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Case Nos: HC-2011-000064
HC-2012-000189
HC-2012-000188

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 17/04/2019

Before:

Mr Justice Roth

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Between:

THE SECRETARY OF STATE FOR HEALTH AND ANOTHER — **English Claimants**

- and -

(1) SERVIER LABORATORIES LIMITED
(2) SERVIER RESEARCH AND DEVELOPMENT LIMITED
(3) LES LABORATOIRES SERVIER SAS
(4) SERVIER SAS — **Defendants**

And between

THE SCOTTISH MINISTERS AND OTHERS — **Scottish/NI Claimants**

- and -

(1) SERVIER LABORATORIES LIMITED
(2) SERVIER RESEARCH AND DEVELOPMENT LIMITED
(3) LES LABORATOIRES SERVIER SAS
(4) SERVIER SAS — **Defendants**

And between

THE WELSH MINISTERS AND OTHERS — **Welsh Claimants**

- and –

(1) SERVIER LABORATORIES LIMITED
(2) SERVIER RESEARCH AND DEVELOPMENT LIMITED
(3) LES LABORATOIRES SERVIER SAS
(4) SERVIER SAS **Defendants**

- -
- -

Jon Turner QC, David Drake (instructed by **Peters & Peters Solicitors LLP**) for the **English Claimants**
Julian Gregory, (instructed by **RPC LLP**) for the **Scottish / NI Claimants**
Josh Holmes QC, (instructed by **Geldards LLP**) for the **Welsh Claimants**
Kelyn Bacon QC, Daniel Piccinin (instructed by **Sidley Austin LLP**) for the **Defendants**

Hearing dates: 6-7 March 2019
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Roth:

INTRODUCTION

1. To what extent, if at all, are factual findings made by the General Court of the European Union ("the General Court") in its judgment on an application for annulment of a competition infringement decision of the European Commission ("the Commission") binding as *res judicata* under EU law against the claimants in a private damages action for breach of competition law in the English court? Where those claimants are connected to the UK government which had the right to intervene as a Member State in the European proceedings, is it an abuse of process under English law for the claimants to make arguments and adduce evidence inconsistent with those findings? These, in summary, are the two questions raised by the defendants in response to the claimants' case on certain preliminary issues that are to be heard in these three actions, which are being tried together. Since the answers to those questions significantly affect the shape of the trial of those preliminary issues, which is due to be heard in October 2019, the court directed that they be heard in advance.

2. The three actions are claims for damages brought, respectively, on behalf of (i) the English health authorities, (ii) the Scottish and Northern Irish health authorities, and (iii) the Welsh health authorities. It is convenient to refer to them, save where further elaboration is required, as the English claimants, the Scottish/NI claimants, and the Welsh claimants. However, the three actions together will be referred to as "the English proceedings", in distinction to the European proceedings progressing before the EU institutions.

3. To explain the context of the two questions and how they arise, it is necessary to describe both the European proceedings and the English proceedings, and then the relevant part of the General Court's judgment.

THE EUROPEAN PROCEEDINGS

4. On 27 July 2012, the Commission issued a Statement of Objections ("SO") in Case COMP/39.612 *Perindopril (Servier).* The SO was addressed to a number of companies, including the first, third and fourth defendants. All the defendants are part of the Servier group of companies and for the purpose of this judgment it is unnecessary to distinguish between them save only to note that the second defendant was not an addressee of the Commission's eventual decision (see para 6 below). With that caveat, I shall refer to them collectively as "Servier".

5. The SO, in essence, alleged that five patent settlement agreements concluded between Servier and a number of producers of generic pharmaceutical products, which involved substantial payments by Servier to the generic company ("reverse payment patent settlements"), infringed Art 101 of the Treaty on the Functioning of the European Union ("TFEU") in giving rise to an appreciable restriction of competition both by object and by effect. Further, it alleged that by its strategy of pursuing these successive patent settlements so as to protect its market position from generic challengers Servier was abusing a dominant position, contrary to Art 102 TFEU. The agreements concerned patents held by Servier relating to perindopril, a prescription-only pharmaceutical product used for a number of different therapeutic purposes, in particular for cardiovascular diseases. It is one of a class of drugs known as angiotensin converting

enzyme ("ACE") inhibitors. Perindopril was a so-called 'blockbuster' drug and became Servier's most successful product, accounting for about 30% of its total turnover.

6. On 9 July 2014, the Commission issued its decision in the case ("the Decision"). The Commission held that Servier and the generic companies had infringed Art 101 TFEU by reason of the agreements, and further that Servier had infringed Art 102 TFEU. For present purposes, it is those aspects of the Decision concerning Art 102 that are relevant. In particular, in determining that Servier held a dominant position, the Commission held that the relevant market for finished products comprised only perindopril and rejected Servier's argument that it comprised, at least, all ACE inhibitors.

7. All the addressees of the Decision were subject to significant fines. The total fine on Servier was €330,997,200.

8. On 21 September 2014, Servier applied to the General Court for annulment of the Decision, as regards both Art 101 and Art 102. On 22 December 2014, a brief summary of Servier's grounds of appeal was published in the EU *Official Journal* (OJ C462/27). Servier relied on 17 pleas in support of its appeal. The 14th plea is summarised as follows:

> "… the Commission wrongly and artificially restricted the relevant market for finished products to the single molecule of perindopril, by excluding fifteen other enzyme conversion inhibitors available on the market."

The 15th plea challenges the finding of dominance on the basis that this rested on the erroneous definition of the market challenged by the 14th plea.

9. The oral hearing before the General Court took place on 6-9 June 2017 and the Court gave its judgment on 12 December 2018 ("the Judgment"). The United Kingdom did not intervene in the proceedings before the General Court.

10. It will be necessary to refer to the material parts of the Judgment in some detail below. However, in summary, the General Court dismissed the appeal as regards four of the five agreements that were found to constitute an infringement of Art 101, but annulled the Decision as regards one of those agreements and as regards the infringement by Servier of Art 102. It is the part that concerns Art 102 that is critical for present purposes, and there the General Court reached its conclusion on the basis that the Commission had not established that the relevant market was limited to perindopril, as compared to all ACE inhibitors.

11. Both the Commission and Servier have appealed against the Judgment to the Court of Justice of the EU ("the CJEU"). Such an appeal is limited to questions of law, including distortions of evidence. The appeal by the Commission is a confidential document. However, I was given in confidence a copy of the Commission's appeal and, since the hearing, a summary of the appeal has been published on the CJEU website. It is sufficient to state that the Commission is challenging the General Court's approach to market definition including, by the ninth ground of its appeal, the General Court's analysis of the considerations of therapeutic substitutability. For reasons explained in a short, unreserved judgment delivered after initial argument, I decided that the hearing

of the questions addressed in this judgment should not be adjourned pending the appeal to the CJEU.

THE ENGLISH PROCEEDINGS

12. The English claimants commenced their action on 3 May 2011. Originally, the claimants comprised the Secretary of State for Health ("the Secretary of State") as the UK government minister with responsibility for the Department of Health and the provision of the National Health Service ("NHS") in England; the NHS Business Services Authority, a Special Health Authority which managed on behalf of the former health authorities and primary care trusts ("PCTs") the making of reimbursement payments to pharmacists in England for dispensed prescriptions; the 10 former Strategic Health Authorities ("SHAs") which distributed to PCTs funds allotted to them by the Secretary of State; and 146 former PCTs, which made reimbursement payments to pharmacists and doctors in respect of medicines supplied pursuant to the NHS in England. With effect from 1 April 2013, these SHAs and the PCTs were abolished and their rights of action vested in the Secretary of State. Since that abolition, the claim has continued to be pursued by the Secretary of State and the NHS Business Services Authority.

13. The Scottish/NI action was commenced on 18 July 2012. The 17 claimants are the equivalent bodies to the English claimants for Scotland and Northern Ireland, including the Scottish Ministers and the Department of Health, Social Services and Public Safety for Northern Ireland.

14. The Welsh action was commenced on 10 September 2012. The eight claimants are the equivalent bodies for Wales, including the Welsh Ministers.

15. The Particulars of Claim in all three actions were significantly amended following the publication of the Decision in 2014 so as to rely on the findings of infringement made by the Commission.

16. As amended, the English action alleges that Servier committed an abuse of the patent system by reason of various representations made in the course of obtaining and enforcing and defending patents concerning perindopril. This conduct is alleged to constitute the economic tort of interference with economic interests by unlawful means ("unlawful means"), alternatively an abuse of a dominant position contrary to Art 102 and/or the equivalent Chapter 2 prohibition under the Competition Act 1998 ("the CA 1998"). Further, the English claimants allege that by entry into the same five agreements with generic producers relied on in the Decision, Servier infringed Art 101 and/or the Chapter 1 prohibition under the CA 1998, and/or that its exclusionary conduct in entering into those agreements constituted a further abuse of its dominant position.

17. In support of the allegations of infringement of Art 101 and/or the Chapter 1 prohibition, and of Art 102 and/or the Chapter 2 prohibition as regards the conduct of entering into the various agreements, the claim relies on the Decision.

18. The English claimants contend that by reason of Servier's unlawful conduct, the entry of generic perindopril onto the UK market was significantly delayed until July 2007, causing the price of Perindopril for several years previously and also for a period of time thereafter to have been substantially higher than it otherwise would have been. In

consequence, the English claimants allege that they suffered very substantial financial loss through the higher prices paid for Servier's product.

19. The Scottish/NI action and the Welsh action advance essentially the same claims, save that in neither of those actions is there a claim at common law for an economic tort. For convenience, in the remainder of this judgment I shall refer only to the pleadings in the English action.

20. It is appropriate to explain how the claims advance the allegation that Servier was dominant. That rests on the definition of the relevant market. The relevant markets alleged are the market for the sale of the perindopril product in the UK and/or the market for the technology used in the production of the perindopril active pharmaceutical ingredient ("API"). The latter market definition derives entirely from the Decision and is not relevant to the issue presently before the court. But the allegation that the perindopril product alone, and not all ACE inhibitors, constituted a relevant market is the subject of extensive and detailed pleading. In essence, the claim identifies the various different conditions for which ACE inhibitors may be prescribed, and states that the manner in which ACE inhibitors are used will vary according to the purpose for which they are used. The Particulars of Claim then states:

> "49. ACE inhibitors are typically prescribed on a long-term basis and NHS clinicians will take different considerations into account on the one hand when deciding which ACE inhibitor to prescribe at the outset of treatment, and on the other hand when deciding whether to continue treatment with the same ACE inhibitor or to switch the patient to another ACE Inhibitor. Factors which influence NHS clinicians in choosing whether to prescribe a particular ACE Inhibitor at the outset of treatment include the following:
>
> 49.1 NHS clinicians will take into account the extent, quality and specificity of the evidence base for the following:
>
> 49.1.1 the therapeutic benefit of using an ACE Inhibitor to treat the particular indication for which the prescription is being written;
>
> 49.1.2 the presence or absence of relevant side-effects and interactions with drugs used for other conditions;
>
> 49.1.3 reasons why a drug should not be prescribed for particular groups of patients or patients suffering from particular conditions ("contra-indications").
>
> 49.2 NHS prescribers will prescribe ACE inhibitors for which the evidence base in respect of the matters set out at paragraph 49.1 is more substantial and/or of higher quality and/or more specific in preference to ACE inhibitors for which the evidence base is less substantial and/or of lower quality and/or less specific. In assessing the quality and specificity of the evidence base, NHS prescribers will prefer to prescribe ACE inhibitors for

which there have been large-scale randomized controlled trials showing a beneficial therapeutic effect specifically in respect of relevant indications, the absence of any relevant contra-indications, and an acceptable or manageable level of side-effects and will take into account the facts and matters set out at paragraph 49A below.

49.3 NHS prescribers will prescribe ACE inhibitors in respect of which the starting and/or target doses for the particular indication for which the prescription is being written have been determined from large-scale randomized controlled trials in preference to other ACE inhibitors in respect of which the starting and/or target doses have not been similarly determined for that particular indication. In that regard NHS prescribers will take into account the facts and matters at paragraphs 48 and 49A.

49.4 NHS prescribers will take into account the extent to which NICE and/or other NHS bodies recommend the use of particular drugs for the treatment of particular indications as set out at paragraph 54 below.

49.5 NHS prescribers may be influenced by the marketing activity of pharmaceutical companies, in particular through the funding of research into particular drugs in order to develop the evidence base for those drugs, and through the active dissemination of information as to the evidence base for prescribing particular drugs.

49A. When deciding whether to continue treatment with the same ACE Inhibitor or to switch the patient to another ACE Inhibitor (or another anti-hypertensive drug), an NHS clinician will consider the matters set out above, but in addition will take into account (i) the experience of the patient with the existing ACE inhibitor: and/or the risk that switching the patient to a different ACE inhibitor will cause undesirable side-effects: and/or (ii) the risk that switching the patient to a different ACE inhibitor will cause a loss of adequate control of blood-pressure, whether temporary or permanent. For long-term patients, ACE inhibitors are therefore an 'experience good', i.e. products for which exact information concerning the qualities of the product is acquired through consumption and in respect of which consumers are typically inclined to continue using the product for which the valuation (here efficacy and side-effects) is known rather than switching to another product for which the respective valuation is uncertain, (See Decision ¶2434)."

21. The pleading proceeds to refer to various clinical trials and studies, before asserting that the evidence base available to prescribers at the material times indicated that ACE inhibitors vary in a number of respects; and that for the different conditions for which perindopril was prescribed there were material differences in the evidence base and/or that the evidence base for perindopril was superior. Further, it is alleged that Servier

marketed its branded perindopril product on that basis. It is alleged that in consequence of all these various factors, a proportion of NHS prescribers preferred to prescribe perindopril for the treatment of each of the various conditions.

22. Servier's original defence to the English claim was served in August 2011. In summary, Servier comprehensively denied that it had engaged in any unlawful conduct, whether by way of a common law tort or under competition law, and disputed the allegations of damage. Specifically as regards the allegation of abuse of dominance, Servier denied that it held a dominant position or (if it did) that it had committed any abuse. Servier asserted that the relevant market comprised ACE inhibitors and angiotensin receptor blockers ("ARBs"), alternatively ACE inhibitors. Servier admitted that "there is some variation between different ACE inhibitors as regards, inter alia, therapeutic effects and side effects" but expressly denied:

> "that either (i) ACE inhibitors other than Perindopril or (ii) ARBs would have at any material time been a clinically inappropriate choice for prescribers in most circumstances in which Perindopril has been prescribed."

That plea was subsequently clarified by way of a response to a request for further information, as follows:

> "The Defendants do not accept that there are any circumstances in which it would not have been clinically appropriate to prescribe another ACE inhibitor instead of Perindopril, except where the patient was allergic to or intolerant of all alternative ACE inhibitors."

23. In November 2015, Servier applied to amend its defences in all three actions to introduce what was described for convenience as "the prescribing argument". The Scottish/NI and Welsh claimants did not object to this amendment, but the English claimants did so (save in one respect that is immaterial for present purposes) and Servier's application was set down for full argument. By a judgment delivered on 4 October 2016, Henderson J granted Servier permission to amend.

24. The prescribing argument, under the heading "Failure to Mitigate, Causation, Remoteness and/or Contributory Negligence" in its relevant respects alleges that:

i) "ACE inhibitors exert a 'class effect' and there was no clinical difference between Perindopril and the other ACE inhibitors already available in generic form. NHS prescribers could therefore prescribe these ACE inhibitors as an alternative to Perindopril";

ii) the claimants should therefore have taken all reasonable steps to encourage switching from the prescription of perindopril to the prescription of cheaper alternative ACE inhibitors in generic form, but failed to do so, or to take sufficient steps to ensure that the various specified measures of encouragement were complied with;

iii) accordingly, the claimants failed to mitigate their loss and/or those events broke the chain of causation and/or rendered any damage too remote; and

iv) as regards the claim in tort for unlawful means, the claimants were contributorily negligent.

25. Point (i) above was subsequently clarified by way of further information to assert that "there was no clinical difference that should have been material to the Claimants' decision as to whether to encourage switching to those ACE inhibitors."

26. The prescribing argument thus brings into still greater prominence the question of the substitutability of perindopril and other ACE inhibitors. That is now relevant in these proceedings not only for the question of market definition and dominance, as a pre-requisite to any allegation of abuse, but to the claimants' ability to recover under any head of their claims.[1]

27. On 2 August 2017, in response to an application by Servier, I struck out the unlawful means claim: [2017] EWHC 2006 (Ch). An appeal against that decision is pending before the Court of Appeal.

THE GENERAL COURT JUDGMENT

28. The operative part of the Judgment comprises seven succinct paragraphs. As stated above, the Judgment annulled the finding in the Decision that the agreement with one of the generic companies (Krka) constituted an infringement of Art 101, but dismissed Servier's appeal as regards the other agreements. It thus largely upheld the Decision as regards the violation of Art 101. However, paragraph 2 of the operative part of the Judgment sets aside article 6 of the Decision. Article 6 of the Decision set out the Commission's finding that Servier had infringed Art 102.

29. The Judgment prior to the operative part is very long and detailed. It comprises 1,968 paragraphs of analysis and assessment. At present, the Judgment is available only in French, but I was supplied with an unofficial English version, which all parties recognised was not altogether accurate.[2] Where it is necessary to quote from the Judgment, I shall therefore use this English text (correcting some of the apparent errors of translation), with the authoritative French text set out in footnotes.

30. The reason for setting aside the finding of infringement of Art 102 is summarised under the Court's "General Conclusions" at para 1963:[3]

> "… as regards Article 102 TFEU, the Court considers that it has not been established that the relevant finished goods market was limited to perindopril. Since Servier's dominant position is not demonstrated in that market or in the technology market, the existence of an abuse of that position is called into question, so

[1] The quotation at para 20 above from the Particulars of Claim in the English action in part reflects amendments made in response to the prescribing argument.
[2] I was told that it was produced using *Google Translate*, followed by some corrections.
[3] *"… s'agissant de l'article 102 TFUE, le Tribunal considère qu'il n'est pas établi que le marché des produits finis pertinent était limité au périndopril. La position dominante de Servier n'étant démontrée ni sur ce marché ni sur le marché de la technologie, l'existence d'un abus de cette position est remise en cause, de sorte que l'article 6 de la décision attaquée, relatif au constat de cette infraction, doit être annulé*."

that Article 6 of the contested decision, relating to the finding of this infringement, must be annulled."

31. Sections 12-14 of the Judgment contain the analysis and reasoning of the Court on market definition. Of those, section 12, concerning the definition of the relevant finished goods market, is the material section. The brief sections 13 (on the market for finished products) and 14 (on the technology market) are dependent on the conclusion in section 12. After setting out the contentions of the parties, the part of section 12 setting out the discussion and findings of the Court comprises 226 paragraphs.

32. Because of the nature of the argument on the *res judicata* issue, it is necessary to go into some detail as to how the Court reached this conclusion. At paras 1367-1371, the Court summarised the three distinct arguments raised by Servier under this head:

> "1368 First, by their first complaint, the applicants criticise the Commission for having disregarded the peculiarities of the pharmaceutical sector in that it based its analysis of the relevant market mainly on the price of medicinal products and not on therapeutic substitutability. That complaint is based on two limbs, the first being that the Commission did not take into account all the elements of the economic context, the second that the Commission attaches excessive importance to the price factor.
>
> 1369 Next, by their second complaint, they challenge the Commission's argument that the ACE inhibitors were not sufficiently substitutable from a therapeutic point of view. They challenge the distinction between perindopril and other ACE inhibitors in terms of efficacy and side effects, the phenomenon of "inertia" of physicians concerning new patients, the low propensity to change patients in continuous treatment and the Commission's analysis of promotional efforts.
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> 1370 Finally, by their third complaint, the applicants contest, in the alternative, the methodological shortcomings of the Commission's econometric analysis of natural events in order to demonstrate that the ACE inhibitors did not exercise significant competitive constraints on perindopril."[4]

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[4] "*1368 Tout d'abord, par leur premier grief, les requérantes reprochent à la Commission d'avoir méconnu les spécificités du secteur pharmaceutique en ce qu'elle aurait fondé son analyse du marché pertinent principalement sur le prix des médicaments et non sur la substituabilité thérapeutique. Ce grief est fondé sur deux branches, la première étant tirée de ce que la Commission n'aurait pas pris en compte l'ensemble des éléments du contexte économique, la seconde de ce que la Commission aurait attaché une importance excessive au facteur prix.*
1369 Ensuite, par leur deuxième grief, elles contestent la thèse de la Commission selon laquelle les IEC n'étaient pas suffisamment substituables d'un point de vue thérapeutique. Elles remettent en cause la distinction entre le périndopril et les autres IEC en termes d'efficacité et d'effets secondaires, le phénomène d'« inertie » des médecins s'agissant des nouveaux patients, la faible propension au changement des patients en traitement continu et l'analyse des efforts promotionnels effectuée par la Commission.

33. After an introductory sub-section addressing the extent of judicial review exercised by the General Court (paras 1372-1379) and the particularities of the pharmaceutical sector (paras 1380-1405), the Court examines the enumerated complaints. The Court first considers and rejects the first limb of the first complaint (paras 1406-1417). The Court then turned to the second complaint, concerning the therapeutic substitutability of ACE inhibitors. The Judgment helpfully summarises Servier's arguments under this second complaint as follows:

> "1418 By their second complaint, the applicants maintain, in essence, that the Commission disregarded the therapeutic substitutability between the ACE inhibitors. They argue, firstly, that the Commission wrongly considered that perindopril was differentiated from other ACE inhibitors by particular qualities, secondly that competition between the ACE inhibitors was keen with regard to new patients, thirdly that the Commission underestimated the propensity to change drugs of patients treated with perindopril and, finally, that promotional actions are one of the essential dimensions of competition in the relevant market."[5]

34. The Judgment proceeds to discuss and evaluate, in a very structured fashion, each of these four arguments in turn (paras 1419-1565).

(i) Distinction between Perindopril and other ACE inhibitors in terms of efficacy and side effects

35. Servier's argument that all ACE inhibitors are in this regard part of a homogeneous class is examined under eight heads, which can be summarised as follows:

a) basic information regarding mode of action, main indications, contraindications and side effects;

b) the ATC classification system;

c) medical recommendations;

d) medical studies;

e) policies implemented by local health authorities in the UK;

f) Servier's internal documents;

1370 Enfin, par leur troisième grief, les requérantes contestent, à titre subsidiaire, les lacunes méthodologiques de l'analyse économétrique des événements naturels de la Commission visant à démontrer que les IEC n'exerçaient pas de contraintes concurrentielles significatives sur le périndopril."

[5] "*1418 Par leur deuxième grief, les requérantes soutiennent, en substance, que la Commission a méconnu la substituabilité thérapeutique entre les IEC. Elles font valoir, premièrement, que la Commission a considéré à tort que le périndopril se différenciait des autres IEC par des qualités particulières, deuxièmement, que la concurrence entre les IEC était vive s'agissant des nouveaux patients, troisièmement, que la Commission a sous-estimé la propension à changer de médicament des patients traités au périndopril et, enfin, que les actions promotionnelles sont l'une des dimensions essentielles de la concurrence sur le marché en cause.*"

g) the Commission's survey of prescribers;

h) replies from manufacturers of other ACE inhibitors to questions put by the Commission.

36. Following that analysis, the Court concludes:

> "1481 In the light of all the documents in the file, it must be concluded that there is no significant difference between perindopril and other ACE inhibitors in therapeutic terms, including in terms of efficacy and side effects. There is no evidence in the record of objective scientific evidence of the therapeutic superiority of perindopril over other ACE inhibitors. ACE inhibitors are widely perceived as substitutable by prescribers and there are many medications considered by physicians as therapeutic equivalents to perindopril. Therefore, the Commission erred in considering that the class of ACE inhibitors was heterogeneous and that perindopril exhibited particular therapeutic characteristics within this class of drugs."[6]

(ii) <u>The phenomenon of 'inertia' of doctors with regard to new patients</u>

37. The Court discusses the question of the extent of this 'inertia' of doctors in their prescribing for new patients under six heads, as follows:

a) the absence of heterogeneity of ACE inhibitors;

b) the relative position of Perindopril in terms of patient numbers compared to other ACE inhibitors;

c) the significance of growth in Perindopril sales compared to other ACE inhibitors;

d) the fluctuations in sales of Perindopril in the 2000s;

e) a study of prescribers in France of Perindopril and the Commission's survey of prescribers;

f) the responses of three manufacturers of other ACE inhibitors.

38. Following that analysis, the Court concludes as regards this factor:

> "1513 In the light of the foregoing, it must be concluded that the Commission has not established that a phenomenon of

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[6] "*1481 Au vu de l'ensemble des pièces du dossier, il convient de conclure qu'il n'existe pas de différence significative entre le périndopril et les autres IEC sur le plan thérapeutique, y compris en termes d'efficacité et d'effets secondaires. Il n'existe pas au dossier de preuve scientifique objective d'une supériorité thérapeutique du périndopril par rapport aux autres IEC. Les IEC sont très largement perçus comme substituables entre eux par les prescripteurs et il existe de nombreux médicaments considérés par les médecins comme des équivalents thérapeutiques au périndopril. Par conséquent, c'est à tort que la Commission a considéré que la classe des IEC était hétérogène et que le périndopril présentait des caractéristiques thérapeutiques particulières au sein de cette classe de médicaments*."

> "inertia" of doctors and the existence of a growing group of prescribers "faithful" to perindopril had significantly restricted the competitive pressure on perindopril by other ACE inhibitors for new patients." [7]

(iii) The propensity for change of patients in continuing treatment

39. Servier's criticism of the Commission's conclusion in this respect is also discussed under six heads:

a) the absence of heterogeneity of ACE inhibitors;

b) a study of prescribing habits of GPs in France and the UK relied on by the Commission;

c) two further studies on the propensity of perindopril treated patients to change their treatment;

d) policies of a number of PCTs in the UK to encourage change of treatment from perindopril to other ACE inhibitors;

e) the Commission's reliance on its prescribers' survey;

f) the Commission's reliance on a reply from the manufacturer of another ACE inhibitor.

40. The Court concludes:

> "1540 It follows from the foregoing that the Commission underestimated the propensity to change patients treated with perindopril, further relying on the erroneous assumption of the heterogeneity of drugs in the class of ACE inhibitors. The evidence in the file shows that the changes in treatment of patients starting treatment with perindopril are significant over a period of five years, which calls into question the average duration of treatment assessed by the Commission and the significance of the effect of foreclosure of the patient base." [8]

(iv) Promotional efforts

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[7] "*1513 Au vu de ce qui précède, il y a lieu de conclure que la Commission n'a pas établi qu'un phénomène d'« inertie » des médecins et l'existence d'un groupe croissant de prescripteurs « fidèles » au périndopril avaient restreint de façon significative la pression concurrentielle exercée sur le périndopril par les autres IEC pour les nouveaux patients.*"

[8] "*1540 Il résulte de ce qui précède que la Commission a sous-estimé la propension au changement des patients traités au périndopril, en se fondant, en outre, sur l'hypothèse erronée de l'hétérogénéité des médicaments de la classe des IEC. Il ressort des pièces du dossier que les changements de traitement des patients débutant un traitement au périndopril sont significatifs sur une période de cinq ans, ce qui remet en cause la durée moyenne de traitement évaluée par la Commission et l'importance des effets de verrouillage de la base de patients*".

41. The Court analyses under four heads Servier's argument that the Commission failed to take due account of the important promotional efforts made by laboratories as a major dimension of competition, concluding:

> "1565 Therefore, it follows from the foregoing that the Commission did not give due consideration to the promotion efforts of the laboratories and their importance in the analysis of the competitive relationship between perindopril and the other ACE inhibitors."[9]

42. Based on its detailed examination and discussion of each of Servier's four arguments, the Court finds that the second complaint is well-founded: para 1566.

43. The Court proceeds (at paras 1567-1585) to uphold the second limb of the first complaint, concerning the excessive weight given by the Commission to changes in the relative prices of medicinal products based on a so-called 'natural events' analysis. The Court accordingly expressly decides that it is unnecessary to consider also Servier's third complaint: para 1586.

44. There follows a concluding sub-section (paras 1587-1592). This effectively summarises the Court's findings and it is relevant to set out the final four paragraphs:

> "1589 In the present case, at the end of the overall assessment of the factors on which the Commission based its assessment and the examination of the applicants' complaints, it must be concluded that the Commission committed a series of errors in the analysis of the definition of the relevant market. Indeed, the Commission:
>
> - wrongly considered, with regard to therapeutic use, that ACE inhibitors were a class of heterogeneous drugs and that perindopril had particular characteristics within this class of drugs;
>
> - wrongly concluded that a mechanism of "inertia" of physicians had significantly restricted the competitive pressure exerted on perindopril by other ACE inhibitors for new patients;
>
> - underestimated the propensity of patients treated with perindopril to change treatment;
>
> - did not give due consideration to laboratory promotion efforts and their importance in the analysis of competitive relationships;
>
> - disregarded the particular characteristics of competition in the pharmaceutical sector, erroneously inferring from an analysis of natural events based primarily on price changes that perindopril

[9] *"1565 Dès lors, il ressort de ce qui précède que la Commission n'a pas dûment pris en considération les efforts de promotion des laboratoires et leur importance dans l'analyse des rapports de concurrence entre le périndopril et les autres IEC.*"

was not subject to significant competitive pressures from other ACE inhibitors.

1590 On the basis of an analysis tainted by the above-mentioned errors, the Commission restricted the relevant market to the single molecule of perindopril, while the evidence shows that perindopril could be exposed to significant non-tariff competitive pressures from the other ACE inhibitors. In those circumstances, it must be held that the errors committed by the Commission are such as to vitiate the result of its analysis.

1591 It must therefore be concluded, following an assessment made by the Court, in compliance with the limits of the judicial review referred to in paragraphs 1587 and 1588 above, that it has not been established that the relevant product market relevant is limited to only branded and generic perindopril.

1592 In the light of the foregoing, the fourteenth plea in law, directed against the definition of the finished product market market as being that of branded and generic perindopril, is accepted."[10]

45. The substantive statement in para 1591 is effectively echoed in the Court's overall conclusions, where it addresses market definition and dominance at para 1963: see at para 30 above.

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[10] "*1589 En l'espèce, au terme de l'évaluation globale des éléments sur lesquels la Commission a fondé son appréciation et de l'examen des griefs formulés par les requérantes, il y a lieu de conclure que la Commission a commis une série d'erreurs dans l'analyse de la définition du marché pertinent. En effet, la Commission:*

– a considéré à tort, s'agissant de l'usage thérapeutique, que les IEC étaient une classe de médicaments hétérogènes et que le périndopril avait des caractéristiques particulières au sein de cette classe de médicaments;

– a conclu à tort qu'un mécanisme d'« inertie » des médecins avait restreint de façon significative la pression concurrentielle exercée sur le périndopril par les autres IEC pour les nouveaux patients;

– a sous-estimé la propension des patients traités au périndopril à changer de traitement;

– n'a pas dûment pris en considération les efforts de promotion des laboratoires et leur importance dans l'analyse des rapports de concurrence;

– a méconnu les caractéristiques particulières de la concurrence dans le secteur pharmaceutique, en déduisant à tort d'une analyse des événements naturels fondée essentiellement sur les variations de prix que le périndopril n'était pas soumis à des pressions concurrentielles significatives de la part des autres IEC.

1590 En se fondant sur une analyse entachée des erreurs qui viennent d'être rappelées, la Commission a restreint le marché pertinent à la seule molécule du périndopril, alors que les pièces du dossier montrent que le périndopril pouvait être exposé, de la part des autres IEC, à des pressions concurrentielles significatives d'ordre non tarifaire. Dans ces conditions, il y a lieu de considérer que les erreurs commises par la Commission sont de nature à vicier le résultat de son analyse.

1591 Il convient ainsi de conclure, à l'issue d'une appréciation opérée par le Tribunal dans le respect des limites du contrôle juridictionnel rappelées aux points 1587 et 1588 ci-dessus, qu'il n'est pas établi que le marché de produits pertinent est limité au seul périndopril princeps et générique.

1592 Compte tenu de ce qui précède, il convient d'accueillir le quatorzième moyen, dirigé contre la définition du marché des produits finis comme étant celui du périndopril princeps et générique."

CONSEQUENCES FOR THE ENGLISH PROCEEDINGS

46. All parties have recognised that the actions before this court cannot proceed to final trial before the European proceedings are finally concluded. In the light of the Judgment, the claimants have stated that they will not pursue their case under Art 101 (or the Chapter 1 prohibition) as regards the Krka agreement or under Art 102 (or the Chapter 2 prohibition) for abuse of dominance, unless the Judgment is reversed in those respects by the CJEU. This is subject to a reservation of their position in the event of a change in the governing legal regime following Brexit. However, they are pursuing their claim under Art 101 (and the Chapter 1 prohibition) in all other respects, subject to Servier's appeal to the CJEU, and if the Court of Appeal should reverse my decision striking out the unlawful means claim, the English claimants will doubtless pursue that also. The prescribing argument therefore remains very relevant to Servier's defence even if the abuse of dominance case may fall away.

47. As explained above, critical to the prescribing argument is the degree of therapeutic equivalence between perindopril and other ACE inhibitors, whether at the material time (i.e., 2003-2009) prescribing doctors viewed them as substitutable, and whether the various health authorities should reasonably have sought to encourage doctors to prescribe another ACE inhibitor instead of perindopril, whether for new patients or by switching existing patients. On that basis, the following have been ordered to be tried as preliminary issues in these actions:

> a. Would it have been reasonable or appropriate in the period between 2003 and 2009 for a clinician to prescribe another ACE inhibitor instead of perindopril in all circumstances, except where the patient was allergic to or intolerant of all alternative ACE inhibitors?
>
> b. If not, in what circumstances would that have been unreasonable or inappropriate?
>
> c. Was it unreasonable for either the present three sets of claimants (collectively "Claimants") or the various relevant predecessor organisations (including PCTs and SHAs) to fail to take any (and if so, which) of the steps set out in paragraph 83C of the Defendants Re-Re-Amended Defence to the English Claimants' claim or identified in the Defendants' Further Information dated 29 September 2017?

48. Some of the findings and statements in the Judgment are obviously relevant to those issues. As directed by this court, Servier served a statement of the eight propositions ("Servier's propositions") which it contends are binding on the court in the trial of the preliminary issues as findings of fact made by the General Court. As slightly amended in the course of argument, and as cross-referenced to the paragraphs in the Judgment, Servier's propositions are as follows:

> "(a) There was no significant difference between perindopril and other ACE inhibitors in therapeutic terms, including in terms of

efficacy and side effects, mode of action, main indications and contraindications (Judgment §§1425, 1429, 1481, 1519, 1589).

(b) ACE inhibitors were widely perceived as substitutable by prescribers and there were many medications considered by physicians as therapeutic equivalents to perindopril (Judgment §§1481, 1489).

(c) There was no element that limited the discretion available to physicians to prescribe ACE inhibitors other than perindopril for new patients (Judgment §1489).

(d) Switching between ACE inhibitors for existing patients did not raise particular fears on the part of physicians (Judgment §1519).

(e) The prescribing behaviour of physicians was not characterised by a high degree of "inertia" and treatment changes in patients undergoing continuous treatment were significant (Judgment §1544).

(f) At least some PCTs considered, as from 2005, that perindopril was no more effective than any other ACE inhibitor and recommended, for cost reasons, the use of other ACE inhibitors than perindopril, or even the substitution of another ACE inhibitor for perindopril, in particular lisinopril or ramipril (Judgment §1464).

(g) At least some PCT policies had a real negative effect on perindopril sales at local level (Judgment §1534).

(h) Servier's promotional activities did not sufficiently differentiate perindopril from other ACE inhibitors for it to be recognised for particular therapeutic qualities by physicians (Judgment §§ 1472, 1473).

49. The claimants dispute that any of these propositions are binding in the present proceedings by reason of the Judgment, but they have stated that they do not as a matter of fact dispute propositions (f) and (g). Accordingly, in practical terms the issue between the parties concerns the other six propositions.

50. The claimants wish to advance arguments to the contrary and they have prepared and served evidence that addresses these matters. For example, Dr Hurding, an experienced Scottish GP who has also worked on medicines management for two Scottish health boards, states that among the factors that led prescribers to prefer perindopril over other ACE inhibitors were the practical considerations that it was easier to titrate and that its easier dosing requirements enhanced patient compliance; and further that there was a strong evidence base supporting the benefit of perindopril treatment for stroke patients. Dr Smithard, a stroke consultant, explains in his witness statement that over the relevant period he almost exclusively prescribed perindopril for the management of stroke patients because it was supported by a stronger evidence base than other ACE inhibitors

and also that it was easier to titrate than other agents. Professor Maskrey, now professor of evidence-informed decision making, who was for many years medical director at the National Prescribing Centre and subsequently at the National Institute for Health and Care Excellence (NICE), discusses in his witness statement the preparation of guidance to prescribers on switching patients to cheaper generic drugs, and explains his serious concerns about advising GPs to switch a patient with a serious heart condition from one ACE inhibitor to an alternative. Such evidence (and the above is merely a snapshot) would be precluded if Servier's propositions are binding on the Court.

51. As stated at the outset, Servier puts its case on two grounds: *res judicata* and abuse of process. But Ms Bacon submitted that it could rely on a combination of these principles: if *res judicata* applies in respect of only some of Servier's propositions, it might nonetheless be an abuse of process for the claimants to contest the others. Before examining the substantive arguments on those two grounds, it is appropriate to consider briefly whether the six propositions at issue properly reflect findings in the Judgment:

    a) The first half of this proposition is a direct quotation from para 1481: see para 36 above. The second half is derived in particular from paras 1425 and 1429 which expresses the Court's conclusion on sub-head (a) of Servier's first argument: para 35.a) above. The Judgment actually states that the mode of action, main indications and contraindications are "similar" ("*similaires*"), which seems to me a less strong characterisation than "no significant difference". But this is not a material point and, overall, I consider that the proposition reflects what is said in the Judgment.

    b) This is a direct quotation from para 1481: see above.

    c) This is derived from and reflects what is said in discussion of the first head under Servier's second argument concerning prescribers' "inertia": para 37.a) above.

    d) This proposition is said to come from para 1519 of the Judgment, where the General Court discusses the first head under Servier's third argument concerning the switching of patients in continuing treatment. However, the relevant sentence in that paragraph states:

        > "In the absence of differences in efficacy and tolerance between ACE inhibitors, *it has not been established that* the change in treatment between ACE inhibitors raised particular fears on the part of physicians"[11] [my emphasis].

        In my view, that does not support the absolute proposition asserted by Servier. It concerns the Commission's failure to meet the necessary standard of proof on this point, which is a different matter.

[11] "*En l'absence de différences d'efficacité et de tolérance entre IEC, il n'est pas établi que le changement de traitement entre IEC suscitait des craintes particulières de la part des médecins*."

e) This proposition is a direct quotation from para 1544 of the Judgment. However, that comes in the discussion of the promotional efforts (Servier's fourth argument) and when read in context the statement is clearly intended as a convenient summary of the conclusions under the second and third arguments. Hence para 1544 begins, "As previously stated,…" The first part of this proposition thus relates back to para 1513 and the second part relates back to para 1540. As regards the inertia factor for new patients, that was expressed in terms that "the Commission has not established that….": see para 1513 at para 38 above. Accordingly, I consider that the proposition would require this qualification if it was more accurately to reflect the Judgment.

h) The eighth proposition is based on part of the discussion of the meaning of Servier's documents under the sixth head of analysis of Servier's first argument: para 35.f) above. The Decision had stated that according to Servier's internal documents, the purpose of its promotional campaigns was to differentiate perindopril from other ACE inhibitors. In its argument that perindopril was not to be distinguished from other ACE inhibitors in terms of efficacy and side-effects, Servier challenged the Commission's reliance on its internal documents for that purpose. Examining the documents, the General Court stated at paras 1472-1473:

> "1472… However, it is clear from these documents that communication campaigns have not sufficiently differentiated, from the point of view of physicians, perindopril from other ACE inhibitors. These documents mention for example a qualitative study conducted in July 2007 with general practitioners and cardiologists that perindopril and ramipril were perceived as similar. The 2009-2010 orientation plan highlights, at the end of the period examined, the lack of differentiation with respect to ramipril. With regard to the Netherlands, the 2006-2007, 2007-2008 and 2008-2009 orientation plans indicate that many GPs considered lisinopril equivalent to perindopril.
>
> 1473 Therefore, Servier's internal documents do not demonstrate that perindopril was recognized for particular therapeutic qualities that differentiated it from other ACE inhibitors. While the company, like other companies marketing ACE inhibitors, has tried to positively promote and differentiate perindopril through complimentary communication, this strategy has not, according to these documents, been able to

differentiate sufficiently perindopril other ACE inhibitors."[12]

Accordingly, the Court's finding concerned what could properly be concluded from Servier's internal documents, and in effect set aside the conclusion which the Commission had drawn from them in the Decision. I do not read this passage as a wider or conclusive assessment of the nature or effect of Servier's promotional efforts.

52. I would therefore, in any event, reject Servier's case that its fourth and eighth propositions can be derived from the Judgment, even if the principles of *res judicata* or abuse of process should apply. Whether either of those principles does apply is the question to which I now turn.

RES JUDICATA

53. The application of *res judi*cata to Servier's propositions for the purpose of determining the preliminary issues was argued entirely on the basis of EU law. Servier does not rely on the English principles of *res judicata* or issue estoppel.

The arguments of the parties

54. Servier relied in particular on the *P&O Ferries* case which Ms Bacon described as the seminal authority establishing the position under EU law: Cases C-442 &471/03P *P&O Ferries v Commission*, EU:C:2006:356. The background to that case is somewhat complex but pertinent, so it is necessary to summarise the details.

55. In July 1992, an agreement ("the original agreement") was concluded between the Provincial Council of Biscay ("the Diputación") and the Ministry of Trade and Tourism of the Basque Government on the one hand and the ferry company subsequently called P&O Ferries on the other hand concerning the establishment of a ferry service between Bilbao and Portsmouth. The two Spanish authorities thereby agreed to acquire over the period 1993-1996 a number of travel vouchers for significant financial consideration.

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[12]"*1472…Toutefois, il ressort de ces mêmes documents que les campagnes de communication n'ont pas suffisamment permis de différencier, du point de vue des médecins, le périndopril d'autres IEC. Ces documents mentionnent par exemple une étude qualitative réalisée en juillet 2007 auprès de médecins généralistes et de cardiologues selon laquelle le périndopril et le ramipril étaient perçus comme similaires. Le plan d'orientation des années 2009-2010 souligne, en fin de période examinée, le manque de différenciation à l'égard du ramipril. S'agissant des Pays-Bas, les plans d'orientation 2006-2007, 2007-2008 et 2008-2009 indiquent que beaucoup de médecins généralistes considéraient le lisinopril comme équivalent au périndopril.*

1473 Par conséquent, les documents internes de Servier ne démontrent pas que le périndopril était reconnu pour des qualités thérapeutiques particulières le différenciant des autres IEC. Si l'entreprise a tenté, comme d'autres entreprises commercialisant des IEC, de promouvoir et de différencier de façon positive le périndopril au travers d'une communication élogieuse, cette stratégie n'a pas permis, selon ces mêmes documents, de différencier suffisamment le périndopril des autres IEC."

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In response to a complaint from a competing operator, Brittany Ferries (referred to as "BAI"), the Commission initiated a statutory procedure and found that the financial payments provided for under the original agreement did not constitute a normal commercial transaction but State aid that had not been notified. In particular, the Commission relied on the facts that the price agreed for purchase of the tickets exceeded the ordinary commercial tariff and that the authorities agreed to absorb the losses sustained by P&O in the first three years of the new service.

56. P&O Ferries thereupon informed the Commission that it had suspended the original agreement and notified to the Commission a further agreement with the Diputación concluded in March 1995 ("the new agreement") for the period 1995-1998 which included an undertaking to purchase a total of 46,500 tickets, at a lower price than in the original agreement, and various other terms. By decision of 7 June 1995 the Commission terminated the procedure commenced regarding the original agreement and determined that the new agreement did not constitute State aid. BAI challenged that decision before what was then the Court of First Instance ("CFI") (now the General Court).

57. In Case T-14/96 *BAI v Commission*, the CFI annulled the decision of 7 June 1995 and held that the new agreement did not constitute a normal commercial transaction and that the Commission's conclusion that the new agreement did not constitute State aid was incorrect. In particular, the CFI noted that although the ticket price was lower than under the original agreement, the total number of tickets which the Spanish authority agreed to purchase was substantially higher, so that the total sum that would be paid to P&O Ferries was higher than under the original agreement; and further the number of tickets to be purchased did not reflect any real needs of the purchaser. Moreover, those tickets could only be used in low season. The CFI held that the effects of the new agreement were in substance the same as those of the original agreement. P&O Ferries and Spain as a Member State intervened in the proceedings before the CFI in support of the Commission.

58. Following the CFI judgment in *BAI*, the Commission proceeded to adopt a further decision on 29 November 2000 declaring that the new agreement constituted State aid incompatible with the common market, and Spain was ordered to recover the sums already paid.

59. P&O Ferries and the Disputación then commenced proceedings before the CFI challenging the Commission's decision of 29 November 2000. They argued, *inter alia*, that the Commission had been wrong to categorise the new agreement as State aid. The Commission submitted that the plea concerning the classification of the agreement as State aid was inadmissible as *res judicata* by reason of the *BAI* judgment. In Cases T-116 & 118/01, *P&O Ferries and Diputaci*ón *v Commission* EU:T:2003:217, the CFI held that *res judicata* applied only "if the action which gave rise to the judgment was between the same parties, had the same subject-matter and was founded on the same grounds": para 77. The Court proceeded to reject the plea of *res judicata* on the grounds that, first, the actions did not have the same subject-matter since BAI's action had been brought against the Commission's decision of 7 June 1995 whereas the action before the Court brought by the Diputación was against the Commission's decision of 29 November 2000; and secondly, the action before the Court was not between the same parties as in the *BAI* case: paras 78-80.

60. On appeal, the European Court of Justice ("ECJ", now the CJEU) reversed the judgment of the CFI. It is appropriate to set out the relevant parts of the Court's judgment:

> "41 Contrary to the view taken by the Court of First Instance, the *BAI* v *Commission* judgment did not only have relative authority preventing merely new actions from being brought with the same subject-matter, between the same parties and based on the same grounds. That judgment was invested with the force of *res judicata* with absolute effect and prevented legal questions which it had already settled from being referred to the Court of First Instance for re-examination.
>
> 42 In the *BAI* v *Commission* judgment the Court of First Instance annulled the decision of 7 June 1995 in which the Commission held that the new agreement did not constitute State aid and consequently decided to terminate the review procedure which had been initiated in respect of the aid granted to [P&O Ferries].
>
> 43 That annulment led retroactively to the disappearance of the decision of 7 June 1995 with regard to all persons. An annulling judgment of that nature thus has authority *erga omnes*, which gives it the force of *res judicata* with absolute effect (see, in particular, Case 1/54 *France* v *High Authority* [1954] ECR 1, or p. 17, 34; Case 2/54 *Italy* v *High Authority* [1954] ECR 37, at p. 55; Case 3/54 *Assider* v *High Authority* [1955] ECR 63; and Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 54).
>
> 44 That authority is not attached only to the operative part of the *BAI* v *Commission* judgment. It is also attached to the *ratio decidendi* of that judgment which is inseparable from it (see, to that effect, Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asterisand Others* v *Commission* [1988] ECR 2181, paragraph 27, and *Commission* v *AssiDomän Kraft Products and Others*, paragraph 54).
>
> 45 In addition, the question of the force of *res judicata* with absolute effect is a matter of public policy, which must, consequently, be raised by the Court of its own motion.
>
> 46 In the present case, in order to annul the decision of 7 June 1995 the Court of First Instance based itself, in particular, in paragraph 80 of the *BAI* v *Commission* judgment, on the conclusion that the new agreement 'is not a normal commercial transaction' and, in paragraph 81, on the fact that 'the cultural and social aims pursued by the Spanish authorities play no part in the characterisation [of the new agreement] in the light of Article 92(1) of the Treaty [now, after amendment, Article 87(1) EC]'. Finally, the Court of First Instance found, in paragraph 82 of the judgment, that 'the Commission's conclusion that [the new

agreement] does not constitute State aid is based on a misinterpretation of Article 92(1) of the Treaty' and that '[c]onsequently, the decision terminating the review procedure initiated in relation to aid granted to [P&O Ferries] is vitiated by an infringement of that provision and must be annulled'.

47 No appeal was lodged against the *BAI* v *Commission* judgment, and its operative part and *ratio decidendi* therefore became final.

48 It is clear from the grounds of that judgment that the Commission should have classified the aid at issue as State aid for the purposes of Article 87(1) EC and that, following the annulment, it would have to reopen the review procedure in respect of that aid.

49 In order to comply with that judgment the Commission, as it was required to do, reopened the review procedure on the compatibility of the aid in dispute with the Treaty. In the contested decision it, first, confirmed the classification as State aid acknowledged by the Court of First Instance in the *BAI* v *Commission* judgment and, second, considered that the aid in dispute was incompatible with the Treaty. The Commission therefore gave its decision on the same measures as those which were classified as State aid in the *BAI* v *Commission* judgment.

50 In those circumstances, when the Diputación brought its application against the contested decision before the Court of First Instance that court could not re-examine the pleas alleging that the aid at issue did not amount to State aid without disregarding the scope of the *BAI* v *Commission* judgment. Consequently, in finding as it did, the Court of First Instance failed to have regard to the force of *res judicata* with absolute effect of its previous judgment."

61. Ms Bacon pointed out that the ECJ set out a distinction in para 41 between the concept of "relative authority", which applied only as between the same parties as regards the same measure and on the same grounds, and the "absolute authority" of a judgment which created a broader *res judicata* which applied *erga omnes*. She emphasised that the relevant finding in *BAI* that gave rise to *res judicata* was essentially factual, i.e. that the new agreement was "not a normal commercial transaction"; it was not an issue of law. And she noted that the formulation set out in *P&O Ferries* had been repeated in subsequent cases. For example, in Case C-221/10P *Artegodan v Commission*, EU:C:2012:216, the CJEU stated, at para 87:

> "… the Court has held, firstly, that *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (*Commission* v *Luxembourg* paragraph 27; and *Thyssenkrupp Nirosta* v *Commission* paragraph 123) and, secondly, that the force of *res judicata*

> attaches not only to the operative part of that decision, but also to the *ratio decidendi* of that decision which is inseparable from it (Joined Cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 44)."

62. In her reply, Ms Bacon further relied on the judgment of the General Court in a trade mark case, Case T-629/16 *Shoe Branding Europe BVBA v EUIPO* EU:T:2018:108. There, adidas AG ("adidas") which was the registered owner of its well-known "three-stripes" mark as applied to footwear, had filed opposition before the EU Intellectual Property Office ("EUIPO") to the application for registration by Shoe Branding Europe BVBA ("Shoe Branding") of a "two stripes" mark for footwear. That opposition was rejected by EUIPO and its Board of Appeal, but on appeal by adidas, in Case T-145/14 *adidas v OHIM – Shoe Branding Europe* EU:T:2015:303 ("the annulling judgment"), the General Court annulled the decision of 28 November 2013 of the EUIPO Board of Appeal. The Court found that EUIPO had been wrong to conclude that there was no similarity between the two marks and that the public would not make a connection between them, and thus that the grounds for opposition under Art 8 of the Community Trade Mark Regulation (then Reg 207/2009) had not been made out. An appeal against that judgment was summarily dismissed by the CJEU: Case C-396/15P.

63. The matter then went back to the EUIPO Board of Appeal, which re-examined the case and by decision of 8 June 2016 held that there was likelihood that the relevant public would establish a link between the two marks. When Shoe Branding brought an action challenging that second decision, the General Court held that this was definitively settled by the earlier annulling judgment of the General Court and the CJEU. The Court stated:

> "100. In that regard, it should be noted that, in finding that the Board of Appeal had erred in its assessment of the similarity of the signs at issue and in annulling the decision of 28 November 2013, the General Court inter alia relied, in paragraphs 33 and 40 of the annulling judgment, on the dual fact, first, that 'sports shoes' were everyday consumer goods and, second, that the relevant public, made up of the average consumer, who is reasonably well informed and reasonably observant and circumspect, had an average degree of attention when purchasing those 'sports shoes'. The applicant attempted to dispute those factual assessments before the Court of Justice, but that Court rejected its argument as being, in part, inadmissible and, in part, manifestly unfounded (order on the appeal, paragraphs 11 to 18). It follows that the judgment annulling the decision of 28 November 2013 is final.

After referring to *P&O Ferries*, the Court continued:

> "103. In the present case, it must be stated that the grounds of the annulling judgment, recalled in paragraph 100 above, relating to the degree of attention of the relevant public, constitute the necessary support for the operative part of that judgment. Therefore, those grounds themselves have the authority of *res judicata* with absolute effect and the Board of Appeal was required to comply with them."

64. Servier stated that in the present case, the relevant operative part of the Judgment is paragraph 2, setting aside the article in the Decision which found that Servier had abused a dominant position in violation of Art 102. However, the reasoning which led to that determination was the Court's conclusion that Servier did not occupy a dominant position in the relevant market, which the Court found was a market for all ACE inhibitors. Servier further submitted, as stated in Ms Bacon and Mr Piccinin's skeleton argument:

> "That finding, in turn, depended on the Court's conclusions on the key factual issues set out above about the extent to which ACE inhibitors were, and were perceived to be, substitutable, and indeed the extent to which they were substituted in practice through PCT switching programmes. None of the eight findings above can be characterised as *obiter dicta* which fall outside the scope of the *res judicata*. All eight formed part of the core of the Court's analysis of the market definition issue."

On that basis, Servier argued that the findings encapsulated in its propositions were binding *erga omnes*, and thus also in the national courts of the Member States.

65. Mr Turner QC for the English claimants, in submissions adopted by the other claimants, accepted that para 44 of *P&O Ferries* set out the governing principle. Accordingly, the operative part of the Judgment gave rise to *res judicata* as regards the present proceedings, i.e. the conclusion that Servier had not abused a dominant position (subject only to his reservation as regards the possible consequences of Brexit: para 46 above). His primary case was that only the ultimate finding which constituted the ratio for this conclusion fell within the principle. Here, that was the finding that the Commission had not established that the relevant market was confined to perindopril: para 1963 of the Judgment. In the alternative, he submitted that, at most, the binding effect extended to the finding that perindopril could be exposed to significant non-price competition from other ACE inhibitors: para 1590 of the Judgment. *Res judicata* as set out in *P&O Ferries* and explained by other decisions of the EU courts did not extend further to what Mr Turner described as "findings of evidentiary facts": such findings did not have effect *erga omnes* and could not bind the claimants in these proceedings. Mr Turner pointed to the distinction between findings of 'evidentiary facts' and findings of 'ultimate facts' in what he suggested was a helpful analogy in the judgment of Aldous LJ in *Kirin-Amgen v Boehringer Mannheim GmbH* [1997] FSR 289, citing at 301 from the judgment of Dixon J in the High Court of Australia in *Blair v Curran* (1939) 62 CLR 464, 532 (who was in turn referring to a judgment of Lord Shaw in the Privy Council on issue estoppel).

66. In that regard, Mr Turner drew attention to the two cases referred to by the ECJ in setting out the general position in *P&O Ferries* at para 44: Cases 97/86 etc *Asteris v Commission*, EU:C:1988:199, and Case-310/97P *Commission v Assidöman Kraft Products*, EU:C:1999:407.

67. *Asteris* concerned the question of what action the Commission had been required to take to give effect to a previous judgment of the ECJ. By a judgment of 19 September 1985, the Court had annulled a Commission regulation fixing the levels of aid payable to Greek producers of tomato concentrate, on the basis that this gave rise to unequal treatment as between producers in Greece and other Member States, and had held that

it was the duty of the Commission to rectify that error. In its subsequent judgment addressing a claim that the Commission had failed to act, the Court stated, at para 27:

> "In order to comply with the judgment and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure."

68. *Assidöman* arose out of the Commission decision and then the ECJ judgment in *Wood Pulp*. By its decision, the Commission determined that a large number of producers of wood pulp had engaged in a cartel contrary to EU competition law. On an action for annulment of the Commission decision brought by 28 of those producers, the Court annulled the finding of a cartel on the basis that this was not established by the evidence relied on by the Commission. The Court considered expert evidence which showed that the conduct on the market was equally consistent with non-concerted parallel pricing, and annulled or substantially reduced the fines on those appellants. In *Assidöman*, representatives of 10 Swedish addressees of the *Wood Pulp* decision who had not brought applications for annulment (and were then out of time to do so), requested the Commission to reconsider the decision as it applied to them and for equivalent repayment of the fines which they had paid. The Commission's refusal of their requests was upheld by the ECJ. Although drafted as a single decision, *Wood Pulp* was to be treated as a bundle of individual decisions by the Commission making findings of infringement against each of the undertakings to which it was addressed and imposing individual fines. On that basis, the Court stated, at paras 54-55 (omitting references):

> "… although the authority *erga omnes* exerted by an annulling judgment of a court of the Community judicature attaches to both the operative part and the *ratio decidendi* of the judgment, it cannot entail annulment of an act not challenged before the Community judicature but alleged to be vitiated by the same illegality.
>
> The only purpose of considering the grounds of the judgment which set out the precise reasons for the illegality found by the Community Court is to determine the exact meaning of the ruling made in the operative part of the judgment. The authority of a ground of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever."

69. On that basis, Mr Turner submitted that legal force of an annulment ruling by the EU courts lies in the operative part. The binding authority of the operative part applies also,

as stated in *P&O Ferries*, to the *ratio decidendi* of the judgment "which is inseparable from it". The criterion of 'inseparability' is explained in the cases relied upon for this proposition in *P&O Ferries*: it applies only to the grounds insofar as they are necessary "to determine the exact meaning" of that operative part. Beyond that, argued Mr Turner, the rest of the judgment does not give rise to *res judicata* of the kind invoked by Servier. It follows, submitted the claimants, that none of Servier's propositions are binding in these proceedings.

Discussion

70. The concept of "*res judicata* with absolute effect" referred to by the ECJ in *P&O Ferries* is by definition of very broad consequence: as the Court stated, it gives those matters to which it applies "authority *erga omnes*". It therefore precludes a party to other proceedings, who had no involvement in the proceedings in which the matter was determined, from adducing its own evidence and arguing that the court should make a contrary finding. I think that underlines the need to keep this concept within proper bounds. It reflects the distinction, with which English law is familiar, between a decision *in rem*, which applies to persons generally, as compared to a decision *in personam*, which applies only to the parties (or their privies): see *Spencer Bower and Handley on Res Judicata* (4th edn, 2009), para 10.01, where the editors suggest that the terms *inter omnes* and *inter partes* would be more appropriate.

71. As the Court made clear in *P&O Ferries* at para 41, such "*res judicata* with absolute effect" applies to "legal questions" which the court had settled. Of course, legal questions may engage related facts. To take an analogy from another area of law, once a patent has been declared invalid, that invalidity has effect *erga omnes*: the holder of a patent declared invalid cannot seek to enforce it against anyone, including someone who was not party to the proceedings which gave rise to the declaration of invalidity. But that invalidity is essentially a legal conclusion: it does not mean that all the many factual findings under the various heads relied on to establish invalidity have such absolute effect so as to apply in litigation concerning other patents or between different parties. Hence judgments that have effect *inter omnes* under English law generally concern questions of status: of a patent, or a marriage, or of property, or concern the disposition of property.

72. This distinction, it seems to me, assists the proper appreciation of the *P&O Ferries* case itself. In *BAI*, the operative part of the judgment simply annulled the Commission's decision of 7 June 1995, terminating the review under the State aid provisions of the new agreement. It was for that reason that the CFI in *P&O Ferries* held that there was no *res judicata* for the later case which challenged a different Commission decision. However, inseparable from the annulment of the Commission's decision of 7 June 1995 was the conclusion that the Commission had misinterpreted the concept of State aid in the Treaty in finding that the new agreement was a normal commercial transaction. This was the essential basis on which BAI had challenged the Commission's decision: see *BAI* at paras 39 and 82. And this was accordingly the *ratio* of *BAI* which the ECJ held was inseparable from the annulment of the Commission decision of 7 June 1995. As the ECJ stated in its judgment in *P&O Ferries*, in discussing *BAI*, at para 48:

> "It is clear from the grounds of that judgment that the Commission should have classified the aid at issue as State aid for the purposes [of the relevant Treaty provision]."

73. Therefore, although in *P&O Ferries* the challenge was to the Commission decision of 29 November 2000, that decision also concerned the new agreement and the same question: whether the new agreement was not a State aid on the basis that it was a normal commercial transaction. The question was directed at the proper characterisation of an agreement for the purpose of the State aid rules. It followed that this question had been determined as the *ratio* that was inseparable from the annulment in the operative part of the *BAI* judgment and so had been settled with absolute effect. But there is nothing in *P&O Ferries* to suggest that all the various factual findings made by the CFI in the *BAI* judgment as part of its reasoning also had the special status of *res judicata erga omnes*: e.g. the finding that the total of 46,500 travel vouchers required to be purchased under the new agreement at the stipulated price gave rise to the same income as the 26,000 vouchers to be purchased at a higher price under the 1995 agreement; or the finding that because the vouchers could be used only in low season the agreement gave rise to no additional cost for P&O Ferries. Those factual findings were significant steps on the way to the CFI's overall conclusion on the question of State aid, but it seems to me that there would be nothing to stop another party putting forward a different analysis of that income or cost in a different context (e.g. for the purpose of licensing the ferry service or as regards a tax assessment).

74. I consider that this analysis explains the approach in *Assidöman*, on which the ECJ expressly relied in formulating the principle set out in *P&O Ferries*. The ECJ judgment in *Wood Pulp* had annulled the decision finding an infringement by those addressees of the decision who had appealed. The Court found that the Commission had not established that the prices on the market being charged by the various addressees of the decision were the result of any concertation between them: on the expert evidence, the explanation could equally lie in mere conscious price parallelism. However, the operative part of the judgment in *Wood Pulp* was the annulment of the Commission's decision in respect of those addressees who had appealed. That followed from the conclusion that the appellants had not infringed the competition rules. But it was only the latter conclusion on that legal question which was *res judicata*, not the subsidiary finding that the evidence did not support concertation between the various wood pulp producers. Accordingly, that subsidiary finding did not assist Assidöman as an addressee of the *Wood Pulp* decision who had not appealed.

75. The position under EU law was succinctly expressed by the UK Supreme Court in *Deutsche Bahn v Morgan Advanced Materials* [2014] UKSC 24, although that case concerned very different issues of limitation for the purpose of a domestic damages claim where the appellant, as the whistle-blower given immunity, had obviously not appealed against a Commission decision whereas the other participants in the cartel had appealed. After citing from *Assidöman* (along with another authority), Lord Mance stated, at [22]:

> "… even if the appeals against infringement by alleged cartel members other than the appellant had succeeded, that would in European law have made no difference to the findings as to the existence and scope of the 'complex of agreements and concerted practices' in the relevant sector to which the Commission had found the appellant to have been party."

I do not consider that *Assidöman* can be distinguished, as Ms Bacon suggested, on the basis that a Commission decision in a cartel case addressed to several parties constitutes in law a series of decisions addressed to each of them separately. That is true, but if

that were the entire basis of this approach, it would have no relevance to the general principle articulated in *P&O Ferries,* where the ECJ significantly relied on *Assidöman*.

76. The *Shoe Branding* case is, in my view, consistent with this analysis. There, by the annulling judgment the General Court had annulled the decision of the EUIPO Board of Appeal dismissing the opposition to registration of the mark advanced by adidas on the basis of Art 8(1)(b) of the Trade Mark Regulation. That provision states:

> "Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:
>
> …
>
> (b) if because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark."

Accordingly, the ratio of the annulling judgment was the finding that there was a likelihood of association by the relevant public between the two marks because of the degree of attention given by the average consumer when buying sports shoes. This finding led directly, and was inseparable from, the operative part of that judgment annulling the decision of the Board of Appeal. It followed that this finding was *res judicata* with absolute effect when the Board of Appeal was required to reconsider adidas' opposition following the annulment of its previous decision. I should add that since Shoe Branding had been an intervener in the first set of proceedings, the parties in the second proceedings were in fact the same, so that the only real distinction was that the action concerned the subsequent, and therefore different, decision of the EUIPO Board of Appeal.

77. I consider, therefore, that Mr Turner is correct in his submission that the only finding of fact in the Judgment that is *res judicata* with absolute effect is that in para 1963: i.e. that the Commission had not established that the relevant finished goods market was limited to perindopril; that conclusion mirrors para 1591 expressing the conclusion at the end of section 12 of the Judgment concerning the definition of the market. It is that finding which is inseparable from, and necessary to explain, the operative part of the judgment annulling article 6 of the Decision which found that Servier had abused its dominant position. At most, the *res judicata* could extend to the immediately preceding para 1590 and the conclusion that perindopril was exposed to significant non-tariff competitive pressures from other ACE inhibitors. In my judgment, there is no basis in EU law for applying *res judicata erga omnes* to all the myriad factual findings based on careful scrutiny of the evidence in the over 200 preceding paragraphs of section 12, or to the subsidiary conclusions in the four sub-sections of analysis of the second of the three complaints assessed by the Court in section 12, or indeed to the findings under the various heads within those sub-sections.

78. I should add that I regard it as significant that all the cases relied on by Servier in this part of the case concerned the question of the binding effect of an EU court judgment in subsequent proceedings before the EU courts. In contrast, the present case concerns

the binding effect of an EU court judgment on a national court. The case therefore concerns the intersection of EU law and national law.

79. Ms Bacon briefly explained that the reason the Judgment is binding on the English court is because of the duty of sincere cooperation between the national courts and the EU, now set out in Art 4(3) of the Treaty on European Union. From that flows the principle of uniform application of EU competition law, given legislative force in Art 16 of Regulation 1/2003 as regards decisions of the Commission. However, this principle prevents a national court from making a decision that is incompatible with the law of the EU. Thus it prevents a national court giving a judgment on agreements, decisions or practices under Art 101 or Art 102 that would run counter to a decision adopted by the EU institutions. That is why, as the claimants accept (subject to their reservation regarding Brexit), this court could not now find that Servier abused a dominant position contrary to Art 102 (or to the Chapter 2 prohibition that has to be interpreted in the same way), unless the Judgment is overturned on appeal. But if this court were to reject Servier's prescribing argument, on evidence about doctors' prescribing practices and the degree of substitutability of perindopril with other ACE inhibitors, I do not see how that could be incompatible with the law of the EU. The legal context in which the facts covered by Servier's propositions now arise is entirely different. The prescribing argument, as set out at paras 24 and 25 above, concerns issues of mitigation or breaking the chain of causation between the effects of any infringement and the claimants' damage, or remoteness of damage. It is well established under EU law that although the question of infringement is a matter of EU law, matters concerning compensation, including such questions of causation, are governed by the domestic law of the Member States: see e.g. Cases 295-298/04 *Manfredi* EU:C:2006:461, para 64.

80. Indeed, if the appeal against the striking out of the economic tort claim should be allowed by the Court of Appeal, the prescribing argument will be just as relevant to that domestic law claim: Servier notably relies on the argument in that context under the additional head of contributory negligence. And if Servier should then succeed in its appeal to the CJEU against the finding of infringement of Art 101, the economic tort claim may be the only claim in these proceedings. It would appear very strange if facts arising under Servier's prescribing argument in opposition to what then would be a purely domestic law claim should be *res judicata* by reason of the Judgment concerning an infringement of EU competition law that was no longer an issue before this court.

81. Ms Bacon sought to dismiss any distinction between the application of the findings in the Judgment for one purpose and their non-application for another by colourfully suggesting that this would make them like Schrödinger's cat: present and binding as regards the abuse of dominance claim but disappearing for the purpose of the prescribing argument. She emphasised the fact that the claimants relied on the same assertions about the non-substitutability of perindopril with other ACE inhibitors and the prescribing practice of doctors in the part of the claimants' pleadings addressing their claim for abuse of dominance. However, that only reinforces my conclusion set out above that all that is binding under EU law as regards the abuse of dominance claim is the Judgment's finding that the Commission had not established that the relevant market is not restricted to perindopril, with the consequence that Servier was not dominant. It is that finding which precludes the claimants from pursuing their claims for abuse of dominance, preserving the consistency of EU law and domestic law as

regards the application of the competition rules. On that basis, the suggested paradox disappears.

ABUSE OF PROCESS

82. This head was advanced purely as a matter of English law. In their skeleton argument, Counsel for Servier stated:

> "As Gloster LJ made clear in *JSCBTA Bank v Ablayazov* [2017] 1 WLR 603, §§54–6, the common law doctrine of abuse of process is not limited to a situation where the relevant litigant was party to the previous decision (or the privy of such a party). Rather, it will depend upon the particular circumstances of the case, and in particular the questions whether it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated, and whether to permit such relitigation would bring the administration of justice into disrepute."

83. Servier invoked that general observation, along with the fifth and sixth principles set out by Lord Sumption JSC, under the heading *"Res judicata: general principles"* in his judgment (with which Lady Hale and Lords Clarke and Carnwath JJSC agreed) in *Virgin Atlantic Airways v Zodiac Seats* [2013] UKSC 46, at [17]:

> "Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

84. In her oral submissions, Ms Bacon relied principally on *Iberian UK Ltd v BPB Industries PLC* [1996] 2 CMLR 601. That was also a competition damages action brought as a follow-on claim after a Commission decision that the defendants ("BPB") had abused their dominant position in the supply of plasterboard. The plaintiff ("Iberian") had complained about BPB's practices to the Commission, which initiated proceedings leading to a decision finding that BPB had infringed what was then Art 86 EEC (now Art 102 TFEU). Iberian, as the complainant, played a full part in the proceedings before the Commission, making written submissions and taking part in the oral hearing. BPB's appeal against that decision was dismissed by the CFI, as was a further appeal to the ECJ, and Iberian was an intervener in both those appeals. In the English damages claim, BPB sought to deny that it had abused a dominant position, and a trial of preliminary issues was ordered to determine whether the findings of the Commission, as upheld by the CFI and the ECJ, were binding in the domestic proceedings.

85. Laddie J rejected Iberian's argument that the findings and decision of the Commission and EU courts gave rise to a strict *res judicata* in terms of issue estoppel. But he proceeded to hold on a broader basis that it would be contrary to public policy to permit BPB to seek to challenge those findings in the domestic proceedings, and that this would be an abuse of process. Laddie J described the question before him as follows, at [44]:

> "In all the circumstances of this case should the complainant and investigatee be allowed to open up and dispute in these proceedings the final conclusions of fact or law reached in competition proceedings in Brussels and Luxembourg? If the answer to that is in the negative, it does not matter whether it is categorised as a part of the law of *res judicata* — i.e. that the complainant and investigatee are bound by those conclusions—or as part of the law of abuse of process— i.e. that any attempt by either of them to challenge the conclusions is improper. In either case the same public policy considerations are at work."

86. The judge proceeded to note the role played by Iberian in the European proceedings that led to the finding of infringement. He said, at [47]:

> "… in large part the European proceedings involved a head to head dispute between the plaintiff and the defendants as to whether or not the defendants had abused their dominant position and, if so, whether that was likely to, and did in fact, distort competition. In particular it was said that a compelling example of such distortion was the harm allegedly inflicted on the plaintiff's import trade. An informal indication of the reality of what was going on before the Commission is given by the title given by the Commission to the proceedings, namely "Case IV/31.900 *Iberian Trading U.K. Ltd v. British Plasterboard Plc* " . As far as I can tell, no quarter was given by either side. A layman who said that the plaintiff and the defendants were engaged in a major antitrust battle with each other in front of the Commission could not be accused of misunderstanding what was going on. He would be just as accurate if he said the same thing about the proceedings before the CFI and the ECJ."

87. After considering various EU authorities, and observing that the English courts are obliged to stay proceedings before them to avoid inconsistency with a decision of the Commission, Laddie J concluded:

> "71. … If English and other national courts are encouraged to stay proceedings pending the resolution of European competition proceedings, but then are obliged by national rules of procedure to take no notice of the results in Europe, the only result will be to add years to the duration of the litigation here for no good reason. As I put it earlier in this judgment, in many cases the result will be to subject the litigant to a decade or more of litigation for no benefit. It seems to me that this course would be contrary to public policy. Indeed the whole rationale of staying national proceedings to await the outcome in Europe must be that the result of the proceedings there should have a major impact in the proceedings before the national court. Absent this, I can see no point in there being a stay.
>
> 72. These cases suggest that the courts should not interpret our rules of procedure in a way which will give rise to an appreciable and unnecessary risk that courts here and the Commission will come to inconsistent results in relation to competition issues. Of course due regard has to be paid to the interests of justice to the parties. But where, as here, the parties have disputed the same issues before the Commission

> and have had real and reasonable opportunities to appeal from an adverse decision, there is no injustice in obliging them to accept the result obtained in Europe. The position is *a fortiori* when, as here, the opportunities of appeal have been used to the full. Therefore, whether expressed in terms of *res judicata* or abuse of process, it would be contrary to public policy to allow persons who have been involved in competition proceedings in Europe to deny here the correctness of the conclusions reached there. The parties are bound. …"

88. Laddie J further held, as an additional ground of his decision, that it would be an abuse of process in the classic sense for BPB to seek to dispute the Commission decision "in proceedings against *any* party before any national court": para [83].

89. There is clearly a direct analogy between the position of BPB in the *Iberian* case and Servier in the present proceedings. The critical question is whether the principle there enunciated, which is not in dispute, applies here to the claimants. Ms Bacon accepted that they were not as closely involved in the European proceedings as Iberian. But she submitted that their involvement was sufficient for them to come within the scope of the *Iberian* principle.

90. Ms Bacon's principal argument was that the English claimants had intervened in the proceedings before the Commission. They applied to the Commission for permission to intervene pursuant to Art 27(3) of Reg 1/2003, as a person with a "sufficient interest", relying in their application on their position as claimants against Servier regarding the price of perindopril in the English proceedings, and the overlap between those proceedings and the proceedings before the Commission. That request was granted, and the English claimants were sent a confidential summary of the SO, although their request for a full copy was denied. On that basis they were able to submit to the Commission 7½ pages of comments on that summary and they also sent the Commission a copy of their Particulars of Claim in the present proceedings. They were permitted to attend the four-day oral hearing on 15-18 April 2013, although their Counsel was allowed to make only a 30 minute oral intervention at the end of the fourth day.

91. The English claimants did not play any part in the appeal before the General Court, but Ms Bacon stressed that the United Kingdom, as a Member State, had a right to be heard in those proceedings, and she submitted that it would therefore have been open to the government, of which the 1st claimant in the English action was effectively part, to participate.

92. In my view, all this is a wholly insufficient basis on which to conclude that the English claimants were so bound up with the European proceedings so as to make it "improper" for them now to advance a contrary case on the factual matters covered by Servier's propositions. In comparison with the plaintiff in *Iberian*, the degree of involvement of the English claimants in the proceedings before the Commission was not only much less, but it was of a fundamentally different character. The proceedings in the EU institutions could not remotely be described as "a major antitrust battle between" the English claimants and Servier. The contrast with *Iberian* is brought out by the following passage from Laddie J's judgment (at [46]):

> "…Although the Commission could have initiated and pursued the complaint against the defendants by itself, the fact is that in this case it did not. As [counsel for Iberian] put it, it was not possible for his client to be more fully involved. It initiated the procedure, it formulated the allegations of abuse (even if they were added to by the Commission), it presented written submissions, answered the plaintiff's responses and played a full part in the oral hearing before the Commission. Subsequently it played an equally full part before the CFI and the ECJ."

93. Moreover, the prescribing argument was first raised by Servier's application to amend its defence in November 2015, more than a year after the Decision. It is in response to that argument, not on the issue of abuse of dominance that was (and still is) at issue in the European proceedings, that the claimants wish to put forward their evidence and arguments in opposition to Servier's propositions.

94. Once the Decision went on appeal, the English claimants were no longer involved at all. They accept that the effect of the Judgment presently precludes them from pursuing their claim under Art 102. I regard it as wholly unreasonable to say that the UK government should nonetheless have sought to intervene because any factual findings that might be made by the General Court could have collateral implications for the response of the English health authorities to a prescribing argument raised by Servier in defence to their claim under Art 101 (and in economic tort), a context in which these facts were irrelevant to the General Court. That is aside from the question of whether the UK government can properly be equated with the English claimants for the purpose of these proceedings. Altogether, there is in my view nothing in the conduct of the English claimants as regards the European proceedings that makes it remotely contrary to public policy to permit the English claimants to run arguments and adduce evidence to contest Servier's propositions.

95. If that is the position as regards the English claimants, it is in my judgment *a fortiori*, the position as regards the Welsh and the Scottish/NI claimants. None of those parties played any part in the European proceedings at all. Ms Bacon could only submit that they could have sought to do so before the Commission, and that if they had asked the UK government to exercise its right to intervene in the appeal before the General Court, the government would surely have done so. But this is pure speculation. It is by no means clear that the Commission would have permitted three other groups of health authorities from the UK to intervene additionally in the proceedings before it. As to asking the UK government to intervene as a Member State before the General Court, it is clear that the devolved administrations have no power to require the government to do so. And as Mr Gregory, appearing for the Scottish/NI claimants, pointed out, the UK government might well have taken the view that it is not appropriate to exercise its right to intervene in its capacity as a Member State in an appeal on whether an undertaking had infringed EU competition law only for the purpose of protecting the interests of public bodies in their claims for damages before the national court.

96. Accordingly, I see nothing unfair, let alone "manifestly unfair", in requiring Servier to litigate in these proceedings the various factual issues raised by its propositions. On the contrary, I would regard it as unfair if the claimants were not permitted to put forward the evidence on which they wish to rely in support of their response to Servier's prescribing argument.

97. Finally, as regards the invocation of Lord Sumption's fifth and sixth principles from the *Virgin Atlantic* case, in his judgment Lord Sumption quoted from the seminal speech of Lord Bingham in *Johnson v Gore-Wood & Co* [2002] 2 AC 1 at 31, where Lord Bingham stated that the *Henderson v Henderson* principle required:

> "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Lord Sumption went on to state, at [25]:

> "Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation."

98. Adopting a broad merits-based approach, having regard to the history and circumstances of the European proceedings and these three proceedings before this court, in my judgment there is nothing abusive or duplicative in the claimants seeking to advance evidence and arguments contesting Servier's propositions in the trial of the preliminary issues raised by Servier's mitigation defence.

CONCLUSION

99. For the reasons set out above, I determine that:

i) of Servier's six propositions which are at issue, propositions (a)-(c) and a qualified version of (e) are findings made in the Judgment but propositions (d) and (h) are not;

ii) none of Servier's propositions are *res judicata* for the purpose of these proceedings; and

iii) it is not an abuse of process for the claimants to advance arguments and adduce evidence contrary to Servier's propositions.