On 25 April 2018, the Advocate General delivered his opinion in the pending referral to the CJEU between Teva and Gilead concerning Gilead’s Truvada SPC.

The Advocate General's proposal for interpretation of the "protected by a basic patent in force" wording in Article 3(a) of the SPC Regulation has been awaited with particular interest.

A large number of court cases around Europe dealing with the validity of Gilead’s SPC for a combination of tenofovir disoproxil and emtricitabine have struggled with the proper construction of this Article in the SPC Regulation.

In his opinion (CJEU case C-121/17), the Advocate General introduces a new test to determine whether a product is protected by a basic patent. He states that products are only protected under the SPC Regulation "[…] if, on the priority date of the patent, it would have been obvious to a person skilled in the art that the active ingredient in question was specifically and precisely identifiable in the wording of the claims of the basic patent."

In the case of a combination of active ingredients this test applies to each active ingredient in that combination.

Interestingly, the Advocate General ventures a step farther in his opinion than merely proposing a framework for the construction Article 3(a), since he specifically opines on whether emtricitabine (one of the compounds included in the combination product protected by Gilead's SPC) is a "product protected by a basic patent in force", cf. paragraph 87 of the opinion. He thinks it is not.

We will now have to hold our breath until the actual judgment by the CJEU is delivered. It is likely to be handed down later in the summer.