in the case of medicinal products which require authorization prior to being placed on the market. Spain claims, first, that the Community has no competence to act in the area of patent law and, as a subsidiary argument, that the Regulation could only be adopted on the basis of Article 235 of the Treaty and not, as was done, on the basis of Article 100a. Greece has intervened in support of Spain; France and the Commission have intervened in support of the Council.

The Regulation

2. According to its preamble, the Regulation has a number of different objectives. The preamble refers first to the fact that the development of medicines requires long and costly research, and that therefore a sufficient level of protection is necessary in order to encourage such research. The implication is that there may be a risk of research centres relocating to third countries thus undermining the development of medicines in Europe. Before the adoption of the Regulation, according to the French Government, the laws of Japan and the United States offered better protection than the laws of most Member States. The problem lies in the lapse of time between the filing of an application for a patent and the marketing authorization, making the period of effective protection under the patent insufficient to cover the investment put into the research.

3. The preamble also states that a uniform solution at Community level should be provided for, since disparities in national law would be likely to create obstacles to the free movement of medicinal products and thus directly affect the establishment and functioning of the internal market. That explains the choice of a regulation as the most appropriate legal instrument for laying down rules regarding:

'... the creation of a supplementary protection certificate granted, under the same conditions, by each of the Member States at the request of the holder of a national or Euro-

* Original language: English.
1 — OJ 1992 L 182, p. 1.

pean patent relating to a medicinal product for which marketing authorization has been granted ... .'

4. Article 2 of the Regulation provides that it applies to:

'Any product protected by a patent in the territory of a Member State and subject, prior to being placed on the market as a medicinal product, to an administrative authorization procedure as laid down in Council Directive 65/65/EEC [2] or Directive 81/851/EEC [3] ... .'

5. Article 3 lays down the conditions for obtaining a certificate, including the condition that in the Member State of application the product is protected by a basic patent in force; that a valid marketing authorization (as defined in Article 2) has been granted; that the product has not already been the subject of a certificate; and that the authorization referred to above is the first authorization to place the product on the market as a medicinal product.

2 — OJ, English Special Edition 1965-1966, p. 20, as last amended by Council Directive 89/341/EEC, OJ 1989 L 142, p. 11.

3 — OJ 1981 L 317, p. 1, as last amended by Council Directive 90/676/EEC, OJ 1990 L 373, p. 15.

6. The subject-matter of the protection afforded by the certificate is defined in Article 4:

'Within the limits of the protection conferred by the basic patent, the protection conferred by a certificate shall extend only to the product covered by the authorization to place the corresponding medicinal product on the market and for any use of the product as a medicinal product that has been authorized before the expiry of the certificate.'

The effects of the certificate are specified in Article 5:

'Subject to the provisions of Article 4, the certificate shall confer the same rights as conferred by the basic patent and shall be subject to the same limitations and the same obligations.'

Article 6 confirms that only the holder of the basic patent or his successor in title is entitled to a certificate.

7. Article 13 determines the duration of the certificate. It takes effect at the end of the lawful term of the basic patent, and is valid for a certain period, calculated by reference to the period which elapsed between the date

on which the application for a basic patent was lodged and the date of the first authorization to place the product on the market in the Community: the latter period, reduced by five years, is the duration of the certificate, with a maximum of five years.

8. A hypothetical example (confined to a single Member State) may illustrate how the system operates. Suppose an application for a basic patent was lodged in 1990, the patent expiring in 2010. If the marketing authorization is given in 1997, the certificate takes effect in 2010 for a period of seven minus five years, and will therefore lapse in 2012.

9. The Regulation contains numerous other provisions, but these are more of a procedural nature, and are therefore of limited interest for the present proceedings.

Community competence

10. Spain claims that the Community has no competence whatsoever in relation to the substance of patent law. That is said to follow from Articles 36 and 222 of the Treaty, and to be confirmed by the Court's case-law, which distinguishes between the existence and the exercise of intellectual property rights.

11. In that respect, Spain refers to the judgment in *Parke, Davis* v *Centrafarm*, [4] where the Court drew a distinction, in the context of Articles 85 and 86 of the Treaty, between the existence and exercise of patent rights.

Similarly, in *Deutsche Grammophon* v *Metro* the Court stated that it was clear from Article 36 that: [5]

'... although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty.'

Spain also draws attention to a sentence in *Consten and Grundig* v *Commission*: [6]

'Articles 36, 222 and 234 of the Treaty relied upon by the applicants do not exclude any

4 — Case 24/67 [1968] ECR 55, p. 72.
5 — Case 78/70 [1971] ECR 487, pp. 499-500.
6 — Joined Cases 56/64 and 58/64 [1966] ECR 299, p. 345.

influence whatever of Community law on the exercise of national industrial property rights.'

12. Spain also points to *Nold* v *Commission*, where the Court stated in relation to rights of ownership in general: [7]

'Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on the condition that the substance of these rights is left untouched.'

13. Lastly, Spain finds confirmation of its views in the Court's judgment in Case C-30/90 *Commission* v *United Kingdom*, where the Court held: [8]

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

14. Spain deduces from that case-law that the Community is not competent to regulate what the applicant calls substantive patent law, but may only harmonize those aspects relating to the exercise of industrial property rights which are capable of having some influence on the realization of the general objectives of the Treaty. The adoption of the Regulation is said to go beyond the Community's competence, since in effect it extends the duration of patent protection, which is considered to be part of the substance of patent law.

15. In Spain's view patent law has a status under Community law which is different from that of other intellectual property rights, such as trade marks. In the field of patents, the Community has not yet acted, and the Regulation is said to constitute a grave infringement of the sovereignty of the Member States, which have never agreed to a transfer of competence to the Community in that area. It is also stated that the Court, when it applies the rules of Community law, adopts a much more restrictive approach towards for example trade marks than it does towards patents, where it is more permissive.

7 — Case 4/73 [1974] ECR 491, paragraph 14 of the judgment.

8 — [1992] ECR I-829, paragraphs 16 and 17 of the judgment. See also paragraphs 12 and 13 of the Court's judgment in Case C-235/89 *Commission* v *Italy* [1992] ECR I-777, which are materially identical.

16. In its reply to the Council's defence, Spain also points out that the Court of First Instance has observed that, in the present state of Community law, powers in the field of intellectual and commercial property have not been transferred to the Community. [9] That observation was made in the context of that Court's answer to arguments based on an alleged infringement of the Berne Convention, to which the Community is not a party.

17. Greece, intervening in support of Spain, is also of the view that the Community is not endowed with competence in relation to patent law. It does not, however, submit any additional arguments.

18. I am not at all persuaded by Spain's arguments. It seems to me that they are based on a misreading of the Court's case-law, and a misconceived interpretation of the rules determining the scope of the Community's competence.

19. Although Spain appears to imply that patent law is a special case, and that Community competence may be wider for other intellectual property rights, the case-law it cites is not limited to patent law, and there is no indication that it does not apply to all such rights. Therefore, in so far as that case-law supported the argument that the Community lacks competence, it would extend to all action affecting the substance of intellectual property law. That, in turn, would mean that a number of other Community acts would also be affected by lack of competence. I will refer to just one example: Council Directive 93/98/EEC harmonizes the term of protection of copyright and certain related rights, [10] which, if Spain's views are correct, goes to the substance of copyright, and is therefore not within the Community's competence.

20. The case-law cited by Spain does indeed distinguish between the existence of intellectual property rights and their exercise. It does so, however, in relation to the application of substantive Treaty rules, such as Articles 30, 36, 85 and 86, and not with a view to determining the scope of the Community's competence to harmonize national legislation, or to introduce new rules. Such is the tenor of *Consten and Grundig* v *Commission*, [11] *Parke, Davis* v *Centrafarm*, [12] *Deutsche Grammophon* v *Metro*, [13] *Commission* v *United Kingdom* and *Commission* v *Italy*, [14] and numerous other cases which could be

9 — Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraph 102 of the judgment. See also Case T-70/89 *BBC* v *Commission* [1991] ECR II-535, paragraph 76. Those cases are commonly referred to as the 'Magill' cases.

10 — OJ 1993 L 290, p. 9.
11 — Cited above, note 6.
12 — Cited above, note 4.
13 — Cited above, note 5.
14 — Cited above, note 8.

cited, most of which are dealt with by the Commission in its observations.

21. As is rightly pointed out by the Council, by the Commission and by the French Government, the Court's case-law in no way suggests that regulating the substance of intellectual property law is not within the Community's province.

22. In the leading case of *Simmenthal* v *Italian Minister for Finance* the Court very clearly stated that Article 36 of the Treaty: [15]

'is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article.'

It seems to me that Spain's arguments, in so far as they are based on Article 36, could not be rebutted more clearly.

23. It is true that the *Simmenthal* case-law only deals with Article 36 of the Treaty, and not with the Community's competence in general. However, in its Opinion of 15 November 1994, relating to the Community's competence to conclude the Agreement establishing the World Trade Organization, [16] the Court considered more general arguments to the effect that the Community was incompetent in relation to certain aspects of intellectual property law. Some Member States had indeed argued that the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) relating to the measures to be adopted to secure the effective protection of intellectual property rights — such as those ensuring a fair and just procedure, the rules regarding the submission of evidence, the right to be heard, the giving of reasons for decisions, the right of appeal, interim awards and the award of damages — fell within the competence of the Member States. The Court rejected that argument, again in very clear terms: [17]

'If that argument is to be understood as meaning that all those matters are within some sort of domain reserved to the Member States, it cannot be accepted. The Community is certainly competent to harmonize national rules on those matters, in so far as, in the words of Article 100 of the Treaty, they "directly affect the establishment or functioning of the common market".'

15 — Case 35/76 [1976] ECR 1871, paragraph 14 of the judgment. See also Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, paragraph 34; Case 153/78 *Commission* v *Germany* [1979] ECR 2555, paragraph 5.

16 — Opinion 1/94.

17 — See paragraph 104 of the Opinion.

24. Of course, that part of the Opinion does not deal with the 'substance' of intellectual property rights, but with enforcement issues. It seems to me, however, that Opinion 1/94 provides authority for the view that, as a matter of principle, the Community may regulate all aspects of intellectual property law, in so far as that is necessary for achieving one of its objectives. The Court did not say so expressly, because the question dealt with was whether the Community had the exclusive competence (and not just the competence) to conclude the TRIPs Agreement. [18] But it did state, in another section of the Opinion, that: [19]

'... the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for creating new rights superimposed on national rights, as it did in Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).'

25. The Community's legislative competence was also explicitly confirmed in the *Ideal Standard* case, [20] where the Court had to consider whether there was an obligation on Member States to enact a particular rule relating to trade marks; the rule in question, which would have precluded the assignment of a national trade mark in respect of only part of the Community, plainly concerned the substance of the right. The Court said:

'It is for the Community legislature to impose such an obligation on the Member States by a directive adopted under Article 100a of the EEC Treaty, elimination of the obstacles arising from the territoriality of national trade marks being necessary for the establishment and functioning of the internal market, or itself to enact that rule directly by a regulation adopted under the same provision.'

As has been seen above, there is no reason to distinguish, in respect of the Community's legislative competence, between trade mark rights and patent rights.

26. It follows that the Court's case-law cannot be said to confirm Spain's view that the Community is not competent to regulate the substance of patent law. That conclusion is fully consistent with the principles governing

18 — See also paragraph 14 of the Opinion.

19 — See paragraph 59.

20 — C-9/93 *IHT Internationale Heiztechnik* v *Ideal-Standard* [1994] ECR I-2789, paragraph 58 of the judgment.

the distribution of powers between the Community and its Member States. The Community may only act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein (see now Article 3b of the Treaty, inserted by the Treaty on European Union). The most significant Community power which comes to mind in connection with these proceedings is of course laid down in Article 100a of the Treaty, concerning the establishment and functioning of the internal market. I will return to that provision in the next section, since it was used — and is contested — as the legal basis for the Regulation in issue in these proceedings. I will simply observe at this stage that the application of Article 100a generally leads to Community legislation touching the most diverse areas of national law, such as the protection of the environment, [21] of public health, of the consumer, and indeed the protection of intellectual property.

27. There is no relevant Treaty provision expressly excluding the Community's legislative competence in this area. Indeed, there are very few such provisions in the Treaty, and most, if not all of them, were introduced by the Treaty on European Union: see e. g. Article 127(4) (vocational training), Article 128(5) (cultural policy), Article 129(4) (public health), all expressly excluding 'any harmonization of the laws and regulations of the Member States'. There are, however, no such provisions referring to patent law, or to intellectual property law in general.

28. Spain appears to claim that Article 222 of the Treaty ought to be interpreted as excluding harmonization of the substance of intellectual property rights. Article 222, it will be remembered, provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership'. Spain's interpretation of that provision is in my view erroneous. A similar argument was advanced by the United Kingdom Government in *Commission* v *United Kingdom*, [22] where that government took the view (and it was supported by Spain) that the obligation to produce products protected by a patent in the national territory was part of a system of (industrial) property ownership within the meaning of Article 222 of the Treaty, that 'the rules relating to the very existence of industrial property rights fall within the sole competence of the national legislature', [23] and that therefore Article 30 of the Treaty could have no effect upon such rules. The Court rejected that argument in the following terms: [24]

'... the provisions of the Treaty, and in particular Article 222 ..., cannot be interpreted as

21 — Confirmed by the Court in Case C-300/89 *Commission* v *Council* [1991] ECR I-2867.

22 — Cited above, note 8.

23 — See the Report for the Hearing, [1992] ECR I-843.

24 — See paragraph 18 of the judgment; see also paragraphs 8 and 9 of the Opinion of Advocate General Van Gerven.

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.'

It is true that that case related to the application of substantive Treaty rules to national patent law, and did not deal with the extent of the Community's regulatory powers in the area of patents. It seems to me, however, that that difference is immaterial for the present purposes. The Court made it clear that the argument of exclusive national competence for matters covered by Article 222 of the Treaty is not correct, and I see no reason why that conclusion should not also be valid for the exercise of Community competence. If Article 222 of the Treaty does not prevent certain national rules (namely those requiring that products protected by a patent be produced within the national territory) from being considered incompatible with Article 30 of the Treaty, and therefore invalid, I do not see how it could preclude the Community from exercising its competences in the field of patents.

29. Most commentators appear to agree that Article 222 of the Treaty essentially expresses the neutrality of the Treaty towards national 'systems' of property ownership, including phenomena such as nationalization and privatization. [25] In that respect, reference may be made to Article 83 of the ECSC Treaty:

'The establishment of the Community shall in no way prejudice the system of ownership of the undertakings to which this Treaty applies.'

The reference to undertakings is not found in Article 222, perhaps because the EC Treaty also applies to individuals. I nonetheless think that both provisions formulate a similar concern.

30. In his Opinion in *Hauer* v *Land Rheinland-Pfalz* Advocate General Capotorti considered Article 222 in the context of the relationship between the fundamental right to private property and Community law. That is indeed the proper context, it seems to me, for applying Article 222. The Advocate General took the view that: [26]

'... the rule expressed in Article 222 of the EEC Treaty ... makes it impossible to hold

25 — Mégret, *Le droit de la CEE*, Vol. 15, Brussels, 1987, p. 421; Groeben, Thiesing, Ehlermann, *Kommentar zum EWG-Vertrag*, Baden-Baden, 1991, pp. 5577-5578; Smit and Herzog, *The Law of the European Economic Community*, New-York, pp. 6-216.61; Grabitz, *Kommentar zum EWG-Vertrag*, München, section on Article 222.

26 — Case 44/79 [1979] ECR 3727, paragraph 7 of the Opinion.

that in Community law private property is more clearly protected or on the contrary subject to a restrictive conception; the truth is that — apart from the limits expressly imposed by some provisions of the Treaties and particularly by the Treaty establishing the EAEC — the article cited confirms that it was not the intention of the Treaties to impose upon Member States or to introduce into the Community legal order any new conception of property or system of rules appertaining thereto.'

31. It may also be noted that the Regulation in issue does not 'prejudice' the rules in Member States governing the system of property ownership: it merely extends patent protection in the case of medicinal products subject to a marketing authorization. Moreover it does so only to compensate for the shorter period of effective protection which results from the need for marketing authorization.

32. The Council argues that the issue of Community competence cannot be dissociated from the issue whether Article 100a is the proper legal basis for the adoption of the Regulation. That is entirely correct, and if Spain had not argued that, as a matter of principle, the Community lacks competence to adopt the contested Regulation, I would only have considered the latter issue, to which I now turn.

The legal basis of the Regulation

33. Spain argues that the Regulation cannot properly be based on Article 100a of the Treaty, since it does not contribute to the establishment or functioning of the internal market, and that, if the Community is considered to be competent at all, the Regulation could only be adopted on the basis of Article 235.

34. Spain contends that the Regulation, by extending the duration of patent protection, also extends the compartmentalization of the internal market, and does not eliminate distortions of competition, because it will remain possible to invoke Article 36 of the Treaty. Moreover, because the certificate cannot be dissociated from the basic patent, which is governed by national law, its application will vary from Member State to Member State. One of those differences in application, according to Spain, is the duration of the patent, which depends on the date on which the application for the basic patent was filed. It follows that the subject-matter of the protection afforded by the certificate, as well as its duration, may differ from Member State to Member State.

35. Spain refers also to a statement allegedly made by the Council's Legal Service, according to which the proper legal basis of the Regulation was Article 235 of the Treaty. The Council asks the Court not to consider that argument, because it has not authorized

Spain to reveal the statement in question in accordance with the Council's Rules of Procedure. It appears that advice given by the Council's Legal Service is normally annexed to the minutes of the Council Meeting in question. The Council's Rules of Procedure provide that, with certain exceptions, the deliberations of the Council shall be subject to the obligation of 'professional secrecy', but that the Council may authorize the production of a copy or an extract from its minutes for use in legal proceedings. [27] It seems plain in any event that, in the absence of express authorization by the Council, advice given by the Council's Legal Service should not be invoked in proceedings before the Court. That would obviously be prejudicial to the public interest in the provision of independent legal advice. [28] In the present case Spain has not produced any document of the Council's Legal Service, but has merely referred in its pleadings to the position allegedly taken by the Legal Service. But it is plain that the same principle must apply. It must therefore be made clear that the statement allegedly made by the Council's Legal Service must be disregarded.

36. Spain adds that the Regulation does not contribute to the achievement of the objectives set out in Article 8a (now 7a) of the Treaty, and that in reality it only aims at correcting insufficiencies in the protection of pharmaceutical research. Spain's conclusion is that, if the Court were to accept that the Community is competent to adopt such legislation, thus ruling that the Treaty need not be revised in order to confer such competence on the Community, the Regulation could only have been adopted on the basis of Article 100 or Article 235 of the Treaty, because those provisions do not trespass on national sovereignty, unanimity being required in the Council.

37. It seems clear, however, that the choice of Article 100 or Article 235 of the Treaty as the legal basis for the adoption of a Community act is not determined by considerations of national sovereignty. The Court has consistently held, as the Council points out, that: [29]

'... in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.'

Among those factors are the aim and content of the measure, [30] but they do not include

27 — At the material time, Rules of Procedure adopted by the Council on 24 July 1979 (79/868/ECSC, EEC, Euratom), OJ 1979 L 268, p. 1, Article 18; see now Council Decision 93/662/EC of 6 December 1993 adopting the Council's Rules of Procedure, OJ 1993 L 304, p. 1, Article 5.

28 — Compare Case 155/79 *AM&S* v *Commission* [1982] ECR 1575, paragraphs 18 et seq. of the judgment.

29 — Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11 of the judgment.

30 — Case C-300/89, cited above in note 21, paragraph 10 of the judgment.

considerations of national sovereignty. Such considerations may determine the division of powers between the Community and its Member States on the occasion of amending the Treaties; they cannot, however, affect the choice of the legal basis for a specific Community act.

38. In the *Commission* v *Council* case referred to in the previous paragraph, the Court also stated: [31]

'It follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question.'

It follows that Spain's action can only succeed if it is established that Article 100a of the Treaty does not provide the competence to adopt the Regulation in issue. It is true that in Opinion 1/94 the Court stated, as cited above, [32] that the Community is competent to harmonize national laws in the field of intellectual property pursuant to Articles 100 and 100a of the Treaty, and that it may use Article 235 as the basis for creating new rights superimposed on national rights, as it did in the Regulation on the Community trade mark. [33] However, the Regulation in issue in the present case does not create new Community rights superimposed on national rights; resort to Article 235 was not therefore necessary.

39. Spain also refers to Article 100 of the Treaty, but that provision merely allows the Council to issue directives, and not a regulation, as was considered appropriate in this case with a view to achieving uniformity. Spain does not appear to contest the choice of a regulation, and it does not provide any arguments, apart from those based on national sovereignty, for preferring Article 100.

40. The Council defends the choice of Article 100a. That provision allows the Community to adopt 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. Those measures should aim at the achievement of the objectives set out in Article 8a of the Treaty (now 7a). It should therefore be verified: (1) whether the Regulation is a measure of approximation; (2) whether the Regulation has as its object the establishment and functioning of the internal market; (3) whether the Regulation aims to achieve the objectives set out in Article 8a.

31 — Case 45/86, cited above in note 29, paragraph 13 of the judgment.

32 — See note 19.

33 — Cited above, paragraph 24.

41. On the first point, the Council recalls that before it adopted the Regulation two Member States, France and Italy, had instituted a supplementary protection certificate for medicinal products, and that in one Member State, namely Belgium, there was a proposal to that effect. It follows that the Regulation, by establishing uniform conditions for the grant of such a certificate, including a uniform term of protection, approximates national legislation, whether extant or envisaged.

In the Council's view, the effect of a supplementary protection certificate on the conditions of competition is undeniable. Any disparities in the granting of such a certificate are liable to distort competition in the internal market if one takes into account the well-known effects of patent protection on competition in the market of the products concerned. The Council adds that since the certificate protects certain products, it in the end also favours the free movement of those products.

42. On the second point, the Council refers to the conditions of competition in the market for pharmaceutical products. It mentions Case C-300/89 *Commission* v *Council*, where the Court stated: [34]

'In order to give effect to the fundamental freedoms mentioned in Article 8a, harmonizing measures are necessary to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition. For that reason, Article 100a empowers the Community to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States and lays down the procedure to be followed for that purpose.'

43. On the basis of those considerations the Council argues that the Regulation clearly contributes to achieving the objectives set out in Article 8a (now 7a) of the Treaty (the third point).

44. It seems to me that that reasoning is convincing, and that not much needs to be added. I will simply add a few words about Spain's argument that, because the Regulation extends patent protection for certain products, in a way which may vary from Member State to Member State, it does not contribute to the free movement of goods, but, on the contrary, is liable to hinder free movement. Again I think that that argument is misconceived. It is true of course that the Regulation does not achieve the full harmonization of patent protection granted to

34 — Cited above in note 21, paragraph 15 of the judgment.

medicinal products; it does not even achieve the full harmonization of the extended protection granted by the supplementary protection certificate, as the scope of that protection is determined by national patent law Full harmonization, and full free movement of products protected by a patent, could only be achieved by creating uniform patent law replacing the national patent systems, as the Commission points out. At this stage of European integration, however, that is apparently not possible. The Regulation nonetheless achieves some degree of uniformity, to the extent that it introduces uniform rules on supplementary protection. The problems resulting from different terms of protection of intellectual property rights under the legislation of different Member States are illustrated by cases such as *EMI Electrola* v *Patricia Im- und Export & Others.* [35] One result of the certificate introduced by the Regulation, and probably the most significant result, is that patent protection, in the case of products covered by the certificate, will terminate at the same point in time in all the Member States where the certificate was granted, even if the application for the basic patent was lodged in different years. A hypothetical example may clarify this. Suppose the application for patent protection was lodged in 1990 in Member State A, and in 1991 in Member State B, patent protection expiring respectively in 2010 and in 2011. The authorization to market the product is first given in Member State C, in 1998. That leads to the following calculation of the duration of the certificate. In Member State A that duration is eight (1990-1998) minus five years, the certificate taking effect in 2010 and expiring in 2013. In Member State B the duration is seven (1991-1998) minus five years, the certificate taking effect in 2011 and, again, expiring in 2013.

45. Such a state of affairs obviously contributes more to the free movement of products protected by a patent than the situation existing before the adoption of the Regulation, where in some Member States there was extended protection and in others there was not. [36] Moreover, measures adopted on the basis of Article 100a of the Treaty need not contribute directly to the free movement of products. In the above-cited *Commission* v *Council* case, the Court ruled that a directive imposing obligations concerning the treatment of waste from the titanium dioxide production process should have been adopted on the basis of Article 100a of the Treaty, [37] notwithstanding the fact that that directive could hardly be considered directly to contribute to free movement, either of waste or of the finished products.

46. Finally, Spain submits that the real objective of the Regulation is to improve the competitive position of Community pharmaceutical companies on world markets. That objective, which does appear to underlie the Regulation, could be seen as an industrial policy objective. I do not see, however, why that should not be permissible. Some would argue that similar considerations underlie the entire internal market programme, as it was conceived in 1985, and competition in world markets has often been said to motivate that programme. I would also point out that, although this action dates from before the entry into force of the Treaty on European Union, the EC Treaty now contains a title

35 — Case 341/87 [1989] ECR 79, paragraph 10 of the judgment.

36 — *EMI Electrola*, cited above in note 35.

37 — See above, paragraph 42.

on industry, according to which the action of the Community and of the Member States shall also be aimed at 'fostering better exploitation of the industrial potential of policies of innovation, research and technological development' (Article 130(1)). In Article 130(3) it is further stated that the Community 'shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of this Treaty'. I have no doubt that those considerations, now expressly stated, could also guide the Community's action before the entry into force of the Treaty on European Union.

Conclusion

47. I conclude that the Spanish Government's application should be dismissed. Spain should accordingly be ordered to pay the costs of the Council, in accordance with Article 69(2) of the Rules of Procedure. However, under Article 69(4) of those Rules, the French Government, the Greek Government, and the Commission must, as interveners, bear their own costs.

48. I am accordingly of the opinion that the Court should:

1) dismiss the application;

2) order Spain to pay the costs of the Council; and

3) order the French Government, the Greek Government and the Commission to bear their own costs.