Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

12 December 2018 *

(Competition — Agreements, decisions and concerted practices — Market for perindopril, a medicinal product intended for the treatment of cardiovascular diseases, in its originator and generic versions — Decision finding an infringement of Articles 101 and 102 TFEU — Agreements intended to delay, or even prevent, entry into the market of generic versions of perindopril — Participation of a subsidiary in the infringement committed by its parent company — Imputation of the infringement — Joint and several liability — Ceiling for the fine)

In Case T-677/14,

Biogaran, established in Colombes (France), represented by T. Reymond, O. de Juvigny and J. Jourdan, lawyers,

applicant,

v

European Commission, represented initially by F. Castilla Contreras, T. Vecchi and B. Mongin, and subsequently by F. Castilla Contreras, B. Mongin and C. Vollrath, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2014) 4955 final of 9 July 2014 relating to a proceeding under Article 101 and Article 102 TFEU (Case AT.39612 — Perindopril (Servier)) in so far as it concerns the applicant and, in the alternative, for reduction of the fine imposed on the applicant by that decision,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni (Rapporteur), President, L. Madise and R. da Silva Passos, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 5 October 2017,

gives the following

* Language of the case: French.

Judgment

I. Background to the dispute

A. Perindopril

1 The Servier group, composed, of Servier SAS, and several subsidiaries (individually or jointly, 'Servier'), developed perindopril, a medicinal product used in cardiovascular medicine, primarily intended for the treatment of hypertension and heart failure, by inhibiting the angiotensin converting enzyme ('ACE').

2 The active pharmaceutical ingredient ('API') of perindopril, that is to say, the biologically active chemical substance which produces the desired therapeutic effects, takes the form of a salt. The salt used initially was erbumine (or tert-butylamine), which is in its crystalline form on account of the synthesis process applied by Servier.

1. Compound patent

3 The perindopril compound patent (patent EP0049658, 'the 658 patent') was filed with the European Patent Office (EPO) on 29 September 1981. The 658 patent was due to expire on 29 September 2001, but protection was prolonged in a number of EU Member States, including the United Kingdom, until 22 June 2003, in accordance with Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ 1992 L 182, p. 1). In France, protection under the 658 patent was prolonged until 22 March 2005 and, in Italy, until 13 February 2009.

2. Secondary patents

4 In 1988, Servier also filed a number of patents before the EPO relating to processes for the manufacture of the perindopril compound with an expiry date of 16 September 2008: patents EP0308339, EP0308340, EP0308341 and EP0309324 (respectively, 'the 339 patent', 'the 340 patent', 'the 341 patent' and 'the 324 patent').

5 Servier filed new patents relating to erbumine and its manufacturing processes with the EPO in 2001, including patent EP1294689 (known as 'the beta patent' — 'the 689 patent'), patent EP1296948 (known as 'the gamma patent' — 'the 948 patent'), and patent EP1296947 (known as 'the alpha patent' — 'the 947 patent'). The 947 patent application relating to the alpha crystalline form of erbumine and the process for its preparation was filed on 6 July 2001 and granted by the EPO on 4 February 2004.

3. Second generation perindopril

6 From 2002, Servier began developing a second generation perindopril product, manufactured using another salt, arginine, instead of erbumine. Perindopril arginine showed improvements in terms of shelf life, which increased from two to three years; stability, enabling the use of a single type of packaging for all climatic zones; and storage, since it required no particular storage conditions.

7 Servier applied for a European patent for perindopril arginine (patent EP1354873B, 'the 873 patent') on 17 February 2003. The 873 patent was granted to Servier on 17 July 2004 with an expiry date of 17 February 2023. The introduction of perindopril arginine in the European Union markets started in 2006.

B. The applicant

8 Biogaran ('the applicant' or 'Biogaran'), a generic company whose distribution activity is almost exclusively limited to France, was founded in 1996 and is a wholly owned subsidiary of Laboratoires Servier SAS, itself a subsidiary of Servier SAS.

C. Niche's activities in relation to perindopril

9 The generic company Niche Generics Ltd ('Niche') assumed all of the obligations and responsibilities of Bioglan Generics Ltd under the development and licensing agreement which it had concluded on 26 March 2001 with Medicorp Technologies India Ltd ('Medicorp'), of which Matrix Laboratories Ltd ('Matrix') was the successor company, with a view to marketing a generic version of perindopril ('the Niche/Matrix agreement'). Under that agreement, the two companies were to market generic perindopril in the European Union, with Matrix responsible primarily for developing and supplying the perindopril API, while Niche was responsible primarily for taking the necessary steps to obtain marketing authorisations and for the business strategy.

10 In April 2003, Matrix provided a pilot batch of perindopril API and the corresponding drug master file in order for Niche to prepare the marketing authorisation applications.

11 Unichem Laboratories Ltd ('Unichem'), the parent company of Niche, was responsible for the production of perindopril in final dosage form under an agreement for the development and manufacture of perindopril tablets concluded on 27 March 2003 with Medicorp (subsequently Matrix), which was responsible for developing the perindopril API and providing it to Unichem.

D. Disputes relating to perindopril

1. Disputes before the EPO

12 Ten generic companies, including Niche, filed opposition proceedings against the 947 patent before the EPO in 2004, seeking the revocation in full of that patent on grounds of lack of novelty, lack of inventive step and insufficient disclosure of the invention. However, Niche withdrew from the opposition procedure on 9 February 2005.

13 On 27 July 2006, the Opposition Division of the EPO confirmed the validity of the 947 patent after Servier made some minor amendments to its original claims ('the EPO decision of 27 July 2006'). Seven companies brought an appeal against that decision. By decision of 6 May 2009, the EPO's Technical Board of Appeal annulled the EPO decision of 27 July 2006 and revoked the 947 patent. Servier's request for a revision of that decision was rejected on 19 March 2010.

14 On 11 August 2004, Niche also filed an opposition against the 948 patent before the EPO, but withdrew from the procedure on 14 February 2005.

2. Disputes before the national courts

15 The validity of the 947 patent has, moreover, been challenged by generic companies before the courts of certain Member States, notably in the Netherlands and the United Kingdom.

16 In the United Kingdom, on 25 June 2004, Servier brought an action for infringement before the High Court of Justice (England & Wales), Chancery Division (Patents Court), against Niche, in relation to the 339, 340 and 341 patents, after Niche applied for marketing authorisations in the United Kingdom

for a generic version of perindopril, developed in partnership with Matrix under the Niche/Matrix agreement. On 9 July 2004 Niche served on Servier a counterclaim for a declaration of invalidity of the 947 patent.

17 The hearing before the High Court of Justice (England & Wales), Chancery Division (Patents Court), concerning the merits of the alleged infringement, was finally scheduled for 7 and 8 February 2005, but lasted for only half a day because a settlement agreement was concluded between Servier and Niche on 8 February 2005, which put an end to the litigation between those two parties.

18 Matrix was kept informed by Niche on the progress of that litigation procedure and was also associated with that procedure as it gave evidence before the High Court of Justice (England & Wales), Chancery Division (Patents Court), on behalf of Niche. Moreover, on 7 February 2005, Servier sent a formal warning letter to Matrix, accusing it of infringing the 339, 340 and 341 patents and threatening to bring an action for infringement.

19 In the autumn of 2004, Servier began to consider acquiring Niche. To that end, Servier carried out a due diligence, of which the first phase was completed on 10 January 2005, the date on which Servier submitted a preliminary non-binding offer to acquire Niche's capital for an amount between 15 and 45 million pounds sterling (GBP). Following the second phase of the due diligence, which took place on 21 January 2005, Servier informed Niche verbally on 31 January 2005 that it did not wish to proceed with the acquisition.

E. The settlements

1. The agreements concluded between Niche, Unichem, Matrix and Servier

20 Servier entered into a series of patent settlement agreements with a number of generic companies with which it was involved in patent disputes.

21 On 8 February 2005, Servier concluded a settlement agreement with Niche and Unichem ('the settlement agreement' or 'the settlement agreement between Servier and Niche'). The territorial scope of the agreement covered all the countries in which the 339, 340, 341 and 947 patents existed (Clause 3 of the agreement).

22 Under the settlement agreement, Niche and Unichem were to refrain from making, having made, keeping, importing, supplying, offering to supply or disposing of generic perindopril made using the process developed by Niche, which Servier regarded as infringing the 339, 340 and 341 patents, as validated in the United Kingdom, using a substantially similar process or using any other process that would infringe the 339, 340 and 341 patents ('the process at issue') until the local expiry date of those patents (Clause 3 of the agreement) ('the non-marketing clause'). However, they would be free, under the agreement, to market perindopril made using the process at issue without infringing the patents after the expiry of those patents (Clauses 4 and 6 of the agreement). Moreover, Niche was required to cancel, terminate or suspend until the expiry date of the patents all of its existing contracts relating, on the one hand, to perindopril made using the process at issue and, on the other, to marketing authorisation applications for that perindopril (Clause 11 of the agreement). Furthermore, Niche and Unichem undertook not to make any applications for marketing authorisations for perindopril made using the process at issue and not to assist any third parties to obtain such a marketing authorisation (Clause 10 of the agreement). Lastly, they were to abstain from any invalidity and non-infringement actions against the 339, 340, 341, 947, 689 and 948 patents until their expiry, except as a defence to a patent infringement action (Clause 8 of the agreement) ('the non-challenge clause'). Niche also agreed to withdraw its oppositions to the 947 and 948 patents before the EPO (Clause 7 of the agreement).

23 In return, Servier undertook, first, not to bring any infringement actions against Niche, Niche customers or Unichem based on the 339, 340, 341 and 947 patents in respect of any act of alleged infringement occurring before the conclusion of the agreement (Clause 5 of the agreement) ('the non-assertion clause'), and, secondly, to pay Niche and Unichem the sum of GBP 11.8 million in two instalments (Clause 13 of the agreement). That sum was to be paid in consideration for the commitments made by Niche and Unichem and for the 'substantial costs and potential liabilities that may be incurred by Niche and Unichem as a consequence of ceasing their programme to develop perindopril made using the process [at issue]'.

24 On 8 February 2005, Servier also concluded a settlement agreement with Matrix ('the Matrix agreement') covering all the countries in which the 339, 340, 341 and 947 patents existed, with the exception of one non-Member State of the European Economic Area (EEA) (Section 1(1)(xiii) of the agreement).

25 Under the Matrix agreement, Matrix committed to refrain from making, having made, keeping, importing, supplying, offering to supply or disposing of perindopril made using the process at issue until the local expiry date of those patents (Clauses 1 and 2 of the agreement). However, the agreement stipulated that Matrix would be free to deal in perindopril made using the process at issue without infringing the patents after the expiry of those patents (Clause 4 of the agreement). Moreover, Matrix was required to cancel, terminate or suspend until the expiry date of the patents all of its existing contracts relating to perindopril made using the process at issue and to marketing authorisation applications for that perindopril by 30 June 2005 at the latest (Clauses 7 and 8 of the agreement). Furthermore, it committed not to apply for marketing authorisations for perindopril made using the process at issue and not to assist any third parties to obtain such a marketing authorisation (Clause 6 of the agreement). Finally, Matrix was to abstain from any invalidity and non-infringement actions against the 339, 340, 341, 947, 689 and 948 patents until their expiry, except as a defence to a patent infringement action (Clause 5 of the agreement).

26 In return, Servier committed, first, not to bring any infringement actions against Matrix based on the 339, 340, 341 and 947 patents in respect of any act of alleged infringement occurring before the conclusion of the Matrix agreement (Clause 3 of the agreement) and, secondly, to pay Matrix the sum of GBP 11.8 million in two instalments (Clause 9 of the agreement). That sum was consideration for the commitments made by Matrix and for the 'substantial costs and potential liabilities that may be incurred by Matrix as a consequence of ceasing its programme to develop and manufacture perindopril made using the process [at issue]'.

2. The agreement concluded between Niche and Biogaran

27 On 8 February 2005 (the day of the conclusion of the settlement agreement between Servier and Niche), a licensing and supply agreement was concluded between Niche and Biogaran concerning the transfer from Niche to Biogaran of three product dossiers (that is to say 'any and all information and/or data in possession of Niche related to the products and necessary for the obtention of marketing authorisations') and of an existing marketing authorisation in return for a payment by Biogaran to Niche of GBP 2.5 million ('the Biogaran agreement').

28 Under the Biogaran agreement, Niche undertook to transfer to Biogaran the product dossier relating to product A for exclusive use by Biogaran in order to obtain marketing authorisations in France, the United Kingdom and a non-EEA country and for non-exclusive use for the rest of the world. As regards the two other product dossiers, relating to product B and product C, the transfer of the dossiers was made on a non-exclusive basis worldwide. As regards product B in particular, Niche agreed to transfer its marketing authorisation for France to Biogaran. The Biogaran agreement provided that, once Biogaran had obtained its marketing authorisations, it would order the products concerned from Niche (Clause 2.2 of the agreement). Pursuant to Clause 2.5 of the agreement, Niche

undertook to provide Biogaran with all the information and all the data owned or controlled by it and constituting the product dossier necessary to obtain the corresponding marketing authorisations. Moreover, Biogaran was required to make all reasonable efforts to ensure that orders for the product or products were placed at the appropriate time, to allow Niche to maintain a consistent production rate for the full duration of that agreement (Clause 4.1 of the agreement). However, the Biogaran agreement stipulated that that agreement would be automatically terminated if the marketing authorisations were not obtained within 18 months (Clause 14.4 of the agreement). Similarly, the agreement provided that neither party would be entitled to compensation in the event of termination in accordance with Clauses 14.2 and 14.4 of the agreement.

29 In consideration for the product dossiers, Clause 2.3 of the Biogaran agreement provided for the payment by Biogaran of GBP 2.5 million and set out payment terms that obliged Biogaran to pay Niche GBP 1.5 million on 14 February 2005 at the latest and GBP 1 million on 5 October 2005 at the latest, the same dates as agreed under the settlement agreement between Servier and Niche for the payment of GBP 11.8 million.

F. The sector inquiry

30 On 15 January 2008, the Commission of the European Communities decided to open an inquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) in order to identify the factors contributing to the decline in innovation in that sector, measured by the number of new medicines reaching the market, and the reasons for the delayed entry into the market of certain generic medicines.

31 The Commission published a preliminary report on the results of its inquiry on 28 November 2008, followed by a public consultation. On 8 July 2009, it adopted a communication giving a summary of its pharmaceutical sector inquiry report. The Commission stated, inter alia, in that communication, that the monitoring of patent settlements concluded between originator companies and generic companies should continue in order better to understand the use of that type of agreement and to identify those agreements that delay generic market entry to the detriment of EU consumers and may constitute an infringement of competition rules. The Commission subsequently published six annual reports on the monitoring of patent settlement agreements.

G. The administrative procedure and the contested decision

32 On 24 November 2008, the Commission made unannounced inspections of the premises of the companies concerned. The Commission sent requests for information to several companies in January 2009.

33 On 2 July 2009, the Commission decided to open proceedings against Servier and the applicant as well as other generic companies.

34 In August 2009 and then between December 2009 and May 2012, the Commission sent several requests for information both to Servier and to Niche. Following two refusals by Servier to communicate information relating to the Biogaran agreement, the Commission adopted a decision based on Article 18(3) of Regulation No 1/2003, requesting that certain information be communicated to it. The response to that request was provided on 7 November 2011.

35 On 27 July 2012, the Commission issued a Statement of Objections to several companies including the applicant, which submitted its reply on 14 January 2013.

36 The hearing of the companies concerned, including the applicant, was held from 15 to 18 April 2013.

37 On 18 December 2013, the Commission granted access to evidence gathered or more widely disclosed after the Statement of Objections and sent a Letter of Facts to which the applicant replied on 21 January 2014.

38 The hearing officer issued his final report on 7 July 2014.

39 On 9 July 2014, the Commission adopted Decision C(2014) 4955 final relating to a proceeding under Article 101 and Article 102 TFEU (Case AT.39612 — Perindopril (Servier)) ('the contested decision').

40 Article 1 of the contested decision finds that Unichem, including its subsidiary Niche, and Servier, including its subsidiary Biogaran, infringed Article 101 TFEU by participating in a reverse payment patent dispute settlement agreement covering all Member States, except Croatia and Italy, for the period starting 8 February 2005, except as regards Latvia (period starting 1 July 2005), Bulgaria and Romania (period starting 1 January 2007) and Malta (period starting 1 March 2007), and ending on 15 September 2008, except as regards the Netherlands (period ending 1 March 2007) and the United Kingdom (period ending 6 July 2007).

41 The Commission considered that the Biogaran agreement had constituted an additional inducement intended to persuade Niche not to enter the market and revealed Biogaran's direct involvement in the infringement committed by Servier, its parent company.

42 In recitals 1349 to 1354 of the contested decision, the Commission found that, in addition to the net value transfer, Servier had provided an additional inducement to Niche through the Biogaran agreement. The Commission pointed out that, on 8 February 2005, that is to say on the same day that the settlement agreement between Servier and Niche was concluded, Niche had also concluded the Biogaran agreement and that, under that agreement, Biogaran had paid Niche GBP 2.5 million in consideration for the transfer of the product dossiers and of a marketing authorisation for pharmaceutical products unrelated to perindopril.

43 According to Article 7(1)(b) of the contested decision, a fine of EUR 131 532 600 is imposed on Servier and Biogaran jointly and severally. Biogaran is also required, under Article 8 of that decision, to refrain both from repeating the infringement found and penalised therein and from any act or conduct having the same or similar object or effect.

II. Procedure and forms of order sought by the parties

44 By application lodged at the Registry of the General Court on 19 September 2014, the applicant brought the present action.

45 The applicant claims that the Court should:

– annul Articles 1, 7 and 8 of the contested decision, in so far as they concern the applicant;

– in the alternative, make use of its unlimited jurisdiction in order to reduce very substantially the fine imposed on the applicant;

– grant the applicant the benefit of any annulment, in whole or in part, of the contested decision in the action brought by Servier and draw all appropriate conclusions therefrom in the exercise of the Court's unlimited jurisdiction;

– order the Commission to pay the costs.

46 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Admissibility

A. The third head of claim, by which the applicant seeks to be granted the benefit of any annulment of the contested decision in the action brought by Servier

47 As a preliminary point, it must be recalled that, pursuant to Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1)(c) of the Rules of Procedure of the General Court of 2 May 1991, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based.

48 According to settled case-law, that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action. The same considerations must apply to all claims, which must be accompanied by pleas and arguments enabling both the defendant and the Court to assess their validity (see judgment of 7 July 1994, *Dunlop Slazenger* v *Commission*, T-43/92, EU:T:1994:79, paragraph 183 and the case-law cited). It is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the text of the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application. Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94 and the case-law cited). A fortiori, a general reference in the application to the pleas and arguments relied on in support of another action, even one brought in a related case, does not meet the requirement referred to above (judgment of 24 March 2011, *Legris Industries* v *Commission*, T-376/06, not published, EU:T:2011:107, paragraph 32).

49 In the present case, the general reference in the application, without any further detail or explanation, to the pleas and arguments relied on in support of the action brought in the case giving rise to the judgment delivered today, *Servier and Others* v *Commission* (T-691/14), does not meet the requirement referred to above.

50 Moreover, even if, by the third head of claim in the application, the applicant was seeking to rely on the case-law according to which the Courts of the European Union must grant a company the benefit of any annulment in favour of another company in a situation where they comprise the same economic entity (judgment of 22 January 2013, *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraphs 43 and 44), as the applicant argued in the reply, that claim cannot succeed. By its judgment delivered today, *Servier and Others* v *Commission* (Case T-691/14), the General Court dismissed the action in so far as it concerned the settlement agreement between Servier and Niche. The applicant therefore cannot rely for its benefit on any annulment of the contested decision in the action brought by Servier.

51 It follows from the foregoing that the applicant's third head of claim, seeking to adopt the form of order sought by Servier and its pleadings, must be rejected.

B. The admissibility of certain annexes to the defence and of some evidence adduced in that pleading

1. Arguments of the parties

52 As a preliminary point, the applicant maintains in the reply that the Commission produced in the defence new documents and arguments in support of the arguments put forward in the contested decision. The defence (which contains 40 pages) is claimed to be based in part on new factual matters, primarily intended to support the contested decision, which devotes only 6 out of a total of 919 pages to condemning Biogaran. Relying on the case-law, the applicant claims that the use of new evidence at the stage of the judicial proceedings infringes the rights of the defence.

53 The applicant requested that certain annexes to the defence be declared inadmissible, on the ground that 23 of them were in English and had not been translated into the language of the case, namely French.

54 The Commission disputes that it put forward new evidence in support of the lawfulness of the contested decision and failed to fulfil its obligation to state reasons. The existence of the link between the Biogaran agreement and the settlement agreement is explained in detail in the contested decision in recitals 561 to 569 and 1351 to 1354 thereof.

55 According to the Commission, the three facts which confirm the existence of a link between the Biogaran agreement and the settlement cannot be described as 'new', since they are set out in the contested decision or may be inferred from the findings of that decision itself. First of all, the pre-eminent role of Mr M. in Niche's negotiations with Servier is referred to in recitals 532 and 538 of the contested decision. Next, the discussions concerning Niche's wish to obtain an amount higher than that allocated to Matrix are mentioned in recital 577 of the contested decision. Finally, Biogaran's role in the relationship between Servier and the generic company Lupin Ltd is also referred to in recital 979 of the contested decision.

2. Findings of the Court

56 The applicant maintains that the Commission, in breach of the principle of respect for the rights of the defence, puts forward in the defence new documents and arguments in support of the arguments advanced in the contested decision in order to remedy an inadequate statement of reasons.

57 It must be borne in mind in that regard that, in an action for annulment, the Commission cannot, in support of the contested decision, produce new inculpatory evidence not contained in the decision. However, the Court of Justice and the General Court have recognised that the author of a contested decision is entitled to provide explanations at the stage of the judicial proceedings in order to supplement a statement of reasons which is already adequate in itself, since those explanations may serve a useful purpose in relation to review by the Courts of the European Union of the adequacy of the grounds of the decision, since they enable the institution to explain the reasons underlying its decision (see, to that effect, judgments of 16 November 2000, *Finnboard* v *Commission*, C-298/98 P, EU:C:2000:634, paragraph 46; of 13 July 2011, *ThyssenKrupp Liften Ascenseurs* v *Commission*, T-144/07, T-147/07 to T-150/07 and T-154/07, EU:T:2011:364, paragraphs 146 to 149, and of 27 September 2012, *Ballast Nedam* v *Commission*, T-361/06, EU:T:2012:491, paragraph 49).

58 In the present case, the Commission has not infringed either its obligation to state reasons or the applicant's rights of defence by providing explanations in the defence. Indeed, the factual matters put forward in the defence and described by the applicant as 'new' merely support the Commission's argument that there is a link between the Biogaran agreement and the settlement and are apparent from the contested decision.

59 First of all, as regards the question whether the Commission could provide additional evidence relating to the participation of certain employees of Biogaran and Servier in the negotiations for the Biogaran agreement and the settlement, it should be noted that the email of 4 February 2005 mentioned several times in the contested decision (recitals 566 and 1351) and reproduced in Annex B. 10 to the defence) shows, first, that Mr M. had played a role for Niche in the negotiation of the two agreements (see also recital 538 of the contested decision) and, secondly, that Ms L., the legal director of the Servier group, a recipient of a copy of that email, was involved in the discussions. That email shows that the person who negotiated the Biogaran agreement on behalf of the applicant was also the signatory of the letter of formal notice sent by Servier to Matrix on 7 February 2005, one day before the conclusion of the settlement.

60 Next, as regards the negotiations between Matrix and Niche and Niche's wish to obtain a higher amount than that of Matrix, the Commission rightly argues that those elements are apparent from recital 577 of the contested decision.

61 Finally, as regards the alleged role played by a director of Biogaran in the conclusion of the settlement between Servier and the generic company Lupin, the Commission is entitled to respond in the defence to the applicant's arguments, when the applicant seeks to establish that the Commission's arguments are vitiated by an error of law, namely that the contested decision sought to impute to Biogaran liability for Servier's acts (see, to that effect, judgments of 13 July 2011, *ThyssenKrupp Liften Ascenseurs* v *Commission*, T-144/07, T-147/07 to T-150/07 and T-154/07, EU:T:2011:364, paragraphs 146 to 149, and of 27 September 2012, *Ballast Nedam* v *Commission*, T-361/06, EU:T:2012:491, paragraphs 49 and 50). The Commission refers to the role of Mr B., the founding chairman of Biogaran, in the agreement between Servier and Lupin, in order to illustrate that Biogaran could be held liable for its direct participation in the infringement and not for the acts alleged against its parent company.

62 As regards the admissibility of certain annexes to the defence, the applicant argues that the documents in question are drafted in English and are not accompanied by translations into the language of the case, namely French.

63 Under the first and second subparagraphs of Article 35(3) of the Rules of Procedure of 2 May 1991, in force at the time when the defence was lodged, the language of the case is to be used in the written and oral pleadings of the parties and in supporting documents, and any supporting documents expressed in another language must be accompanied by a translation into the language of the case. The second subparagraph of Article 7(5) of the Instructions to the Registrar of the General Court of 5 July 2007 provides that where documents annexed to a pleading or procedural document are not accompanied by a translation into the language of the case, the Registrar is to require the party concerned to make good the irregularity if such a translation appears necessary for the purposes of the efficient conduct of the proceedings. It follows from points 64 and 68 of the Practice Directions to the parties before the General Court of 24 January 2012 (OJ 2012 L 68, p. 23) that, if the defence does not comply with the procedural rules relating to the translation into the language of the case of any documents drafted in a language other than the language of the case, a reasonable period is to be prescribed for the purposes of putting it in order.

64 In the light of those provisions, it must be held that, in the absence of a request from a party to that effect, it is only if the translation into the language of the case appears necessary for the purposes of the efficient conduct of the proceedings that it is for the Registrar to have it carried out (see, to that effect, judgment of 15 June 2010, *Mediaset* v *Commission*, T-177/07, EU:T:2010:233, paragraph 37).

65 In the present case, it should be pointed out that the applicant did not expressly request that the Court ask the Commission to translate into French, the language of the present case, the annexes to the defence drafted in English. The applicant only challenged the admissibility of those annexes on the ground that they were not drafted in the language of the case. However, within a reasonable period

after lodging the defence, the Commission notified the Registry of the Court, by letter of 28 September 2015, of the translation into French of those annexes. Moreover, the applicant was able to comment on those documents at the hearing. Therefore, in any event, without it being necessary to determine whether that translation was necessary for the purposes of the efficient conduct of the proceedings, the objection of inadmissibility raised by the applicant against the annexes in question must be rejected.

66 Accordingly, the pleas of inadmissibility raised by the applicant must be rejected.

IV. Substance

67 The applicant raises three pleas in support of its claims. It submits, first, that the contested decision fails to establish that it participated in any infringement of the competition rules. Secondly, it challenges the Commission's factual assessment of the existence of an additional inducive benefit resulting from the Biogaran agreement. Thirdly, it submits that the Commission erred in law by imposing a fine on it. The second plea must be examined first, then the first plea and finally the third plea.

A. The plea alleging distortion of the facts in that the contested decision wrongly finds that the Biogaran agreement served as an additional inducement for Niche to conclude the settlement with Servier

68 By this plea, the applicant disputes the Commission's assessment of the facts in question, which led the Commission to find that there was a restriction of competition.

1. Arguments of the parties

(a) The error of assessment in the analysis of the link between the Biogaran agreement and the settlement agreement

(1) The chronology of the negotiations for the agreements

69 The applicant submits that the history of the negotiations of the two agreements differs, even though the Biogaran agreement and the settlement agreement between Servier and Niche were signed on the same day. Indeed, several contemporaneous documents show that Biogaran started to negotiate the Biogaran agreement in 2002, nearly two years prior to the start of the discussions relating to the settlement. The applicant thus disputes the claim that the two agreements were negotiated during the same period, as stated in recital 1351 of the contested decision.

70 The fact that the applicant started to negotiate the Biogaran agreement even before the beginning of the dispute between Servier and Niche demonstrates that Biogaran had its own, autonomous and separate interest in signing that agreement, irrespective of the settlement.

71 The applicant argues that the conclusion of the two agreements on the same day reveals not the existence of a link, but simply the fact that the dispute between Servier and Niche had the collateral effect of blocking the pre-existing negotiations between Niche and Biogaran, which resumed in February 2005, a few days before the signing of the settlement agreement.

72 The Commission maintains that it has established in the contested decision that the chronology of the negotiations confirmed the existence of a link between the settlement agreement and the Biogaran agreement.

73 In the first place, Niche confirmed, in a statement of 15 June 2011, that the settlement agreement and the Biogaran agreement had been negotiated at the same time. In the second place, the earlier negotiations between Niche and Biogaran related only to product A and were extended to other compounds only in February 2005. The scope of the agreement was therefore extended at the last moment, which is confirmed by an email of 4 February 2005 sent by Biogaran's lawyer to Niche. In the third place, contacts between Biogaran and Niche were still in progress in August 2004, over a month after the start of the litigation in the United Kingdom. Even though those contacts were unsuccessful, negotiations between Biogaran and Niche resumed only during the negotiations for the settlement, although the litigation between Servier and Niche was still ongoing. The negotiations concerning product A therefore do not seem to have been paralysed on account of the litigation which had commenced in June 2004.

(2) The legal link between the settlement agreement and the Biogaran agreement

74 According to the applicant, contrary to what the Commission states in recital 1190 of the contested decision, the agreement signed by Biogaran was not 'dependent' on Niche's acceptance of the terms of the settlement agreement. Under neither of those two agreements was the signing or performance of either agreement linked to or dependent on the signing or performance of the other.

75 Moreover, the applicant emphasises that the two agreements are governed by different laws and do not fall within the jurisdictions of the same courts. Similarly, the two agreements are not binding on the same legal persons within the Servier group and were not signed in the same place, since the Biogaran agreement was signed in Paris (France) while the settlement agreement was signed between Niche and Servier in London (United Kingdom).

76 Furthermore, the applicant states that the payment dates provided for by the two agreements were only identical in part, since Biogaran's payments relating to the supply permitted under the licence were later.

77 The applicant adds that the Commission's argument relating to the existence of a link between the two agreements is largely based on the statements made by Niche, even though the ambiguity of those statements should have led the Commission to use them with caution. The Commission simply rejected the statements which were contrary to its arguments, on the sole ground that they were subsequent to the Statement of Objections and therefore allegedly less conclusive than the statements made earlier in the context of the administrative procedure.

78 The Commission contends that the two agreements, negotiated simultaneously, were concluded on the same day and provided for payments to be made in instalments on exactly the same dates in relation to the transfer of the product dossiers, which transfer was the rationale for the payment of GBP 2.5 million. The Commission argues that Niche expressly confirmed on several occasions during the administrative procedure, in particular in response to the Statement of Objections, that the Biogaran agreement had been proposed to Niche by Servier in order to provide Niche with the total overall consideration agreed for entering into the global settlement agreement. The Commission refers to a draft settlement between Servier and Niche in which the handwritten word 'ramipril' appears in front of a reference to '2.5 million'. According to the Commission, those elements show that the price paid by Servier in consideration for Niche's commitments includes the payment of GBP 2.5 million provided for in the context of the ramipril dossier, that is to say the Biogaran agreement.

79 The Commission acknowledges that Niche added, in its response to the Statement of Objections, that the Biogaran agreement was a genuine commercial agreement with real consideration. Nevertheless, in the same document, Niche maintained that occasionally, although it was not normal commercial practice, agreements could be signed for several products at the same time. Moreover, the

Commission points out that Niche's statements made at a time when Niche was aware of the complaints made against it do not have the same probative value as statements made earlier, *in tempore non suspecto*.

80 The Commission also argues that the email dated 4 February 2005 sent by Biogaran's lawyer to Niche concerning the amount at stake corroborates the existence of a link between the two agreements. The parties agreed on an amount to be paid by Biogaran to Niche and subsequently discussed the content of the Biogaran agreement. The primary objective of the agreement was therefore to provide Niche with an additional inducement and not to conclude a commercial agreement, as Biogaran suggests in paragraph 75 of the application. That agreement demonstrates neither Biogaran's interest in those products nor any incentive to market products which were included within the scope of the agreement only at the end of the negotiations.

81 Moreover, the Commission takes the view that, although the Biogaran and settlement agreements did not have the same signatories, the negotiators involved in the negotiations were, in part, the same. Similarly, the draft Biogaran agreement was circulated within the Servier group and the group's legal director, Ms L., was a recipient of a copy of the email of 4 February 2005 sent by Biogaran to Niche, although that email related to a contract to be concluded by Biogaran, and also received a copy of the agreement concluded between Niche and Biogaran of 20 July 2004 concerning the capsules of product A.

(3) The intention to induce Niche

82 The applicant claims that the Commission failed to establish in the contested decision that Biogaran intended to induce Niche to sign the settlement. Similarly, nor does the Commission explain the reasons which allegedly led Servier to make that additional payment of GBP 2.5 million through Biogaran, while Servier itself undertook to pay directly to Niche the amount of GBP 11.8 million.

83 The Commission argues that when they concluded their respective settlements with Servier, Niche and Matrix discussed the distribution of the amounts between them. An internal Matrix document of September 2005 shows that the amounts forming the subject matter of the settlements were negotiated and divided equally between Niche and Matrix, although Matrix wished to receive more than Niche (recital 577 of the contested decision). The conclusion of a separate agreement between Biogaran and Niche clearly made it possible to increase the contribution paid by the Servier group to Niche while excluding Matrix. Moreover, Niche confirmed that the payment formed part of the 'total overall compensation' of GBP 15.7 million negotiated between Servier and Niche.

84 The Commission adds that it did not need to show that Biogaran intended to induce Niche to sign the settlement. The intention of the parties does not constitute a necessary element for determining the restrictive nature of the agreement. Moreover, the Commission considers that it has established the indissociable nature of the two agreements concluded, respectively, by Biogaran and its parent company, Servier, with Niche. Since Biogaran and Servier constitute a single economic entity, it was not necessary to show that, within that entity, each of its parts intended to induce Niche to sign the settlement agreement.

85 The Commission argues that the terms of the Biogaran agreement, according to which the parties could not claim reimbursement of the amounts paid in the event of a failure to obtain marketing authorisations, were not intended to encourage Biogaran to apply for marketing authorisations.

86 First of all, Biogaran's contractual obligations did not include the obligation to apply for marketing authorisations on the basis of the dossiers transferred (Clauses 2.2 and 3 of the Biogaran agreement).

87 Next, if Biogaran had not obtained a marketing authorisation within 18 months and, pursuant to Clauses 14.2 and 14.4 of the Biogaran agreement, the agreement had been automatically terminated, the payment already paid to Niche was not refundable.

88 Moreover, Biogaran was not subject to any exclusivity as regards the product dossiers and could therefore easily avoid being bound to Niche, by not applying for a marketing authorisation on the basis of the dossiers, since Biogaran was under no obligation to do so. That is indeed what happened, as Biogaran concluded another agreement with company A. for the acquisition of several dossiers, also relating to product A in various dosages. The Commission notes that the agreement concluded with company A., unlike the Biogaran agreement, provided that company A. would reimburse the payments transferred by Biogaran in the event of a failure to obtain marketing authorisation. Such a difference between the terms of those two agreements suggests that Niche had no guarantee that Biogaran was going to apply for marketing authorisations and obtain supplies from Niche following the Biogaran agreement. In so far as the payment should, in any event, have been paid to Niche before it was possible to ascertain whether Biogaran was going to obtain the marketing authorisations, Niche had no guarantee that Biogaran was going to apply for the marketing authorisations and obtain supplies from Niche.

89 Finally, the Commission argues that Biogaran's explanations concerning the payment of the amount of GBP 2.5 million are implausible. Biogaran was unable to justify, first, why it had paid that amount — whether as an incentive for it to apply for marketing authorisations, as a means of securing a second source of supply for product A or as a means of obtaining 'security' dossiers selected at random (except for product A) — and, secondly, why it had taken the risk of losing that payment. The Commission likewise questions the unusual structure of the Biogaran agreement and in particular the non-refundable nature of the payment. Indeed, the Biogaran agreement differs from the agreement concluded with company A., which stipulated that in the event of a failure to obtain marketing authorisations, company A. would reimburse the payment received.

(b) The taking into account of the applicant's commercial interest in concluding the Biogaran agreement

90 The applicant argues that the Biogaran agreement was justified by Biogaran's commercially legitimate and pro-competitive intention of securing several sources of supply in order to launch and develop products on the generic market, and in particular product A, by turning to Niche, a long-standing partner which had the requisite dossiers and supply capabilities. The fact that the GBP 2.5 million payment constituted reasonable consideration for the rights acquired under the Biogaran agreement is confirmed by the fact that that sum was not taken into account by the Commission in the contested decision in the calculation of the amount of the fine imposed on Niche.

91 The Commission rejects the applicant's argument that it was securing sources of supply, which the Commission describes as 'implausible', on the ground that Biogaran took no steps to obtain the marketing authorisations.

(1) Product A

92 The applicant states that, in view of the commercial success of product A, obtaining the rights necessary for the launch of the generic version of that medicinal product represented a major challenge for Biogaran. Thus, in order to secure its supply, Biogaran wished to obtain two dossiers from different market operators, by concluding two agreements, the first with company A. in December 2004 and the second with Niche in February 2005. The applicant emphasises that acquiring several sources of supply is a common practice for generic companies due to the technical and regulatory difficulties encountered during the development of a generic.

93 The applicant submits that, in the present case, securing two sources of supply proved to be relevant for two reasons. First, Niche's product A 10 mg dossier proved to be very weak from an analytical perspective, which could have delayed the assessment by the competent authorities (Annex A. 17 to the application). Secondly, the measures of inquiry taken by the Agence française de sécurité sanitaire des produits de santé (AFSSAPS) (Agency for the Safety of Health Products, France) in July 2005 in connection with several of company A.'s dossiers cast doubt on their validity (Annex A. 18 to the application).

94 Moreover, the securing of a second source of supply for product A from Niche offered several advantages by comparison with the agreement concluded with company A. First, the Biogaran agreement allowed Biogaran to obtain dossiers for product A in tablet form and product A 10 mg, which were not covered by the agreement with company A.; secondly, the agreement with Niche offered the prospect of opportunities in the United Kingdom and in a non-EEA country at a time when Biogaran was seeking to pursue its activities abroad.

95 However, the applicant preferred the dossiers of company A., because they allowed a faster entry into the market, since company A. had filed its marketing authorisation dossiers before Niche.

96 The applicant argues that the financial stakes justified its supply strategy. Since its launch in France, that generic product has generated a turnover of more than EUR 79 million (EUR 83 million, according to the update referred to in the reply). In the light of those factors, the applicant argues that it had to secure its supply of product A, in order to justify the payment to Niche of GBP 2.5 million and so as not to be limited solely to the turnover generated by the sales of product B.

97 Finally, the applicant adds that the payment of that amount to Niche was all the more justified because Niche had granted it exclusive rights to the product dossiers in France, the United Kingdom and a non-EEA country, which was not the case with other non-exclusive agreements concluded by Biogaran. In that context, the comparison made by the contested decision with those other agreements is therefore ineffective.

98 The Commission takes the view that the audit produced by Biogaran after the conclusion of the Biogaran agreement, revealing the alleged weaknesses of the Niche dossier, works to the detriment of the applicant's case. That argument shows that Biogaran did not have any information about the performance of Niche's product A before entering into that agreement and took the risk of paying GBP 2.5 million, even though the product A dossier was potentially worthless. Although that audit concerning the quality of the Niche dossiers might justify the securing of a second source of supply from company A., it cannot explain why the applicant wanted to pay a higher price than that for the dossier of company A. Biogaran paid company A. EUR 330 000 in total under the two agreements relating to product A, an amount well below the amount paid to Niche.

99 The Commission points out that the opportunity for Niche to supply tablets and the 10 mg dosage could not justify the agreement at issue. Two months after the agreement, although Biogaran had the possibility of filing the Niche dossier with the competent authorities, it concluded a second agreement with company A. for product A in tablet form.

100 Moreover, the Commission disputes the applicant's argument that Biogaran was encouraged to conclude the Biogaran agreement because of an investigation initiated by AFSSAPS in July 2005 concerning company A. That event could not have influenced Biogaran because it occurred after the Biogaran agreement.

101 Furthermore, Biogaran has not adduced any evidence of the usefulness of the Biogaran agreement in the context of its planned expansion abroad.

102 The Commission points out that, although Biogaran has generated a turnover of more than EUR 79 million since 2007, the income deriving from Niche's product A is equivalent to 0 (recital 567 of the contested decision). In that context, the Commission disputes the claim that Biogaran had to acquire a second source of supply from Niche.

103 Finally, the Commission disputes the argument that the exclusivity granted by the Biogaran agreement makes the comparison with other agreements ineffective. The comparison shows that none of the other agreements provided for a non-refundable payment. According to the Commission, the payment was already lost and Biogaran made no effort to make a return on it. Similarly, exclusivity has no value if development of the product was not sufficiently advanced or if there were other regulatory barriers.

(2) Product B

104 The applicant claims that the Biogaran agreement enabled it to market product B 10 mg and to achieve a turnover of EUR 150 000 (EUR 211 000 according to the update in the reply). The marketing of that product was entrusted to Almus, one of the main wholesale distributors in France.

105 The Commission argues that the agreement previously concluded between Biogaran and Bioglan (now Niche) concerning product B provided that the payment by Biogaran was refundable in the event of a failure to obtain the marketing authorisations, which was not the case with the Biogaran agreement. Moreover, Niche provided no guarantee, by that agreement, to transfer the marketing authorisation it had obtained in France in 2001, since that transfer required a renewal of the marketing authorisation and Niche had not applied for its renewal to the competent authorities.

106 As regards the marketing contract awarded to Almus and its loyalty, the Commission argues that product B did not lead to the conclusion of that contract, in that product B was only one of the approximately 23 compounds covered by that contract.

(3) Product C

107 The applicant claims that it has been able to market product C since 2000 as a result of a number of agreements concluded with Disphar. However, it decided to secure other sources of supply because of the uncertainty concerning the renewal of the supply agreement with Disphar and its desire to expand its activities abroad. Biogaran did not ultimately make use of the product dossiers granted by Niche, because of the renewal of the agreement concluded with Disphar.

108 Accordingly, the fact that, for two of the three products, Biogaran did not obtain a marketing authorisation on the basis of the dossiers transferred by Niche cannot suggest the existence of a link between the Biogaran agreement and the settlement. This simply reveals Biogaran's desire to secure several sources of supply in accordance with the practice in the sector concerned.

109 The Commission takes the view that it is not credible that Biogaran paid such a large amount solely for the opportunity to possess a product dossier which it never used. Biogaran did not even insist that Niche ensure that the transfer of the dossier take place before the agreement at issue was automatically terminated owing to the failure to obtain marketing authorisations.

2. Findings of the Court

(a) Preliminary remarks

110 As a preliminary point, it should be pointed out that the Biogaran agreement was regarded by the Commission in the contested decision as an inducement from Servier to Niche, in addition to that resulting from the settlement agreement between Servier and Niche, in order to convince Niche to give up its efforts to enter the perindopril market. The Biogaran agreement is, according to the Commission, a component of the infringement represented by that settlement agreement, which constitutes a restriction of competition by object. The Biogaran agreement can therefore be unlawful in nature only if the settlement agreement between Servier and Niche is of the same nature. In those circumstances, it is necessary to set out, for the purposes of the examination of the present action, the legal context of the settlement agreement with which the Biogaran agreement was linked.

111 It should be noted in that regard that a patent dispute settlement agreement may have no negative impact on competition. That is the case, for example, if the parties agree that the patent in question is not valid and therefore provide for the immediate market entry of the generic company.

112 In the present case, the agreement concluded between Servier and Niche does not fall into that category because it contains non-challenge clauses in respect of patents and non-marketing clauses in respect of products, which are, by themselves, restrictive of competition. The non-challenge clause undermines the public interest in eliminating any obstacle to economic activity which may arise where a patent was granted in error (see, to that effect, judgment of 25 February 1986, *Windsurfing International* v *Commission*, 193/83, EU:C:1986:75, paragraph 92) and the non-marketing clause entails the exclusion from the market of one of the patent holder's competitors.

113 Nevertheless, the insertion of such clauses may be legitimate, but only in so far as it is based on the parties' recognition of the validity of the patent in question (and, consequently, of the infringing nature of the generic products concerned).

114 The presence of non-marketing and non-challenge clauses whose scope is limited to that of the patent in question is, however, problematic when it is apparent that the generic company's agreement to those clauses is not based on its recognition of the validity of the patent. As the Commission rightly points out, 'even if the limitations in the agreement on the generic undertaking's commercial autonomy do not go beyond the material scope of the patent, they constitute a breach of Article 101 [TFEU] when those limitations cannot be justified and do not result from the parties' assessment of the merits of the exclusive right itself' (recital 1137 of the contested decision).

115 In that respect, it should be noted that the existence of a 'reverse payment', that is to say a payment from the originator company to the generic company, is doubly suspect in the context of a settlement agreement. In the first place, it must be borne in mind that a patent is intended to reward the creative effort of the inventor by allowing him to make a fair profit from his investment and that a valid patent must, in principle, allow a transfer of value to its holder — for example, through a licence agreement — and not vice versa. In the second place, the existence of a reverse payment gives rises to doubts as to whether the settlement is actually based on the recognition, by the parties to the agreement, of the validity of the patent in question.

116 However, the mere presence of a reverse payment does not mean that there is a restriction by object. It is possible that some reverse payments, where they are inherent in the settlement of the dispute in question, may be justified. However, where an unjustified reverse payment occurs in the conclusion of the settlement, the generic company must then be regarded as having been induced by that payment to agree to the non-marketing and non-challenge clauses and it must be concluded that there is a

restriction by object. In that case, the restrictions of competition introduced by the non-marketing and non-challenge clauses no longer relate to the patent and to the settlement, but rather can be explained by the conferral of a benefit inducing the generic company to abandon its competitive efforts.

117 It must be pointed out that, although neither the Commission nor the Courts of the European Union are competent to rule on the validity of the patent, it is nevertheless the case that those institutions may, in the context of their respective powers and without ruling on the intrinsic validity of the patent, find that it has been used abnormally, in a manner which has no relation to its specific subject matter (see, to that effect, judgments of 29 February 1968, *Parke, Davis and Co.*, 24/67, EU:C:1968:11, pp. 71 and 72, and of 31 October 1974, *Centrafarm and de Peijper*, 15/74, EU:C:1974:114, paragraphs 7 and 8; see also, by analogy, judgments of 6 April 1995, *RTE and ITP* v *Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 50, and of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 104 to 106).

118 Inducing a competitor to accept non-marketing and non-challenge clauses, in the sense described in paragraph 116 above, or its corollary, accepting such clauses because of an inducement, constitutes an abnormal use of the patent.

119 As the Commission rightly stated in recital 1137 of the contested decision, 'patent law does not provide for a right to pay actual or potential competitors to stay out of the market or to refrain from challenging a patent prior to entering the market'. Likewise, according to the Commission, 'patent holders are not entitled to pay generic companies to keep them off the market and reduce the risks of competition, whether in the context of a patent settlement agreement or otherwise' (recital 1141 of the contested decision). Lastly, the Commission correctly added that 'paying or otherwise inducing potential competitors to stay out of the market [was] not part of any patent right, nor [was] it one of the means provided for under patent law to enforce the patent' (recital 1194 of the contested decision).

120 Where an inducement has been found, the parties may no longer rely on their recognition, in the context of the settlement, of the validity of the patent. The fact that the validity of the patent is confirmed by a judicial or administrative body is, in that regard, irrelevant.

121 It is then the inducement, and not the recognition of the validity of the patent by the parties to the settlement, which must be regarded as the real cause of the restrictions of competition introduced by the non-marketing and non-challenge clauses (see paragraph 112 above), which — since they are in that case entirely illegitimate — therefore reveal a sufficient degree of harm to the proper functioning of normal competition that a restriction by object may be found.

122 Where they involve an inducement, the agreements in question must therefore be regarded as market exclusion agreements, in which the 'stayers' are to compensate the 'goers'. Such agreements actually constitute a buying-off of competition and must therefore be classified as restrictions of competition by object, as follows from the judgment of 20 November 2008, *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraphs 8 and 31 to 34), and the Opinion of Advocate General Trstenjak in *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:467, point 75), referred to inter alia in recitals 1139 and 1140 of the contested decision. Moreover, the exclusion of competitors from the market constitutes an extreme form of market sharing and of limitation of production (judgment of 8 September 2016, *Lundbeck* v *Commission*, T-472/13, under appeal, EU:T:2016:449, paragraph 435), which, in a context such as that of the agreements in question, reveals a degree of harm which is all the greater since the companies excluded are generic companies, the market entry of which is, as a rule, favourable to competition and which also contributes to the public interest in lowering the cost of healthcare. Lastly, that market exclusion is augmented, in the agreements at issue, by the fact that it is not possible for the generic company to challenge the patent in question.

123 It follows from all the foregoing that, in the context of patent dispute settlement agreements, a finding of a restriction of competition by object presupposes that the settlement agreement contains both an inducement in the form of a benefit for the generic company and a corresponding limitation of the generic company's efforts to compete with the originator company. Where those two conditions are met, a finding of restriction of competition by object must be made in view of the harmfulness of that agreement to the proper functioning of normal competition.

124 By the judgments delivered today, *Servier and Others* v *Commission* (T-691/14) and *Niche Generics* v *Commission* (T-701/14), the Court held that those two conditions were met, in particular that the Commission correctly considered that the sum of GBP 11.8 million paid to Niche by Servier under the settlement agreement concluded between those two companies was an inducement intended to exclude Niche from the market and that that agreement constituted a restriction of competition by object.

125 Accordingly, the plea raised at the hearing by Biogaran, in response to the written question from the Court relating to the settlement agreement, alleging that that agreement did not constitute an infringement of Article 101 TFEU, must be dismissed, without it being necessary to rule on its admissibility.

(b) The existence of an inducement in the form of a benefit represented by the Biogaran agreement

126 Biogaran argues that the Biogaran agreement is not a further incentive for Niche to conclude the settlement agreement, but an autonomous commercial agreement concluded at arm's length.

127 In that regard, it follows from Article 2 of Regulation No 1/2003 and from settled case-law that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (judgments of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 58, and of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 86; see, also, judgment of 12 April 2013, *CISAC* v *Commission*, T-442/08, EU:T:2013:188, paragraph 91 and the case-law cited).

128 In that context, any doubt on the part of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement in question to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (see judgment of 12 April 2013, *CISAC* v *Commission*, T-442/08, EU:T:2013:188, paragraph 92 and the case-law cited).

129 It is necessary to take into account the principle of the presumption of innocence resulting in particular from Article 48 of the Charter of Fundamental Rights of the European Union. Given the nature of the infringements in question and the nature and degree of severity of the penalties which may ensue, the presumption of innocence applies, inter alia, to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see judgment of 12 April 2013, *CISAC* v *Commission*, T-442/08, EU:T:2013:188, paragraph 93 and the case-law cited).

130 In addition, account must be taken of the non-negligible stigma attached to a finding of involvement in an infringement of the competition rules for a natural or legal person (see judgment of 12 April 2013, *CISAC* v *Commission*, T-442/08, EU:T:2013:188, paragraph 95 and the case-law cited).

131 Thus, the Commission must show precise and consistent evidence in order to establish the existence of the infringement and to support the firm conviction that the alleged infringement constitutes a restriction of competition within the meaning of Article 101(1) TFEU (see judgment of 12 April 2013, *CISAC* v *Commission*, T-442/08, EU:T:2013:188, paragraph 96 and the case-law cited).

132 It is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the set of indicia relied on by the Commission, viewed as a whole, meets that requirement (see judgment of 12 April 2013, *CISAC* v *Commission*, T-442/08, EU:T:2013:188, paragraph 97 and the case-law cited).

133 The existence of an anticompetitive practice or agreement must sometimes even be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 57).

134 For example, although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market (judgment of 14 July 1972, *Farbenfabriken Bayer* v *Commission*, 51/69, EU:C:1972:72, paragraph 25).

135 Likewise, the presence of a 'side deal' — the expression used by the Commission in recital 1190 of the contested decision — may constitute, as regards the settlement of a patent dispute, a strong indication of the existence of an inducement and, consequently, of a restriction of competition by object.

136 In this connection, it should be noted that the Biogaran agreement was regarded by the Commission as a 'side deal', the expression used by the Commission in recital 1190 of the contested decision. In recitals 1349 and 1351 of that decision, the Commission considered that, through the Biogaran agreement, which was in the Commission's view linked to the settlement agreement, Servier provided Niche with an additional inducement for Niche to conclude the settlement and that the existence of such an inducement followed from certain elements indicating that the Biogaran agreement was not an arm's length deal.

137 It should be explained that a side deal is a normal commercial agreement 'linked' to a dispute settlement agreement which contains clauses which are by themselves restrictive. Such a link exists, in particular, where the two agreements are concluded on the same day, where they are legally linked, the binding nature of one of the agreements being conditional upon the conclusion of the other agreement, or where, in the light of the context in which they are concluded, the Commission is able to establish that they are indissociable. It may be added that, the shorter the time between the conclusion of each agreement, the easier it will be for the Commission to establish that indissociable nature. The fact that the settlement agreement and the side deal are concluded on the same day or that there is a contractual link between them is an indication that those agreements form part of a single contractual framework. If those agreements were not concluded on the same day (and if there were no contractual link between them), one of the parties to the negotiation would grant the other party everything it wants without any certainty of ultimately obtaining the expected quid pro quo. That temporal or legal link between the two agreements is also an indication that they were negotiated together.

138 The side deal is a normal commercial agreement that could exist independently without the settlement of a dispute being at issue. Likewise, the conclusion of a settlement agreement does not require the concurrent conclusion of a commercial agreement. Thus, the two agreements do not need to be linked. Moreover, that linkage cannot be justified by the settlement of a dispute, because the purpose of the side deal is not to reach such a settlement but rather to carry out a commercial transaction.

139 In addition, a side deal involves value transfers, of a financial or non-financial nature, between the parties. It may involve, in particular, the transfer of value from the patent holder or from the subsidiary with which it constitutes a single economic entity to the generic company. There is therefore a risk that the linking of a commercial agreement with a settlement agreement containing non-marketing and non-challenge clauses, which are, by themselves, restrictive of competition, is actually intended — under the guise of a commercial transaction, taking the form, as the case may be, of a complex contractual arrangement — to induce the generic company to accept those clauses, through a value transfer provided for in the side deal.

140 Consequently, the fact that a commercial agreement, which does not normally have the settlement of a dispute as its subject matter, and which serves as a vehicle for a transfer of value from the originator company, or from the subsidiary with which that company constitutes a single economic entity, to the generic company, is, in the circumstances set out in paragraph 137 above, linked with a dispute settlement agreement containing competition-restricting clauses is a strong indication of the existence of a reverse payment.

141 However, the strong indication referred to in the preceding paragraph is not sufficient and the Commission must therefore support it with other consistent evidence justifying the conclusion that there is a reverse payment. Such a payment, in the specific context of side deals, corresponds to the part of the payment made by the originator company which exceeds the 'normal' value of the asset traded (or, as the case may be, to the part of the 'normal' value of the asset traded which exceeds the payment made by the generic company).

142 In the present dispute, in finding that the Biogaran agreement had served as an additional inducement for Niche, the Commission stated, in recital 1351 of the contested decision, on the basis of a number of indications, that that agreement 'was not an arm's length deal' and that it 'was not normal commercial practice'.

143 In that regard, it should be noted that the concept of 'normal competitive conditions', which is similar to that of 'arm's length commercial conditions', even though it is not used in relation to agreements, decisions and concerted practices, is not alien to competition law, since it is used in the particular field of State aid in order to determine whether a State has acted like a private investor (judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 68), that is to say, whether the advantage granted to the undertakings in question constitutes the normal remuneration for a quid pro quo obtained by the State. That concept may therefore constitute, by analogy, a relevant reference parameter when determining whether two companies that concluded a commercial transaction did so on the basis of economic considerations limited to the economic value of the asset traded, for example to its prospects of profitability, and, thus, at arm's length.

144 Where there are indicia or evidence put forward by the Commission in order to support a finding that the side deal was not concluded at arm's length, the parties to the agreements may present their version of the facts, supporting their claims with the evidence that they are able to provide and which permits the conclusion that the commercial agreement, although linked to the settlement agreement, is justified by reasons other than the exclusion of a competitor by means of a reverse payment. The parties to the agreements may thus argue that the side deal was concluded at arm's length by adducing relevant evidence concerning, for example, the industrial and commercial practices in the sector or the particular circumstances of the case.

145 In the light of all the evidence available to it and, as the case may be, the lack of an explanation or the lack of a plausible explanation from the parties to the agreements, the Commission may be justified in finding, following an overall assessment, that the side deal was not concluded at arm's length, that is to say that the payment made by the originator company exceeds the value of the asset traded (or that the value of the asset transferred to the generic company exceeds the payment made by the latter). The Commission may thus conclude that there is a reverse payment.

146 A reverse payment, if it is not intended to compensate for costs inherent in the settlement, therefore constitutes an inducive benefit (see paragraph 116 above). That is the case where the purpose of a side deal is not to settle a dispute but rather to carry out a commercial transaction (see paragraph 138 above).

147 However, the parties to the agreement may still argue that the benefit in question is insignificant, if the amount of that benefit is insufficient to be regarded as a significant inducement to accept the competition-restricting clauses set out in the settlement agreement.

148 It is now appropriate to apply to the particular circumstances of the present case the principles set out in the foregoing paragraphs.

149 In the present case, it is common ground that Biogaran paid GBP 2.5 million to Niche. That payment stemmed from the Biogaran agreement, under which Niche undertook to transfer to Biogaran product dossiers and a marketing authorisation for products unrelated to perindopril.

150 Although the Biogaran agreement and the settlement agreement between Servier and Niche are formally separate legal acts, governed by different laws and not falling within the jurisdictions of the same courts, there are several elements which establish the existence of a link between those two agreements.

151 The Commission rightly pointed out, in recital 1351 of the contested decision, that the chronology of the agreements was one of the elements supporting a finding of the existence of such a link between them. Indeed, those agreements were concluded on the same day. Moreover, the payment dates stipulated by the two agreements were the same, that is to say no later than 14 February 2005 and 5 October 2005, and only the payments relating to the supply of medicinal products provided for by the Biogaran agreement were later.

152 The Commission also correctly pointed out that the Biogaran agreement was negotiated at the same time as the settlement agreement, based in particular on Niche's statement of 15 June 2011. Although Niche qualified that statement subsequently, at the end of the administrative procedure, by producing several documents describing discussions concerning the licence almost two years before the start of the discussions concerning the settlement, that position of Niche, at a time when that company was aware of the complaints against it, does not have the same probative value as its previous statements.

153 Next, while the Commission does not deny that Biogaran and Niche were indeed in contact concerning product A even before the dispute between Servier and Niche began, there is no evidence in the file to support the claim made by the applicant that that dispute had the effect of paralysing the negotiations between Niche and Biogaran. In that regard, an email of 4 February 2005 shows that the negotiations for the conclusion of the Biogaran agreement were very advanced at that date, while the litigation between Niche and Servier was still ongoing and was only settled on 8 February 2005. The simultaneity of the negotiations is a strong indication of the existence of a link between the two agreements.

154 Moreover, while the two agreements do not have the same signatories and were signed respectively in Paris, as regards the Biogaran agreement, and in London, as regards the settlement agreement between Servier and Niche, they had, in part, the same negotiators. On the one hand, Mr M., one of the directors of Niche, participated in the negotiations for both agreements. On the other hand, it is clear from the email of 4 February 2005, sent by Biogaran's lawyer to the director of Niche, that the person who negotiated the agreement with Niche on behalf of Biogaran was also the signatory of the letter of formal notice sent by Servier to Matrix on 7 February 2005, the day before the conclusion of the settlement between Servier and Matrix. As the Commission points out, it is likely that that person

was aware of the settlement with Niche, in view of the linkage between the settlement agreement between Servier and Niche and the Matrix agreement. A copy of that same email was sent to the legal director of the Servier group, although it related to a contract concerning Biogaran.

155 Finally, the Commission rightly maintains that the fact that the payments from Biogaran relating to the supply of medicinal products — and not to the transfer of product dossiers, which transfer was the rationale for the Biogaran agreement — were later confirms the existence of a link between the agreements. It is the transfer of dossiers that constitutes the very essence of the licensing agreement, and not the supply of products by Niche. Thus, the simultaneous nature of the payments of GBP 2.5 million, in consideration for the product dossiers, and of GBP 11.8 million, provided for in the settlement, confirms the existence of a link between the two agreements.

156 It follows from the foregoing considerations (see paragraphs 150 to 155 above) that the Biogaran agreement constituted a side deal linked to the settlement agreement. The fact that that agreement, which served as a vehicle for a transfer of value to Niche, is associated with the agreement for the settlement of the dispute between Servier and Niche, even though that side deal is presented as a normal commercial agreement which does not have the settlement of a dispute as its subject matter, is a strong indication that the transfer of value in question is not merely the quid pro quo for the asset transferred under the side deal, but also involves a reverse payment (within the meaning of that expression in relation to side deals).

157 Moreover, the Commission found a number of consistent indications confirming the finding of the existence of a reverse payment.

158 First, the Commission, for the purpose of arguing that the consideration obtained by Biogaran could not be valued at GBP 2.5 million, correctly pointed out that that amount was much higher than the amount paid by Biogaran to another generic company, company A., in order to acquire several dossiers relating to product A in tablet form in various dosages. Biogaran paid company A. a total of EUR 330 000 under the two agreements relating to product A, an amount well below the amount of GBP 2.5 million, even though the latter amount also covered product B and product C.

159 Next, the Commission stated, again correctly, that the absence of a clause in the Biogaran agreement, unlike in the agreement with company A., allowing Biogaran to claim reimbursement of the amounts paid to Niche in the event of a failure to obtain marketing authorisations was a sign that the agreement was not aimed at encouraging Biogaran to apply for those marketing authorisations and was not in the nature of a normal commercial agreement.

160 Finally, it was reasonable of the Commission to point out that Niche had repeatedly stated during the administrative procedure that the Biogaran agreement had been proposed to Niche by Servier in order to provide Niche with the total overall consideration agreed for entering into the global settlement agreement with Servier. It is also apparent from a draft settlement agreement between Servier and Niche, annexed to the defence and containing the list of payments to be made, that a payment of GBP 2.5 million for the benefit of Niche was envisaged in relation to ramipril, one of the products covered by the Biogaran agreement. As the Commission rightly argues, it is also apparent from the email of 4 February 2005, already mentioned (see, in particular, paragraph 154 above), that the parties to the Biogaran agreement had agreed to the payment of GBP 2.5 million even before Biogaran's consideration for such a sum had been negotiated and agreed by the contracting parties. Niche itself also pointed out in the course of the administrative procedure, before retracting that statement, that the Biogaran agreement was not a normal commercial practice and that the magnitude of the payment formed part of the settlement (recital 562 of the contested decision).

161 However, the applicant has not adduced any specific evidence to show that the acquisition of Niche's product dossiers for GBP 2.5 million could reasonably be regarded as a profitable investment (see, to continue the analogy with the concept of a 'private investor in a market economy' begun in

paragraph 143 above, paragraph 84 of the judgment of 12 December 2000, *Alitalia* v *Commission*, C-296/97, EU:T:2000:289, in which it is stated that the conduct of a private investor in a market economy is guided by prospects of profitability) or, at the very least, as being such as to generate, for the acquirer of those product dossiers, income capable of compensating for the high cost of acquiring them.

162 Moreover, there is nothing in the file to explain how Niche's dossiers could yield for their acquirer profits which could offset such an acquisition cost. In that regard, it should be pointed out that Biogaran's total turnover as a result of the agreement amounted only to between EUR 100 000 and EUR 200 000.

163 It may be noted, furthermore, that there is no evidence in the file to show that, before concluding the Biogaran agreement, the applicant had required Niche to provide it with all the data necessary to ensure that the price quoted for the product dossiers in question was not overstated in view of their foreseeable profitability.

164 It follows from the foregoing, in the light of all of the evidence discussed before the Court, that the Commission established to the requisite legal standard the existence of a reverse payment which was not inherent in the settlement of the dispute at issue (see paragraph 146 above). The Commission therefore reasonably concluded that the payment of GBP 2.5 million to Niche under the Biogaran agreement constituted an additional inducive benefit and not a transaction carried out at arm's length.

165 Lastly, it must be noted, in view of the considerations set out in the preceding paragraphs, that it has not been established that the benefit in question is insignificant, that is to say, of an amount insufficient to be regarded as a significant inducement to accept the anticompetitive clauses contained in the settlement agreement (see paragraph 147 above).

166 That conclusion cannot be called into question by the applicant's other arguments.

167 First, in the response to the Letter of Facts, Biogaran claimed that 'the absence of reimbursement of the amounts [which it had] paid … in the event of a failure to obtain marketing authorisations was intentional on the part of Niche and was aimed at ensuring [that Biogaran do] what was required to obtain such marketing authorisations so as to generate a profitable turnover for Niche'.

168 However, that argument, reproduced by Biogaran in its application, cannot be accepted. The structure of that agreement provides no guarantee that Biogaran would apply for marketing authorisations and obtain supplies from Niche, since the payment was to be paid to Niche before it knew whether Biogaran was going to obtain the marketing authorisations. The Commission rightly points out that Biogaran's contractual obligations did not include the obligation to apply for marketing authorisations on the basis of the transferred dossiers (Clauses 2.2 and 3 of the Biogaran agreement). Moreover, even if Biogaran did not obtain the marketing authorisations within 18 months from the date of the entry into force of the agreement, the agreement had to be automatically terminated and neither party had the right to compensation. Furthermore, Biogaran was not subject to any exclusivity, since it could apply for marketing authorisations on the basis of dossiers other than those transferred by Niche.

169 Although Biogaran referred, in its response to the Letter of Facts, to other agreements signed by it, which did not contain a reimbursement clause, those agreements contained payments in several instalments and the payments were considerably lower than the single payment of GBP 2.5 million at issue in the present case.

170 Secondly, the applicant claims that the Biogaran agreement was intended to ensure that it had a second source of supply for product A.

171 That argument cannot be accepted.

172 The applicant had already signed an agreement with company A. for the supply of product A in December 2004, before the agreement at issue. Similarly, following an audit in March 2005 of Niche's product dossier relating to product A in the form of 10 mg tablets, a form and dosage which were not covered by the agreement with company A., Biogaran noted that the dossier was very weak from an analytical perspective. Thus, the Commission rightly argues that, in view of those elements, it is surprising that Biogaran agreed to pay a considerably higher amount for that dossier than for the dossier of company A. Although Biogaran states that product A has generated for it a turnover of more than EUR 79 million since 2007, it is apparent from recital 569 of the contested decision, which Biogaran does not dispute, that Biogaran's overall turnover from the Biogaran agreement remained below EUR 200 000.

173 Thirdly, as regards the product B dossier, Biogaran does not dispute that in 2001 Biogaran itself concluded with Bioglan (now Niche) a commercial agreement concerning the compound for product B 5 mg and 10 mg which, unlike the Biogaran agreement, provided for a refundable payment in the event of a failure to obtain marketing authorisations. It should be noted that the fact that the Biogaran agreement did not provide such a refund guarantee, as provided for in the previous agreement between Bioglan and Biogaran, confirms that the transfer of the product B dossier was not a transaction carried out at arm's length.

174 Fourthly, as regards the product C dossier, Biogaran acknowledges that Niche's product dossier was not used and that Biogaran continued its business relationship with Disphar. Similarly, although the Biogaran agreement had already been terminated because of the failure to obtain marketing authorisations, that dossier was transferred only in January 2007, that is to say after Niche had already received the whole payment, which was non-refundable. The Commission rightly argues that it is not credible that Biogaran paid such a large amount when it had for several years had a supply contract with Disphar and that the mere fact that the renewal of the Disphar agreement was uncertain did not justify such a transaction.

175 Moreover, even assuming that Biogaran also pursued legitimate objectives by acquiring Niche's product dossiers, it must be borne in mind that the mere fact that an agreement also pursues legitimate objectives is not sufficient to preclude a finding of restriction of competition by object (see, to that effect, judgments of 8 November 1983, *IAZ International Belgium and Others* v *Commission*, 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, EU:C:1983:310, paragraph 25; of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 64; and of 20 November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21).

176 Finally, the applicant submits that the Commission has not established the existence of anticompetitive intentions on the part of Biogaran.

177 In that regard, it is apparent from recital 577 of the contested decision, which is not seriously challenged by Biogaran, that the payments provided for by the settlement agreements concluded by Servier with Niche and Matrix were negotiated and divided equally between Niche and Matrix, although Matrix wished to receive more than Niche. The Commission rightly argues that the Biogaran agreement made it possible, under the guise of a seemingly ordinary transaction, to increase the contribution paid by the Servier group to Niche while excluding Matrix. Niche also confirmed that the amount of GBP 2.5 million formed part of the GBP 15.7 million 'total overall compensation' negotiated between Niche and Servier (recital 560 of the contested decision). Although the Commission does not put forward additional evidence on the reasons prompting Servier to use Biogaran to induce Niche, the evidence gathered by the Commission constitutes a conclusive set of indicia of the existence of an inseparable link between the payment of GBP 2.5 million and the main payment made by Servier to Niche under the settlement agreement.

178 In any event, it must be pointed out that the parties' intention is not a necessary factor in determining whether a type of coordination between undertakings is restrictive (judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 118).

179 It follows from the foregoing that the Commission correctly concluded that the payment of GBP 2.5 million to Niche under the Biogaran agreement constituted an additional inducive benefit.

180 It should be added that the additional inducement is sufficiently decisive in that it had a determining influence on Niche's decision not to enter the perindopril market. The Commission noted, in recital 577 of the contested decision, without this being seriously challenged, that the amounts which were the subject matter of the settlements concluded by Servier with Niche and Matrix, respectively, were originally divided equally, but that the payment from Biogaran to Niche ultimately made it possible to increase the contribution paid by the Servier group to Niche without Matrix being aware of this. Moreover, Niche itself confirmed that the additional payment formed part of the 'total overall compensation' which it had negotiated with Servier. In the light of that evidence, it must be concluded that, without the Biogaran agreement, Niche would probably not have entered into the settlement agreement. Therefore, it is the combined actions of Servier and its subsidiary which allowed a restriction of competition to occur.

181 That finding alone supports the conclusion that there was a restriction of competition by object in which Biogaran directly participated. The fact that Biogaran was not a competitor of Niche at the material time, even if it were established, has no bearing on that conclusion. As the Court of Justice has held, a company may participate in a cartel without necessarily operating on the market affected by the restriction of competition (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 34).

182 The applicant's argument that the Biogaran agreement does not contain an anticompetitive clause cannot be relied upon in the light of the foregoing evidence. That fact does not have the effect of depriving the agreement of its true nature as a restriction, inasmuch as the purpose of that agreement is to act as a supplement to the settlement containing such clauses.

183 Lastly, the fact that the Commission did not take into account the payment of GBP 2.5 million in the calculation of the amount of the fine imposed on Niche is not such as to establish that the Biogaran agreement did not constitute an additional transfer of value aimed at inducing Niche to conclude the settlement. The Commission, in response to a question from the Court, explained that it was not necessary to take into account that amount in order to ensure the deterrent effect of the fine imposed on Niche, particularly in view of Niche's modest size and situation. Even assuming that the failure to take that amount into account in calculating the amount of Niche's fine is merely the result of an oversight on the part of the Commission, that omission remains, in any event, immaterial to the finding, reasonably made in that decision, that the Biogaran agreement supports the restriction of competition resulting from the settlement agreement.

184 It follows from all the foregoing that the present plea must be rejected.

B. The plea alleging errors of law in that the contested decision fails to establish that Biogaran participated in any infringement of the competition rules

1. Arguments of the parties

(a) The unlawful nature of the Biogaran agreement

185 The applicant argues that the Biogaran agreement itself does not, by the Commission's own admission, constitute an infringement. The terms of that agreement were not the subject of any criticism in the contested decision, which, moreover, only devotes six pages to that agreement. Accordingly, Biogaran was penalised for an agreement which does not involve any restriction of competition, with the result that the mere fact that Biogaran was a signatory to that agreement could not be penalised on the basis of Article 101 TFEU. Biogaran's liability is strictly linked to the allegedly unlawful nature of the settlement, of which it was not a signatory, even though the contested decision acknowledges, in recital 1351, that 'the settlement agreement and the Biogaran agreement are separate legal acts'.

186 Relying on the Opinion of Advocate General Wahl in *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:350), the applicant claims that, in order to be a party to a cartel the object or effect of which is to restrict competition, the undertaking in question must represent a competitive pressure for the other cartel members, which is not the case here, since Biogaran was not a competitor of Niche at the material time.

187 The Commission takes the view that the Biogaran agreement cannot be examined independently of the settlement from which it is inseparable. The Commission has already shown, in recitals 1351 and 3011 of the contested decision, that that agreement served to support the transfer to Niche of an additional amount of GBP 2.5 million in consideration for the commitments made by Niche in the settlement between Servier and Niche.

188 That payment contained in the Biogaran agreement constitutes direct participation by Biogaran in the cartel, even though the terms of that agreement are not at issue. The Commission adds that that amount constitutes an additional inducement offered to Niche in order to convince it to adhere to the settlement. The fact that that amount was paid in the context of a licensing agreement does not deprive it of its nature as a supplement to the payment of GBP 11.8 million made in the context of the settlement. Similarly, the fact that the Biogaran agreement relates to compounds distinct from those forming the subject matter of the settlement and that it may have had some operational utility, which was never established, does not deprive the payment of its nature as a direct inducement.

(b) Imputing to the subsidiary liability for the parent company's acts

189 The applicant submits that the contested decision imputes to the applicant liability for an alleged infringement connected with the conclusion by its parent company of an agreement to which the applicant is not a party and of whose contents it was unaware. Such an approach is contrary to the principle of personal responsibility, which, according to the case-law, should be interpreted strictly. Given its separate legal personality, the applicant argues that it could not be held liable for the infringement allegedly committed by Servier, unless it is established that the applicant was a co-perpetrator or beneficiary of the alleged cartel.

190 The applicant notes that it stated, in its responses to the Statement of Objections, that it acted autonomously on the market by means of directors, premises, brands, activities and assets distinct from those of Servier, which operates as an originator company whereas Biogaran is, by contrast, a generic company. The applicant points out that, since it is neither the parent company nor the

shareholder of Niche or Servier, it consequently had no right or means of control over the commercial policy or strategy of the parties to the settlement agreement allegedly contrary to Article 101 TFEU.

191 In that regard, the applicant complains that the Commission established, in breach of the principle of legality, a presumption of liability of the subsidiary for the acts of the parent company, thus infringing the principle that penalties should be applied solely to the offender as guaranteed by the Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and by Article 48 of the Charter of Fundamental Rights.

192 The Commission contends that it did not, in the contested decision, seek to impute to the subsidiary liability for the acts of the parent company. The Commission argues that Biogaran is held liable for its direct participation in the infringement committed by Servier. It is the combined action of Servier (the signing of the settlement) and its subsidiary (the signing of the licensing agreement) which made it possible to block the entry into the market of Niche's generic products, for the benefit of the Servier group as a whole.

193 The Commission points out that it did not argue that Biogaran was liable on the basis of the absence of control or supervision. It held Biogaran liable on the basis of its direct participation in the infringement and took into account its membership of the Servier group in order to hold its parent company jointly and severally liable.

194 The Commission argues that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. The Commission adds that, in the case where a parent company has a 100% shareholding in a subsidiary which has infringed competition law, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. According to the Commission, in such a context, the parent company and the subsidiary must be held jointly and severally liable for the payment of a fine for that infringement.

195 The Commission adds that, although the settlement agreement between Servier and Niche and the Biogaran agreement are separate acts, they are nevertheless indissociable in that both have the purpose of making, on the same day, a substantial payment to Niche in consideration for commitments not to enter the perindopril market (recitals 1351 and 3011 of the contested decision). The two entities pursued the same objective, their conduct was concerted and they behaved as a single economic entity, not only on the market but also for the purpose of the infringement.

196 The Commission is of the view that the context of the Biogaran agreement made it possible to establish that Biogaran could not be unaware that the payment formed part of the settlement, the objective of which was the exclusion of Niche from the perindopril market. The Biogaran agreement is an element of the common plan of the single economic entity and the fact that the Biogaran agreement does not reproduce the non-marketing and non-challenge clauses of the settlement does not deprive the Biogaran agreement of its true nature, that is to say as an additional inducement intended to exclude Niche from the perindopril market.

(c) Biogaran's knowledge of Servier's unlawful conduct

197 The applicant states that, at the material time, it was not aware of the content of the settlement and could not therefore foresee the anticompetitive nature of that transaction.

198 On the basis of the case-law, the applicant argues that 'in order to hold a company liable for a single and continuous infringement, awareness (proved or presumed) of the offending conduct of the other participants in the cartel is required'. The Commission is claimed to have wrongly disregarded the standard of proof laid down by the case-law, in that it stated in the contested decision that it was 'not necessary to prove Biogaran's awareness of the anticompetitive nature of the settlement agreement'.

199 Moreover, the applicant takes the view that, according to the case-law, the existence of an objective link between the infringement and the agreement is not sufficient to enable the Commission to impute the infringement to Biogaran. The Commission must establish that the undertaking was aware of the existence of the infringement or could reasonably foresee it. The Commission distorted the facts and disregarded the case-law referred to above by considering that 'Biogaran was in a position to understand that the Biogaran agreement was related to the … settlement agreement'.

200 The applicant adds that, even if the Commission were able to show that the agreements were linked and that Biogaran could not be unaware of that link, this does not mean that the applicant was aware of or could reasonably foresee the content of the settlement. In that regard, the contested decision did not demonstrate that Biogaran was aware both of the allegedly anticompetitive objective of the settlement and of the essential features of that settlement, an awareness which cannot be presumed.

201 The applicant emphasises that it could not have been aware of the allegedly unlawful nature of the settlement, in that there was at the material time (2005) no precedent in accordance with which such a settlement agreement was unlawful. Relying on an opinion of Sir Francis Jacobs, the applicant argues that, at the material time, it was impossible for anyone to conceive of the analytical approach presented by the Commission in the Statement of Objections.

202 Finally, the applicant raises the inadmissibility of certain arguments relied on by the Commission, at the stage of the defence, in support of the claim that Biogaran could not be unaware of Servier's 'actual conduct'.

203 The Commission argues that Biogaran could reasonably foresee the actual conduct planned by the other participants in the collusive practice and that it was prepared to take the risk. The Commission considers that awareness or knowledge which a party to the cartel has of its own participation in an infringement of Article 101 TFEU cannot be interpreted in the same way when its partner in a foreclosure operation is its parent company. In such a case, the subsidiary is unable to act in a context other than that determined by its parent company, that is to say, in the present case, the implementation of a far-reaching anti-generic strategy. In that context, Biogaran could reasonably have foreseen that a payment to a producer of generic products in the process of entering the market could have no other objective than the foreclosure of that producer from the market. There is then no plausible explanation for the payment other than the intention to offer Niche an additional inducement to conclude the settlement agreement.

204 The Commission also claims that awareness of the unlawful nature of the operation is all the more certain since Servier's lawyers were involved in the preparation of the Biogaran agreement or were recipients of it. Moreover, the allegations of denigration made by Sandoz AG against Biogaran in 2008 also attest to Biogaran's involvement in Servier's anticompetitive strategy. Similarly, the fact that Biogaran played an intermediary role in 2006 in establishing an allegedly anticompetitive settlement between Servier and Lupin supports the Commission's claim that Biogaran was aware of Servier's actual conduct.

205 Finally, the Commission relies on the negotiations between Niche and Matrix relating to the amounts paid to them by Servier in consideration for the settlement, in support of its argument that Biogaran could not be unaware of the aim pursued simultaneously by the settlement and the Biogaran agreement. Indeed, Niche confirmed that the payment was part of the GBP 15.7 million 'total overall compensation' negotiated between Niche and Servier.

2. Findings of the Court

206 It is necessary to note the decisive grounds relied on by the Commission in the contested decision in order to reach the conclusion, first, that the Biogaran agreement was an additional inducement for Niche to conclude the settlement agreement, which could be classified as a restriction of competition by object (recitals 1369 and 3011 of the contested decision), and, secondly, that Biogaran could be held jointly and severally liable with Servier for the entire period of that infringement (recitals 3006, 3012 and 3145 of the contested decision).

207 The Commission considered that the amount paid by Biogaran to Niche in consideration for the purchase of the product dossiers constituted an additional inducement for Niche, contributing to Niche's exclusion from the perindopril market. According to the Commission, Niche's commitment not to enter the perindopril market was made possible by an inducement taking the form, on the one hand, of a payment by Servier in the context of the settlement with Niche and, on the other hand, of a further payment made directly by Biogaran, a subsidiary of Servier, in the context of the Biogaran agreement.

208 The applicant disputes those assessments. It argues that the Commission disregarded the principle of personal responsibility by imputing to it liability for an agreement concluded by its parent company. It maintains that the Biogaran agreement does not constitute an infringement of Article 101 TFEU and that it was unaware both of the conduct of its parent company and of the unlawful nature of the settlement concluded between its parent company and Niche.

209 As a preliminary point, it must be pointed out that, contrary to what the applicant claims, the Commission did not, in the contested decision, impute to Biogaran the acts alleged against its parent company. In recital 1349 of the contested decision, the Commission considered that Servier had provided to Niche an additional inducement through the Biogaran agreement. In recital 3011 of that decision, the Commission stated that, although it was not necessary to prove Biogaran's knowledge of the anticompetitive nature of the settlement agreement, there were several elements showing that Biogaran was in a position to understand that the Biogaran agreement was related to the settlement and that, by that agreement, Biogaran had directly participated in the infringement. As the Commission observes in the defence, it in no way sought to impute to Biogaran the acts alleged against its parent company.

210 The Commission stated, in recital 3007 of the contested decision, that Servier wholly owned its subsidiary at the time of the signature of the agreement and therefore formed a single undertaking with its subsidiary. Similarly, the Commission found Biogaran jointly and severally liable, in that the Biogaran agreement and the settlement agreement had been 'concluded between the same undertakings', namely the Servier group, on the one hand, and Niche and Unichem, on the other hand (recital 1351 and footnote 1898 of the contested decision).

211 In that regard, the Court notes that the Courts of the European Union have not, to date, ruled on the question of the conditions under which the Commission may hold a subsidiary jointly and severally liable where, as in the present case, that subsidiary participated directly in the unlawful conduct of its parent company.

212 It follows from settled case-law that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. In that regard, the Court of Justice has stated, on the one hand, that, in the same context, the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons and, on the other hand, that when such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see judgment of 20 January 2011, *General Química and Others* v *Commission*, C-90/09 P, EU:C:2011:21, paragraphs 34 to 36 and the case-law cited).

213 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed competition law, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 60). Thus, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercises decisive influence over the subsidiary's commercial policy (judgment of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 98).

214 This is the case here. Biogaran was a wholly owned subsidiary of Servier at the time of the conclusion of the Biogaran agreement and the presumption arising from that finding has not been rebutted (see, to that effect, judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraphs 60 to 65). It should be pointed out that Biogaran has not demonstrated that it decided its commercial policy independently of Servier. The evidence discussed above concerning the existence of an inseparable link between the two agreements confirms Servier's decisive influence over Biogaran's conduct and the actual use of that power. In order to illustrate Biogaran's independence of Servier, the applicant argues that Biogaran's directors have never held positions at Servier. However, that evidence cannot rebut the presumption that Servier actually exercises a decisive influence over Biogaran (see, to that effect, judgment of 16 September 2013, *Roca* v *Commission*, T-412/10, EU:T:2013:444, paragraph 76). As regards the other circumstances alleged by the applicant, showing that it was operating independently on the market — by means of premises, brands and assets distinct from those of Servier — and also as a generic company, they illustrate only that Biogaran is a legal person separate from Servier but cannot rebut the presumption that Servier exercises a decisive influence over Biogaran.

215 Biogaran was therefore, at the time of the conclusion of the Biogaran agreement and of the settlement agreement between Servier and Niche, the subsidiary of Servier and constituted with its parent company one and the same undertaking for the purposes of competition law.

216 The Commission was therefore entitled, in application of the concept of 'undertaking', to consider that Servier and Biogaran were jointly and severally liable for the conduct which was alleged against them, since the acts committed by each were accordingly deemed to have been committed by one and the same undertaking (see, to that effect, judgments of 20 March 2002, *HFB and Others* v *Commission*, T-9/99, EU:T:2002:70, paragraphs 524 and 525, and of 12 December 2007, *Akzo Nobel and Others* v *Commission*, T-112/05, EU:T:2007:381, paragraph 62; see also, to that effect and by analogy, judgments of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, 6/73 and 7/73, EU:C:1974:18, paragraph 41, and of 16 November 2000, *Metsä-Serla and Others* v *Commission*, C-294/98 P, EU:C:2000:632, paragraphs 26 to 28).

217 The fact that, in the present dispute, the infringement of Article 101 TFEU found by the Commission results, in part, from the conduct of the parent company and, in part, from the conduct of the subsidiary, whereas in the situations of joint and several liability between a parent company and its subsidiary most often brought before the Courts of the European Union the infringement results solely from the conduct of the subsidiary, is not such as to call into question that conclusion.

218 If it is possible to impute to a parent company liability for an infringement committed by its subsidiary and, consequently, to make both companies jointly and severally liable for the infringement committed by the undertaking which they comprise, without infringing the principle of personal responsibility, the same applies a fortiori where the infringement committed by the economic entity comprising a parent company and its subsidiary results from the combined conduct of both those companies.

219 As the Commission rightly points out, the contested decision could have been addressed to Servier based on its joint liability for the infringement committed by Biogaran, even if there were no evidence that Servier had had any involvement in the infringement. A fortiori, the contested decision could have been addressed to Servier as the parent company and to its subsidiary, based on their joint and several liability, since each company played a direct part in the infringement.

220 The Commission therefore correctly considered that the Biogaran agreement and the settlement agreement between Servier and Niche were concluded between the same undertakings, namely the Servier group, on the one hand, and Niche, on the other hand, and that the infringement of Article 101 TFEU was to be imputed to the Servier group, thereby justifying the finding that Servier as the parent company and its subsidiary Biogaran were jointly and severally liable, the respective conduct of each having contributed to the infringement. That conclusion is all the more necessary since the conduct of the two companies is closely related because of the inseparable links, established by the Commission, between the Biogaran agreement and the settlement agreement between Servier and Niche.

221 Biogaran cannot claim that it should not be found jointly and severally liable for the infringement on the ground that it was unaware of the conduct of its parent company.

222 In the first place, that complaint is based on the erroneous assumption that Biogaran was held liable for an infringement which its parent company committed. However, as has just been stated, that assumption has no basis in fact or in law.

223 In the second place, it should be recalled that the decisive influence which a parent company exercises over its wholly owned subsidiary supports the presumption that the acts of the subsidiary are carried out in the name and on behalf of the parent company and, consequently, of the undertaking which they comprise. Since the Court has held, as is apparent from the response to the preceding plea, that Biogaran had not pursued a genuine commercial interest in concluding the Biogaran agreement and had not implemented an autonomous strategy, outside the control of its parent company, the Commission was entitled to find that the Biogaran agreement, as an additional inducement for Niche to accept the settlement, was one of the components of the infringement in which Biogaran had directly participated, without it being necessary to show that Biogaran was aware of Servier's conduct or overall plan or of the characteristics of the infringement.

224 Moreover, the applicant is wrong to rely on the judgment of 2 October 2003, *Aristrain* v *Commission* (C-196/99 P, EU:C:2003:529, paragraph 99). That case concerned not a relationship between a parent company and its wholly owned subsidiary, but a holding by the same person or family in the share capital of two separate commercial companies, a circumstance which was considered insufficient by the Courts of the European Union, as such, to establish the existence, between those two companies, of an economic unit, with the result that, under EU competition law, the conduct of each may be imputed to that economic unit. Similarly, the references to the judgments of 8 July 2008, *AC-Treuhand* v *Commission* (T-99/04, EU:T:2008:256), of 30 November 2011, *Quinn Barlo and Others* v *Commission* (T-208/06, EU:T:2011:701), and of 10 October 2014, *Soliver* v *Commission* (T-68/09, EU:T:2014:867), are not relevant, since they are unrelated to the context of the parent-subsidiary relationship and of an economic unit.

225 In the third place, if, as the applicant claims, the Commission had to prove that the subsidiary was aware of the parent company's conduct in order to impute the infringement to the group, this would have an effect on the concept of economic unit. It would be necessary to establish, for each component of the infringement resulting from the conduct of one or other of those two companies, that the subsidiary was aware of the objectives pursued by the parent company, whereas the very concept of undertaking within the meaning of EU competition law presupposes, through the presumption that the parent company exercises a decisive influence over the wholly owned subsidiary, that the subsidiary acts within the framework of the objectives pursued by the parent company, under

the parent company's direction and control. As the Court of Justice has held, the condition for the attribution of various anticompetitive acts constituting the cartel as a whole to all the parts of the undertaking is satisfied where each part of that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role (see, to that effect, judgments of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraphs 117 to 126, and of 8 July 2008, *AC-Treuhand* v *Commission*, T-99/04, EU:T:2008:256, paragraph 133).

226 If the applicant's argument were accepted, the finding of infringements of competition law in groups of companies would be made more difficult, whereas the presumption of control by the parent company of its wholly owned subsidiary seeks to prevent unlawful conduct from being attributed only to the subsidiaries which are directly responsible for it and from thereby going unpunished at the level of the group. It would be sufficient for a parent company to apportion the unlawful conduct between itself and its subsidiary and to argue that the subsidiary was unaware of the parent company's conduct in order for the part of the infringement resulting from the subsidiary's direct participation in the infringement to be imputed only to the subsidiary. This would render action to combat anticompetitive practices less effective, which cannot be justified by observance of the principle of personal responsibility for infringements.

227 It follows from the foregoing that the applicant's line of argument that the Commission, in breach of the principle of personal responsibility, wrongly imputed to the applicant liability for the unlawful conduct of its parent company therefore has no basis in either fact or law. Not only did the Commission not impute to Biogaran the infringement alleged against its parent company, since the infringement was imputed only to the Servier group, but the Commission also rightly considered that it was not necessary to establish that Biogaran was aware of the conduct of its parent company.

228 Contrary to what the applicant argued at the hearing in support of the plea which it raised on that occasion, alleging an inadequate statement of reasons and a contradiction in the reasoning vitiating the contested decision, that decision is free from such defects. It is clear from that decision, in particular recitals 1349, 3007 and 3011 thereof, that the Commission considered that the entity responsible for the infringement was the undertaking, within the meaning of Article 101 TFEU, comprising Servier and its wholly owned subsidiary Biogaran and that it was not necessary to prove Biogaran's knowledge of the anticompetitive nature of the settlement agreement in order to impute liability for the infringement to the 'undertaking'. Although it is true, as Biogaran noted at the hearing, that the Commission, in its pleadings, stated that it was possible to presume that Biogaran was aware of Servier's conduct and that such an analysis is debatable in that a subsidiary cannot be presumed, in principle, to be aware of the conduct of its parent company, no such ground is included in the contested decision, which merely concludes that Biogaran, a wholly owned subsidiary of Servier, is presumed to act under the influence and control of Servier and finds that there is evidence to indicate Biogaran's direct involvement in an infringement committed by the single economic entity concerned.

229 For the sake of completeness, even if the Commission were required to establish that Biogaran was aware of Servier's conduct and of the unlawful nature of the settlement agreement between Servier and Niche, it is apparent from the documents before the Court that such evidence was adduced to the requisite legal standard by the Commission.

230 It should first be recalled that the undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (see judgment of 24 June 2015, *Fresh Del*

Monte Produce v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 158 and the case-law cited; judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 119).

231 On the other hand, if an undertaking has directly taken part in one or more of the forms of anticompetitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 159 and the case-law cited; judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 120).

232 In the present case, the Commission established that Biogaran was aware that the Biogaran agreement was intended to contribute to achieving the objective of excluding Niche from the market. By the evidence which it gathered, referred to in recital 1351 of the contested decision, relating to the inducive nature of the Biogaran agreement, and which could not reasonably be called into question by Biogaran in the context of the plea alleging distortion of the facts, the Commission — stating also that Biogaran, a wholly owned subsidiary of Servier, could not act autonomously — demonstrated that the Biogaran agreement could be assessed only as an additional inducement to Niche: Biogaran could not be unaware of the nature of that inducement.

233 As is apparent from the examination of the plea alleging the distortion of the facts, Biogaran has put forward no plausible explanation justifying the conclusion of that agreement in conjunction with the settlement agreement between Servier and Niche. Nor can it reasonably argue that it was unaware of the unlawful nature of those agreements. Indeed, it was obvious to the negotiators of those agreements that the objective of excluding Niche from the market, achieved in exchange for substantial payments, was restrictive in nature.

234 It follows from all the foregoing that the present plea must be rejected, without it being necessary to take into consideration the arguments put forward by the Commission in its defence, relating to facts subsequent to the signature of the Biogaran agreement.

C. The plea alleging that the Commission erred in law by imposing a fine on Biogaran

1. Arguments of the parties

(a) The unprecedented, unpredictable and complex nature of the case

235 On the basis of the principle that offences and penalties must have a proper legal basis, as laid down in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms and in Article 49 of the Charter of Fundamental Rights, the applicant argues that the Commission may impose penalties only in relation to practices defined as being in the nature of an infringement at the material time. Similarly, it adds that, in accordance with the Commission's decision-making practice, a

fine cannot be imposed where the infringements found are relatively new in nature and where, at the material time, there was no precedent clearly establishing the unlawful nature of the type of conduct in question or where a new approach has been adopted in terms of the principles established.

236 Furthermore, the applicant takes the view that the Commission could not impose a fine for practices whose classification was unclear at the material time. The contested decision is based on an unprecedented and unforeseeable criticism of the settlement agreement between Servier and Niche. The applicant argues that there existed, at the material time, no precedent and, consequently, that Biogaran could not have suspected that such a settlement agreement would be classified as unlawful.

237 The Commission points out that the wording of the infringements provided for in Article 101 TFEU literally suggests that the practices in question, namely the exclusion of a competitor from a market in exchange for a transfer of value, are anticompetitive. The Commission refers to the relevant sections of the contested decision in order to assert that it was common ground at the time of the agreements that practices aiming at excluding competitors from the market were likely to be considered anticompetitive (recital 3092 of the contested decision).

238 The Commission maintains that the discussions within Servier at the material time concerning the compatibility of the settlement with competition law clearly show an awareness of the potentially anticompetitive nature of the agreements.

239 Finally, the fact that the legal advisors of the parties to the agreements did not identify any risk of infringement cannot have the effect of exempting the undertaking from a fine, since that undertaking could not be unaware of the anticompetitive nature of that conduct.

(b) The disproportionate nature of the fine

240 The applicant claims, in any event, that the amount of the fine is manifestly disproportionate in the light of the minor role played by Biogaran in bringing about the alleged infringement. On the basis of the case-law, the applicant emphasises that the fact that an undertaking did not participate in all the constituent elements of a cartel or that it played a minor role in the aspects in which it was involved must be taken into account when assessing the gravity of the infringement and, where appropriate, in determining the amount of the fine.

241 By imposing a penalty without taking into account Biogaran's limited contribution to the alleged infringement, the Commission manifestly infringed the principles of proportionality and equal treatment. Indeed, the severity of the fine infringes the principle of equal treatment, which requires that comparable situations are not treated differently and that different situations are not treated in the same way, unless such treatment is objectively justified.

242 Thus, by imposing on Biogaran jointly and severally the whole of the fine imposed on its parent company, even though the objective circumstances characterising the participation of the two companies were not comparable, the Commission infringed the principle of equal treatment. While Servier is being penalised for anticompetitive conduct, the Commission is penalising Biogaran for an act which is not in itself restrictive of competition. Moreover, even assuming that the Biogaran agreement forms part of the allegedly anticompetitive settlement agreement, the transfer of value to Niche complained of by the Commission amounts to a total of GBP 13.8 million, of which Biogaran contributed only GBP 2.5 million.

243 Furthermore, the applicant states that the amount of the fine imposed on it for having indirectly participated in an allegedly anticompetitive agreement is so disproportionate that it greatly exceeds the total cumulative amount of the pecuniary penalties imposed on the other five generic companies (that is to say EUR 96.6 million), although they participated directly in the settlement agreements at issue.

244 Finally, the decision is vitiated by an error of law in that it uses for Biogaran the value of the sales of its parent company (EUR 476 million), although Biogaran did not itself have any sales. The applicant thus argues that, in accordance with the principle of equal treatment, the Commission should have applied to Biogaran the same reasoning as for the other generic companies. If the Commission had taken into account the value transferred under the agreement signed by Biogaran, that is to say GBP 2.5 million, the amount of the fine imposed on Biogaran would have been divided by more than 150.

245 The Commission responds that Biogaran did not act as an entity independent of and distinct from the Servier group. Biogaran acted as an integral part of the Servier group and it is therefore Servier as a whole which is held liable for the infringement. The Commission adds that Biogaran played a causal role as important as that of its parent company.

246 Finally, the Commission takes the view that the comparison between the fines of the generic companies and that of Biogaran is not relevant, since Biogaran acted as part of the same undertaking as Servier in this case. It acted as the producer of the originator product seeking to preserve its monopoly, a position distinct from that of the generic companies which agreed not to enter the market in return for a significant payment.

(c) The 10% upper limit of the fine

247 The applicant argues that the Commission infringed Article 23(2) of Regulation No 1/2003 by ordering Biogaran jointly and severally to pay a fine of EUR 131.5 million, that is to say almost 18% of its total turnover, for having allegedly 'induced' Niche to conclude the settlement agreement.

248 Relying on the case-law, the Commission argues that the ceiling of the amount of the fine must be calculated on the basis of the turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 101 TFEU. The Commission did not therefore err in taking into account the turnover of the Servier group.

249 Finally, the Commission maintains that it is not possible to apply the method of calculating the generic companies' fines to Biogaran's fine. Biogaran acted in support of the patent holder and helped to pay a generic producer to induce it not to enter the market of Biogaran's parent company, which is not comparable to the role played by the generic producers.

2. Findings of the Court

(a) The unprecedented, unpredictable and complex nature of the case

250 According to the case-law, the principle that offences and penalties must have a proper legal basis implies that legislation must define clearly offences and the penalties which they attract. That requirement is satisfied where the individual concerned is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 40 and the case-law cited).

251 The principle that offences and penalties must have a proper legal basis cannot be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 41 and the case-law cited).

252 The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it covers and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. Such persons can therefore be expected to take special care in evaluating the risk that such an activity entails (see judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 42 and the case-law cited).

253 It should be added that the need for professional advice appears all the more evident where, as was the case here, it is necessary to prepare and draft a licensing agreement in the context of the settlement of a dispute.

254 In that context, even though, at the time of the infringement found in the contested decision, the Courts of the European Union had not yet had the opportunity to rule specifically on settlement and licensing agreements of the type adopted by Servier, Niche and Biogaran, Biogaran should have expected, if necessary after taking appropriate legal advice, that the undertaking's conduct to which it contributed by means of the Biogaran agreement would be declared incompatible with the EU competition rules, especially in the light of the broad scope of the terms 'agreement' and 'concerted practice' established by the case-law of the Court of Justice (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 43).

255 In particular, Biogaran could assume that the fact that its parent company required Niche to accept non-marketing and non-challenge clauses, by themselves restrictive of competition, rendered the inclusion of such clauses in a patent settlement agreement entirely illegitimate. Indeed, the inclusion of such clauses was not based on recognition by the parties to the agreements of the validity of the patent and thus indicated a misuse of the patent, unrelated to its specific purpose (judgment delivered today, *Servier and Others* v *Commission*, T-691/14). Moreover, the applicant could also assume that providing an additional inducement to Niche by means of the Biogaran agreement was such as to reinforce the restrictive effects of the agreement concluded by its parent company. The applicant could therefore reasonably have foreseen that its conduct was caught by the prohibition laid down in Article 101(1) TFEU (see, to that effect, judgments of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 46, and of 8 September 2016, *Lundbeck* v *Commission*, T-472/13, under appeal, EU:T:2016:449, paragraph 764).

256 In addition, it should be noted that, well before the date of conclusion of the two agreements, there was case-law on the application of competition law in fields characterised by the presence of intellectual property rights (see, to that effect, judgment of 8 September 2016, *Xellia Pharmaceuticals and Alpharma* v *Commission*, T-471/13, not published, under appeal, EU:T:2016:460, paragraphs 314 and 315).

257 Thus, the Court of Justice held, as early as 1974, that although the existence of rights recognised under the industrial property legislation of a Member State is not affected by Article 101 TFEU, the conditions under which those rights may be exercised may nevertheless fall within the prohibitions

contained in that article and that this may be the case whenever the exercise of such a right appears to be the object, the means or the consequence of an agreement (judgment of 31 October 1974, *Centrafarm and de Peijper*, 15/74, EU:C:1974:114, paragraphs 39 and 40).

258 Next, since the judgment of 27 September 1988, *Bayer and Maschinenfabrik Hennecke* (65/86, EU:C:1988:448), it is clear that patent dispute settlements may be categorised as agreements within the meaning of Article 101 TFEU.

259 Moreover, it must be pointed out that, by the agreements at issue, Niche, Servier and Biogaran actually decided to conclude market exclusion agreements (judgment delivered today, *Servier and Others* v *Commission*, T-691/14). Although it was only in a judgment delivered after the conclusion of the agreements at issue that the Court of Justice held that market exclusion agreements, in which the stayers are to compensate the goers, constitute a restriction of competition by object, it nonetheless made clear that that type of agreement conflicts patently with the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the market (judgment of 20 November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraphs 8 and 32 to 34). In concluding an agreement such as the Biogaran agreement, the applicant could not, therefore, have been unaware of the anticompetitive nature of its conduct.

260 Indeed, although, because the agreement between Niche and Servier was concluded in the form of a patent settlement and the Biogaran agreement was presented as a licensing and supply agreement, the unlawful nature of those agreements might not have been evident to an outside observer such as the Commission, the same could not be said for the parties to the agreement.

261 In the light of all the foregoing considerations, it must be concluded that Biogaran, even though it was not active on the perindopril market affected by the restriction of competition, could reasonably foresee that the prohibition laid down in Article 101 TFEU was applicable to it.

262 That conclusion is not called in question by the other arguments submitted by the applicant.

263 In the first place, although the applicant refers to the existence of a legal opinion which it had requested from Sir Francis Jacobs, it does not adduce sufficient evidence for it to be possible to conclude that there was real uncertainty as to the unlawful nature of the Biogaran agreement and of the settlement agreement between Servier and Niche in the light of the EU rules on competition law. Although Sir Francis Jacobs' opinion acknowledges that the Commission's analysis is novel in nature and that an 'analytical approach' of that kind had never been applied by the Courts of the European Union, it takes the view that the Commission's legal approach is well founded in principle.

264 Moreover, that legal opinion does not dispute that Article 101 TFEU literally suggests that the practices in question, namely the exclusion of a competitor, are not compatible with competition law. The Commission also rightly pointed out, in recital 597 of the contested decision, that the issue of the compatibility of the agreements at issue with competition law had given rise to uncertainty on the part of Servier.

265 In the second place, the argument alleging that the Commission has a practice of not imposing fines or imposing merely symbolic fines when it examines complex issues of law which have never been settled by the Courts of the European Union cannot be accepted. In spite of the novelty of some of the questions raised in the present dispute, Biogaran could not have been unaware in this case of the anticompetitive nature of Servier's strategic plan (paragraphs 229 to 234 above) or of the fact that, since it is wholly owned by Servier, its conduct as a subsidiary was likely to be attributed to the undertaking comprising Servier and its subsidiary. Similarly, the Commission rightly states, in

paragraph 80 of the rejoinder, that the length of the decision and the duration of the administrative procedure certainly reflect the complexity of the facts, but do not amount to proof of the unforeseeable nature of the infringement.

266 In any event, according to the case-law, the Commission has a margin of discretion when setting the amount of fines, in order that it may channel the conduct of undertakings towards compliance with the competition rules. The fact that in the past the Commission has applied fines of a particular level for certain types of infringements, on those occasions symbolic fines for infringements of an unprecedented nature, does not mean that it is precluded from increasing that level within the limits indicated in Regulation No 1/2003, if that is necessary to ensure the implementation of EU competition policy. The proper application of the European Union competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy (judgment of 8 September 2016, *Lundbeck* v *Commission*, T-472/13, under appeal, EU:T:2016:449, paragraph 773).

267 In the third place, the applicant cannot rely on the fact that its legal advisor provided an incorrect legal classification of its conduct forming the basis for the finding of the infringement. The error made by the advisor of the undertaking concerned cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anticompetitive nature of that conduct (see, to that effect, judgment of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 37).

268 In the fourth place, contrary to what the applicant maintains, the clauses of the Biogaran agreement could be perceived by the signatories of that agreement only as an additional restriction of competition. Even though the applicant claims that the clauses of the agreement 'are not at issue', the applicant was in a position to understand that the agreement, in view of the fact that it contained atypical terms by comparison with other licensing agreements and provided no real consideration for the payment, had no objective other than to induce a potential competitor of Servier not to enter the perindopril market and, consequently, constituted an infringement of competition law.

269 It follows from all the foregoing that the present complaint must be rejected.

(b) The disproportionate nature of the fine

270 It should be noted that Biogaran's criticisms of the amount of the fine imposed on it jointly and severally with its parent company, which it regards as disproportionate, are based on the assumptions, first, that the infringement committed by its parent company was imputed to Biogaran and, secondly, that it was on that basis penalised as a legal person separate from Servier, although its conduct was less serious than that of its parent company and its participation in the infringement was much more limited than that of its parent company.

271 Those assumptions are, as has been stated in response to the first plea, erroneous.

272 As the Commission rightly argues, Biogaran acted not as an entity independent of and distinct from the Servier group but as an integral part of that group, under the control of its parent company. Although the Commission found that Biogaran was directly involved in the infringement and noted the decisive nature of the Biogaran agreement in giving rise to the restrictive effects of the settlement agreement between Servier and Niche, it nonetheless did not hold Biogaran liable for the infringement as an autonomous legal person, distinct from the Servier group. The fine at issue is in fact imposed on the undertaking, within the meaning of Article 101 TFEU, comprising the subsidiary and its parent company, which are jointly and severally liable for the infringement and for the payment of the corresponding fine, and that fine is not intended to penalise the anticompetitive conduct attributable to each of those two companies as separate legal persons.

273 Joint and several liability of the subsidiary and parent company for payment of a fine — the basis of the operative part of the contested decision, Article 7(1)(b) of which covers Servier and Biogaran, jointly and severally liable for the payment of EUR 131 532 600 — cannot be interpreted as meaning that liability for an infringement committed by Biogaran's parent company has been imputed to Biogaran.

274 Indeed, it must be borne in mind that joint and several liability for payment of a fine is merely the manifestation of an *ipso jure* legal effect of the concept of an 'undertaking', the designation of the entity which may be penalised by the Commission on account of an infringement of EU competition rules (judgments of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 57, and of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 122 to 124). Companies may therefore be held jointly and severally liable for the payment of a fine in so far as they may be held personally responsible for participation in the infringement committed by the single undertaking which they constitute (judgment of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 49).

275 Moreover, it is irrelevant whether or not the personal liabilities incurred by companies by reason of their participation in the commission of the infringement are the same, since, during the period of the infringement, they constituted a single undertaking (judgment of 3 March 2011, *Areva and Others* v *Commission*, T-117/07 and T-121/07, EU:T:2011:69, paragraph 206). Furthermore, the Commission's power to impose penalties cannot extend to the determination of the shares to be paid by each of those held jointly and severally liable from the perspective of their internal relationship (judgments of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 58, and of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 151). In addition, Biogaran stated at the hearing, in response to a question from the Court, that its parent company had paid the full amount of the fine referred to in Article 7(1)(b) of the contested decision.

276 In imposing the fine on the single economic entity constituted by the parent company and its wholly owned subsidiary and in taking into account the value of the sales made by the Servier group, the Commission thus acted in accordance with the settled case-law of the Courts of the European Union and did not err in law (see, to that effect, judgments of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraphs 145 to 148 and the case-law cited, and of 23 January 2014, *Evonik Degussa and AlzChem* v *Commission*, T-391/09, not published, EU:T:2014:22, paragraphs 129 to 135).

277 For the same reasons, the applicant cannot claim that the fine was imposed on it in breach of the principle of equal treatment.

278 Since neither Biogaran nor Servier is penalised for its conduct as a separate legal person, the comparison made between Servier's situation and that of Biogaran is irrelevant.

279 Likewise, since Biogaran was held jointly and severally liable for payment of the fine only as an integral part of the single economic entity which it forms with Servier, its situation cannot be compared to the situation of the generic companies to which the contested decision was addressed. While the fine imposed on the Servier group is based on the value of the sales of that group, the fines imposed on those companies could not be calculated on the basis of that parameter, since those companies were not on the market at the time of the practices alleged against them (judgment delivered today, *Servier and Others* v *Commission*, T-691/14).

280 Nor is it possible to uphold the complaint, raised by Biogaran at the hearing, that Niche was not penalised on the basis of the Biogaran agreement, since the Commission failed to take into account the payment of GBP 2.5 million in the calculation of Niche's fine. That complaint was raised, in connection with the principle of equal treatment, only at the hearing and is therefore inadmissible, in

the absence of justification for its presentation at that stage of the proceedings. Moreover, as has just been stated, Biogaran, a subsidiary of Servier, was not in a situation comparable to that of the generic companies which, like Niche, had concluded an agreement with Servier. Lastly, the fact, if it were established, that Niche was not penalised by the Commission cannot exempt Biogaran from its liability for the infringement committed by the undertaking of which it is a part.

281 It follows from all the foregoing that the present complaint must be rejected.

(c) The 10% upper limit of the fine

282 The applicant claims that the Commission infringed Article 23(2) of Regulation No 1/2003 by imposing on it a fine which amounts to more than 10% of its annual turnover and which uses the value of the sales of its parent company, Servier (that is EUR 476 million), even though Biogaran itself did not have any sales.

283 In that regard, it should be recalled that the ceiling provided for in Article 23(2) of Regulation No 1/2003 must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 101 TFEU (see judgments of 8 May 2013, *Eni* v *Commission*, C-508/11 P, EU:C:2013:289, paragraph 109 and the case-law cited, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 172 and 173 and the case-law cited; see also, to that effect, judgment of 26 November 2013, *Groupe Gascogne* v *Commission*, C-58/12 P, EU:C:2013:770, paragraph 56).

284 The proportionality of a penalty must in particular be assessed in the light of the deterrent effect sought by its imposition and it is necessary to use that total amount, for the purposes of that assessment, in order to take into account the economic power of the undertaking concerned (see, to that effect, judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraphs 83 and 84).

285 In the present case, it is apparent from the considerations set out above that the undertaking concerned comprised the applicant and its parent company, Servier, both of which together constitute one and the same economic entity (see paragraphs 206 to 234 above). Consequently, in accordance with the principles set out in paragraph 283 above, the Commission relied on the total turnover of the parent company of the Servier group over the period from 1 October 2012 to 30 September 2013 for the purposes of the application of the abovementioned limit of 10% of turnover (recital 3144 of the contested decision).

286 As that turnover amounts to a little over EUR 4 billion, the Court considers that the fine of EUR 131 532 600 imposed on the applicant, jointly and severally with its parent company, clearly did not exceed that limit.

287 Accordingly, the present complaint, as well as the present plea in its entirety, must be rejected.

288 In the light of all the foregoing considerations, the action must be dismissed in its entirety and, in view of all the facts of the case, the claims that the Court, in the exercise of its unlimited jurisdiction, should cancel the fine or reduce its amount must also be rejected.

Costs

289 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders Biogaran to bear the costs.

Gervasoni Madise da Silva Passos

Delivered in open court in Luxembourg on 12 December 2018.

[Signatures]

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