Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 14 July 2022 [1]

Case C-201/19 P

Servier SAS,
Servier Laboratories Ltd,
Les Laboratoires Servier SAS
v

European Commission

(Appeal – Competition – Agreements, decisions and concerted practices – Market for perindopril, a medicinal product for the treatment of cardiovascular diseases – Patent dispute settlement agreements concluded between a patent-holding originator company and generic companies – Potential competition – Restriction of competition by object – Duration of the infringement – Concept of 'single infringement' – Fines)

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I. Introduction

1. Following on from the cases of *Generics (UK) and Others*[2] and *Lundbeck* v *Commission*,[3] the present case, one of a group of nine appeals lodged against eight judgments of the General Court,[4] again concerns the assessment, from the perspective of EU competition law, of a number of patent dispute settlement agreements concluded by a manufacturer of originator medicinal products (here: Servier) with generic companies.

2. As in the cases of *Generics (UK) and Others* and *Lundbeck* v *Commission*, those agreements were made in a situation in which the patent for the active substance of the medicinal product at issue (here: perindopril) had already entered the public domain, although Servier still held 'secondary' patents for certain procedures for the manufacturing of that medicinal product.

3. The contested agreements ensured, in essence, that generic companies which wanted to enter the market with generic versions of the medicinal product undertook to delay their entry in return for transfers of value from Servier.

4. In the decision at issue,[5] the Commission considered, first, that the contested agreements, concluded by Servier with Niche/Unichem, Matrix, Teva, Krka and Lupin, constituted restrictions of competition by object and by effect and, therefore, infringements of Article 101 TFEU.

5. Second, it took the view that their conclusion, together with other actions such as the acquisition of technologies for the manufacture of the active pharmaceutical ingredient (API) of perindopril, constituted a strategy on Servier's part intended to delay the entry of generic perindopril companies to the market for that medicinal product, on which Servier held a dominant position. The Commission therefore penalised that conduct as an abuse of a dominant position under Article 102 TFEU.

6. In the judgment under appeal and in its other judgments in the group of cases concerned, the General Court confirmed the Commission's analysis that the agreements concluded by Servier with Niche/Unichem, Matrix, Teva and Lupin constituted restrictions of competition by object. Those findings of the General Court are contested by Servier in this appeal, which functions as the 'pilot' case, as well as by those generic companies in their respective appeals lodged against the judgments of the General Court concerning them.

2 Judgment of 30 January 2020 (C-307/18, EU:C:2020:52) ('judgment in *Generics (UK) and Others*').

3 Judgments of 25 March 2021, *Lundbeck* v *Commission* (C-591/16 P, EU:C:2021:243) ('judgment in *Lundbeck* v *Commission*'); *Sun Pharmaceutical Industries and Ranbaxy (UK)* v *Commission* (C-586/16 P, not published, EU:C:2021:241); *Generics (UK)* v *Commission* (C-588/16 P, not published, EU:C:2021:242); *Arrow Group and Arrow Generics* v *Commission* (C-601/16 P, not published, EU:C:2021:244); *Xellia Pharmaceuticals and Alpharma* v *Commission* (C-611/16 P, EU:C:2021:245); and *Merck* v *Commission* (C-614/16 P, not published, EU:C:2021:246).

4 Judgments of the General Court of the European Union of 12 December 2018, *Servier and Others* v *Commission* (T-691/14, EU:T:2018:922) ('the judgment under appeal') (challenged by this appeal and by the appeal in Case C-176/19 P, *Commission* v *Servier and Others*); *Biogaran* v *Commission* (T-677/14, EU:T:2018:910) (appeal C-207/19 P, *Biogaran* v *Commission*); *Teva UK and Others* v *Commission* (T-679/14, not published, EU:T:2018:919) (appeal C-198/19 P, *Teva UK and Others* v *Commission*); *Lupin* v *Commission* (T-680/14, not published, EU:T:2018:908) (appeal C-144/19 P, *Lupin* v *Commission*); *Mylan Laboratories and Mylan* v *Commission* (T-682/14, not published, EU:T:2018:907) (appeal C-197/19 P, *Mylan Laboratories and Mylan* v *Commission*); *Krka* v *Commission* (T-684/14, not published, EU:T:2018:918) (appeal C-151/19 P, *Commission* v *Krka*); *Niche Generics* v *Commission* (T-701/14, not published, EU:T:2018:921) (appeal C-164/19 P, *Niche Generics* v *Commission*); and *Unichem Laboratories* v *Commission* (T-705/14, not published, EU:T:2018:915) (appeal C-166/19 P, *Unichem Laboratories* v *Commission*).

5 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)) ('the decision at issue').

7. However, the General Court annulled the decision at issue as far as concerns the classification of the agreements concluded by Servier with Krka as restrictions of competition by object and by effect, and in relation to the finding of Servier's abuse of a dominant position, on the ground that the Commission had made errors in defining the relevant market.

8. Those annulments by the General Court are challenged by the Commission in the case of *Commission* v *Servier and Others* (C-176/19 P), in which I am also delivering an Opinion today, as well as in the case of *Commission* v *Krka* (C-151/19 P). Those cases raise novel issues concerning the classification as a restriction of competition by object of a licence agreement concluded at the same time as a patent dispute settlement agreement, the classification of such an agreement as a restriction of competition by effect and the definition of the relevant market in the pharmaceutical field.

9. Conversely, the present case raises, for the most part, merely questions that have previously been addressed in the cases of *Generics (UK) and Others* and *Lundbeck* v *Commission*, the principles established in which should therefore be applied in the context of the present case.

II. Background to the dispute

A. Facts

10. The General Court set out the background to the dispute in paragraphs 1 to 73 of the judgment under appeal which, for the purposes of these appeal proceedings, can be summarised as follows.

1. Operators concerned by the present case

11. The Servier group, which is composed inter alia of Servier SAS, its parent company established in France, Les Laboratoires Servier SAS and Servier Laboratories Ltd (together, 'Servier'), brings together pharmaceutical companies at the global level. Les Laboratoires Servier is a French pharmaceutical company specialised in the development of originator medicines, inter alia for the treatment of cardiovascular diseases.[6] Biogaran is a wholly owned generic subsidiary of Les Laboratoires Servier.[7]

12. Niche Generics Ltd ('Niche') is an undertaking that launches and supplies generic pharmaceutical products which was initially 60% owned and now, since 2006, is wholly owned by the Indian pharmaceutical company Unichem Laboratories Ltd, which conducts research into and manufactures APIs and finished products ('Unichem') (together, 'Niche/Unichem').[8]

6 Paragraph 1 of the judgment under appeal and recital 11 et seq. of the decision at issue.

7 Recital 14 of the decision at issue.

8 Paragraph 8 of the judgment of 12 December 2018, *Niche Generics* v *Commission* (T-701/14, not published, EU:T:2018:921), and paragraph 8 of the judgment of 12 December 2018, *Unichem Laboratories* v *Commission* (T-705/14, not published, EU:T:2018:915), as well as recital 31 et seq. of the decision at issue.

13. Matrix Laboratories Ltd ('Matrix') is an Indian company which primarily develops, produces and markets APIs for generic companies. Following a number of shareholding acquisitions, Mylan Inc. has held between 97% and 98% of Matrix's capital since 2011; Matrix has operated under the name Mylan Laboratories Ltd since 5 October 2011. [9]

14. Teva Pharmaceutical Industries Ltd is a multinational pharmaceutical company that develops, produces and markets generic medicines and APIs for its own pharmaceutical production and for other companies. Teva UK Ltd is a wholly owned subsidiary of Teva Pharmaceuticals Europe BV, which itself is a wholly owned subsidiary of Teva Pharmaceuticals Industries (together, 'Teva'). Teva is one of the largest pharmaceutical groups in the world operating in the generic medicines sector. On 26 January 2006, Teva merged with Ivax Europe ('Ivax'), a multinational pharmaceutical company which manufactures generic medicines, which therefore became a wholly owned subsidiary of Teva. [10]

15. Lupin Ltd is the parent company, registered in India, of the companies which form part of the Lupin group, including Lupin (Europe) Limited, the primary activities of which are the sale of APIs and Lupin finished products, as well as the licensing of Lupin's product marketing authorisation dossiers and the small-scale direct sale of Lupin finished products in the United Kingdom (together, 'Lupin'). [11]

2. Product and patents at issue

16. Servier developed perindopril, a medicinal product used in cardiovascular medicine, primarily intended for the treatment of hypertension and heart failure. The API of perindopril 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. [12]

17. Perindopril compound patent EP0049658 was filed with the European Patent Office (EPO) on 29 September 1981. That patent was due to expire on 29 September 2001, but its protection was prolonged in a number of EU Member States, including the United Kingdom, until 22 June 2003. [13] In France, protection under the patent was prolonged until 22 March 2005 and, in Italy, until 13 February 2009. [14] Perindopril erbumine tablets (2 and 4 mg) for the treatment of hypertension obtained marketing authorisation in Europe between 1988 and 1989. [15]

18. After filing the compound patent, Servier filed a number of patents relating to the process for the manufacture of perindopril before the EPO. The patents relevant to these proceedings are, inter alia, patents EP0308339, EP0308340 and EP0308341 (respectively, 'the 339 patent', 'the 340 patent' and 'the 341 patent'), filed in 1988 and due to expire in 2008, and, in particular, patent

9 Paragraphs 8 and 9 of the judgment of 12 December 2018, *Mylan Laboratories and Mylan* v *Commission* (T-682/14, not published, EU:T:2018:907), and recital 27 et seq. of the decision at issue.

10 Paragraphs 8 and 9 of the judgment of 12 December 2018, *Teva UK and Others* v *Commission* (T-679/14, not published, EU:T:2018:919), and recital 37 et seq. of the decision at issue.

11 Paragraph 8 of the judgment of 12 December 2018, *Lupin* v *Commission* (T-680/14, not published, EU:T:2018:908), and recital 23 et seq. of the decision at issue.

12 Paragraphs 2 and 3 of the judgment under appeal and recitals 1 et seq., 86 et seq. and 2143 et seq. of the decision at issue.

13 As permitted under 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).

14 Paragraph 4 of the judgment under appeal and recital 92 et seq. of the decision at issue.

15 Recital 98 of the decision at issue.

EP1296947 (known as 'the alpha patent' – 'the 947 patent'), filed in 2001. The 947 patent covered the alpha crystalline form of perindopril erbumine and the methods for its manufacture and was granted on 4 February 2004. [16]

19. Servier also filed national patent applications in several EU Member States, for example in Bulgaria, the Czech Republic, Estonia, Hungary, Poland and Slovakia. Patents were thus granted on 16 May 2006 in Bulgaria, on 17 August 2006 in Hungary, on 23 January 2007 in the Czech Republic, on 23 April 2007 in Slovakia and on 24 March 2010 in Poland. Those patents corresponded, in essence, to the patents filed before the EPO. [17]

20. From 2002, Servier began developing a second-generation perindopril product, manufactured using a new salt (arginine), for which it filed a patent application (EP1354873B) on 17 February 2003. That patent was granted on 17 July 2004 with an expiry date of 17 February 2023. The introduction of perindopril arginine in the EU markets started in 2006. That product is a bioequivalent generic version of the first-generation product, but is sold in different dosages due to the different molecular weight of the new salt. [18] Perindopril arginine received marketing authorisation in France in 2004 and was subsequently authorised via the mutual recognition procedure in other Member States. [19]

3. Patent disputes relating to perindopril and launch of generic versions of perindopril

21. Between 2003 and 2009, Servier was party to a series of disputes concerning perindopril, both before the EPO and before national courts. Those disputes essentially concerned applications for injunctions and proceedings relating to the 947 patent, initiated in various Member States between Servier and a series of generic companies preparing to launch a generic version of perindopril. [20]

(a) Disputes before the EPO

22. First of all, 10 generic companies, including Niche, Teva and Lupin, 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. [21]

23. 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'). Nine companies brought an appeal against that decision, but Krka and Lupin gave notice of the withdrawal of their appeals on 11 January and 5 February 2007, respectively, further to their agreements with Servier. 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 ('the EPO decision of 6 May 2009'). Servier's request for a revision of that decision was rejected on 19 March 2010. [22]

16 Paragraphs 5 to 8 of the judgment under appeal and recitals 94, 118 et seq. and 124 et seq. of the decision at issue.

17 Paragraph 8 of the judgment under appeal and recital 120 of the decision at issue.

18 Paragraphs 9 and 10 of the judgment under appeal and recitals 8, 88 and 218 et seq. of the decision at issue.

19 Recital 100 of the decision at issue.

20 Paragraphs 11 to 27 of the judgment under appeal, and recitals 129, 151 et seq., 157 et seq., and tables in recitals 156 and 201 of the decision at issue.

21 Paragraphs 11 and 12 of the judgment under appeal and recital 158 et seq. of the decision at issue.

22 Paragraph 12 of the judgment under appeal and recitals 162 to 170 and 962 of the decision at issue.

(b) Disputes before the national courts

24. The validity of the 947 patent has also been challenged by generic companies before the courts of certain Member States, and Servier has applied for interim injunctions, some of which were successful.[23] However, the majority of those disputes ended before a final decision was given on the validity of the 947 patent on account of the settlement agreements concluded between Servier and generic companies.

25. In that context, regard must nevertheless be had to two disputes between Servier and Apotex, the only generic company party to a dispute with Servier in the United Kingdom with which Servier did not conclude a settlement agreement. Those disputes, one pending in the United Kingdom and the other pending in the Netherlands, were not interrupted by the conclusion of settlement agreements and subsequently led to the invalidation of the 947 patent.

26. Thus, first, on 1 August 2006, Servier brought an action for infringement of the 947 patent against Apotex, which had launched a generic version of perindopril 'at risk' on the UK market, before the High Court of Justice (England & Wales), Chancery Division (Patents Court) (United Kingdom), and obtained an interim injunction on 8 August 2006. However, following a counterclaim for annulment of the patent brought by Apotex, the 947 patent was declared invalid on 6 July 2007, the injunction was lifted and Apotex entered the market with generic perindopril, which opened the market to generics in the United Kingdom. On 9 May 2008, the decision invalidating the 947 patent was confirmed on appeal.[24]

27. Second, on 13 November 2007, Katwijk Farma, an Apotex subsidiary, brought an action before the Netherlands courts for annulment of the Dutch part of the 947 patent and, on 13 December 2007, launched its generic perindopril, whilst an application for an interim injunction made by Servier was rejected. On 11 June 2008, the Netherlands courts annulled the 947 patent for the Netherlands on completion of concurrent judicial proceedings initiated by Pharmachemie, a subsidiary of Teva.[25]

28. From May 2008, Sandoz, another generic company, launched its generic perindopril in a number of Member States.[26]

4. Patent dispute settlement agreements concerned by the present case, concluded by Servier with generic companies

29. Between 2005 and 2007, Servier concluded settlement agreements with the generic companies Niche/Unichem, Matrix, Teva, Krka and Lupin. The agreements concerned by this appeal are those concluded by Servier with Niche/Unichem, Matrix, Teva and Lupin.

23 Paragraphs 16 to 21 and 24 to 27 of the judgment under appeal, and recitals 171 to 202 of the decision at issue.

24 Paragraphs 25 and 26 of the judgment under appeal and recital 175 et seq. of the decision at issue.

25 Paragraph 27 of the judgment under appeal and recital 193 et seq. of the decision at issue.

26 Recital 410 of the decision at issue.

(a) Agreements concluded with Niche/Unichem and Matrix

30. Niche/Unichem and Matrix cooperated on the launch of a generic version of perindopril. Matrix's role was as provider of the API and Niche/Unichem were responsible for obtaining marketing authorisations and distributing the finished product. [27]

31. In addition to the opposition filed by Niche before the EPO, [28] Servier and Niche had been parties to proceedings since 25 June 2004 before the High Court of Justice (England & Wales), Chancery Division (Patents Court) in relation to patents 339, 340, 341 and 947. The hearing in those proceedings had been scheduled for 7 and 8 February 2005. Matrix was involved in those proceedings by providing witness statements, but did not have pending litigation of its own with Servier. [29]

32. On 8 February 2005, Servier concluded two settlement agreements, one with Niche/Unichem ('the Niche agreement') and one with Matrix ('the Matrix agreement'). On the same day, Niche concluded a licence and supply agreement with Biogaran, a wholly owned subsidiary of Les Laboratoires Servier.

33. The agreements concluded by Servier with Niche/Unichem and Matrix covered 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) in the case of the Matrix agreement. They provided, in summary, [30] that Niche/Unichem and Matrix would refrain from manufacturing and supplying perindopril which Servier regarded as infringing its patents and from challenging Servier's patents.

34. In return, Servier undertook not to bring any infringement actions against Niche/Unichem and Matrix and to pay 11.8 million pounds sterling (GBP) to Niche/Unichem and GBP 11.8 million to Matrix. In addition, under the agreement with Biogaran, Niche undertook to transfer to Biogaran files concerning three medicinal products which were necessary to obtain marketing authorisations and a French marketing authorisation for one of those medicinal products. In return, Biogaran was to pay Niche the sum of GBP 2.5 million, which was non-refundable even if Biogaran failed to obtain the marketing authorisations.

(b) Agreement concluded with Teva

35. In addition to the opposition filed by Teva before the EPO, [31] Servier and Ivax had been parties to proceedings in the United Kingdom since 9 August 2005 in relation to the 947 patent, but had however decided to stay the proceedings until the adoption of the final decision in the opposition proceedings before the EPO. On 15 August 2007, Pharmachemie, a Teva subsidiary, brought an action for revocation of the 947 patent, as validated in the Netherlands, which was upheld on 11 June 2008. [32]

27 Recital 423 et seq. of the decision at issue.

28 See point 22 of this Opinion.

29 Paragraph 16 et seq. of the judgment under appeal and recital 483 et seq. of the decision at issue.

30 For a detailed description, reference is made to paragraph 29 et seq. of the judgment under appeal and to recitals 422 and 546 et seq. of the decision at issue.

31 See point 22 of this Opinion.

32 Paragraphs 20 and 21 of the judgment under appeal and recital 677 of the decision at issue. With regard to the dispute with Pharmachemie, see point 27 of this Opinion.

36. On 13 June 2006, Servier and Teva concluded a settlement agreement which covered the United Kingdom only ('the Teva agreement'). That agreement was concluded for a term of three years and was renewable for an additional two-year period.

37. Under the agreement, Teva undertook to purchase exclusively from Servier the perindopril erbumine intended for distribution in the United Kingdom for a three-year period. In return for payment by Servier of an amount of GBP 5 million, Teva undertook not to sell generic perindopril (other than that supplied by Servier) and not to challenge Servier's patents in the United Kingdom, it being stipulated that Teva was not prohibited from continuing opposition proceedings against the disputed patents before the EPO. In addition, Servier and Teva agreed on the payment of liquidated damages to Teva in the case of non-supply of perindopril from 1 August 2006 and, in such a case, Teva had no right to terminate the settlement agreement. Following the EPO decision of 27 July 2006 confirming the 947 patent and the injunction granted by the High Court of Justice (England & Wales), Chancery Division (Patents Court), against Apotex on 8 August 2006, [33] Servier relied on the liquidated damages clause and Teva thus received, over a period of 11 months, a sum of GBP 5.5 million from Servier in compensation for the non-supply of perindopril. An aggregated payment of GBP 10.5 million was therefore made by Servier to Teva under that settlement agreement. [34]

38. On 23 February 2007, Servier and Teva concluded an amendment to the Teva agreement, confirming the actual implementation of the exclusive purchasing obligation by setting a date on which Teva could start to distribute the generic perindopril supplied by Servier. That date either had to be set unilaterally by Servier, had to correspond to the date of revocation or expiry of the 947 patent or be the date on which Apotex commenced distribution of generic perindopril in the United Kingdom following the settlement of its dispute with Servier. [35] Teva ultimately entered the market in the United Kingdom with the generic perindopril supplied by Servier following the invalidation of the 947 patent in respect of the United Kingdom on 6 July 2007 in the litigation with Apotex. [36]

(c) Agreement concluded with Lupin

39. In addition to its opposition filed before the EPO, [37] Lupin brought an action before the UK courts on 18 October 2006 for a declaration of invalidity of the 947 patent, as validated in the United Kingdom, and a declaration that the generic version of perindopril which it intended to market in that country did not infringe that patent. [38]

40. On 30 January 2007, Servier and Lupin concluded a patent settlement agreement covering all countries, with the exception of one country outside the EEA ('the Lupin agreement').

41. Under that agreement, Lupin agreed not to sell generic perindopril (until generic perindopril was placed on the market by Servier or by third parties or until the expiry/invalidation of the Servier patents) and not to challenge a series of patents held by Servier. The agreement also provided that the parties would use 'all reasonable endeavours' to conclude a distribution

33 See points 23 and 26 of this Opinion.

34 Paragraph 37 et seq. of the judgment under appeal and recitals 652 and 741 et seq. of the decision at issue.

35 Paragraph 42 of the judgment under appeal and recitals 749 and 770 et seq. of the decision at issue.

36 See point 26 of this Opinion and recital 776 et seq. of the decision at issue.

37 See point 22 of this Opinion.

38 Paragraph 24 of the judgment under appeal and recital 1013 et seq. of the decision at issue.

agreement under which Servier would begin to supply perindopril to Lupin once generic perindopril had been placed on the market by Servier or by third parties. No such agreement was ultimately signed and Lupin never entered the market for perindopril.

42. Furthermore, Servier and Lupin also concluded, in the context of the Lupin agreement, an agreement for the assignment of intellectual property rights and a licence agreement. Under those agreements, Servier paid to Lupin a sum of EUR 40 million to acquire the latter's perindopril-related patent applications and Lupin obtained the back-licensing of the applications acquired. [39]

B. The decision at issue

43. The Commission adopted the decision at issue on 9 July 2014. [40]

44. As far as these appeal proceedings are concerned, the Commission considered that the agreements concluded by Servier with Niche/Unichem, Matrix, Teva and Lupin constituted restrictions of competition by object and by effect.

45. Moreover, the Commission also considered that the agreements concluded by Servier with Krka constituted a restriction of competition by object and by effect, and that Servier had infringed Article 102 TFEU by drawing up and implementing, by means inter alia of technology acquisition and settlement agreements, an exclusionary strategy covering the market for formulations of perindopril in France, the Netherlands, Poland and the United Kingdom and the market for perindopril API technology.

46. The Commission therefore found that Servier had infringed Articles 101 and 102 TFEU and imposed fines on it for those infringements.

C. The judgment under appeal

47. By application lodged at the Court Registry on 21 September 2014, Servier brought an action against the decision at issue. Before the General Court, the form of order sought by Servier was supported by the European Federation of Pharmaceutical Industries and Associations (EFPIA).

48. By the judgment under appeal, the General Court, in its extended composition, first, annulled 1) Article 4 of the decision at issue (which found that Servier had infringed Article 101 TFEU on account of the Krka agreements), 2) Article 6 of the decision at issue (which found that Servier had infringed Article 102 TFEU), and 3) Article 7(4)(b) and (6) of the decision at issue (which imposed fines on Servier in respect of those two infringements).

49. Second, the General Court 4) reduced the amount of the fine imposed on Servier in respect of the agreement with Matrix, to which reference is made in Article 2 of the decision at issue, by Article 7(2)(b) of that decision. Third, it 5) dismissed the remainder of the application and, fourth, it 6) and 7) ordered Servier, the Commission and the EFPIA to each bear their own costs.

39 Paragraph 52 et seq. of the judgment under appeal and recitals 975 and 1037 et seq. of the decision at issue.

40 See footnote 5 to this Opinion.

III. The procedure before the Court and the forms of order sought

50. By document of 28 February 2019, Servier lodged an appeal against the judgment under appeal; the EFPIA once again supported the form of order sought by Servier.

51. At the same time, the other addressees of the decision at issue who had been unsuccessful before the General Court also lodged appeals against the judgments of the General Court dismissing their actions against that decision, whilst the Commission lodged appeals against the General Court's annulment of the parts of the decision at issue concerning the Krka agreements and Article 102 TFEU. [41]

52. By document of 22 May 2019, the United Kingdom sought leave to intervene, in the present case, in support of the form of order sought by the Commission. Leave was granted by decision of the President of the Court of 16 June 2019.

53. Servier claims that the Court of Justice should:

– Primarily, in the light of the first to fifth grounds challenging the finding of an infringement of Article 101 TFEU:

  – set aside points 4, 5 and 6 of the operative part of the judgment under appeal;

  – annul Article 1(b), Article 2(b), Article 3(b) and Article 5(b) and, consequently, Article 7(1)(b), Article 7(2)(b), Article 7(3)(b) and Article 7(5)(b) of the decision at issue or, in the alternative, refer the case back to the General Court for adjudication on the effects of the agreements concerned;

– In the alternative, in the light of the sixth ground:

  – set aside points 4 and 5 of the operative part of the judgment under appeal in so far as they confirm the Commission's conclusions concerning the existence of separate infringements and cumulative fines in respect of the Niche and Matrix agreements and, consequently, annul Article 1(b), Article 2(b), Article 7(1)(b) and Article 7(2)(b) of the decision at issue;

– In the further alternative:

  – set aside points 4 and 5 of the operative part of the judgment under appeal and annul Article 7(1)(b), Article 7(2)(b), Article 7(3)(b) and Article 7(5)(b) of the decision at issue in the light of the first and second parts of the seventh ground challenging the principle and the amount of all the fines;

[41] See footnote 4 to this Opinion.

– set aside point 5 of the operative part of the judgment under appeal and annul Article 5(b) and Article 7(5)(b) of the decision at issue in the light of the fourth part of the fifth ground concerning the duration of the alleged infringement and the calculation of the fine in relation to the agreement between Servier and Lupin and, consequently, set the fine in the exercise of its unlimited jurisdiction.

– And in any event:

– order the Commission to pay the costs.

54. The EFPIA claims that the Court of Justice should:

– set aside points 4, 5 and 6 of the operative part of the judgment under appeal;

– annul Article 1(b), Article 2(b), Article 3(b) and Article 5(b) and, consequently, Article 7(1)(b), Article 7(2)(b), Article 7(3)(b) and Article 7(5)(b) of the decision at issue or, in the alternative, refer the case back to the General Court for adjudication on the effects of the agreements concerned; and

– order the Commission to pay the costs of these proceedings and those at first instance.

55. The Commission contends that the Court of Justice should:

– dismiss the appeal; and

– order the appellants to pay the costs incurred by the Commission before both the General Court and the Court of Justice.

56. The United Kingdom supports that form of order sought by the Commission.

57. On 13 September 2021, the Court asked the parties to submit their comments on the judgment in *Generics (UK) and Others* and on the judgments of the group *Lundbeck* v *Commission*.[42]

58. On 20 and 21 October 2021, the parties to the nine appeals lodged against the eight judgments of the General Court concerning the decision at issue presented oral argument and answered the questions put to them by the Court of Justice at a joint hearing.

[42] Judgment in *Lundbeck* v *Commission*; judgments of 25 March 2021, *Sun Pharmaceutical Industries and Ranbaxy (UK)* v *Commission* (C-586/16 P, not published, EU:C:2021:241); *Generics (UK)* v *Commission* (C-588/16 P, not published, EU:C:2021:242); *Arrow Group and Arrow Generics* v *Commission* (C-601/16 P, not published, EU:C:2021:244); *Xellia Pharmaceuticals and Alpharma* v *Commission* (C-611/16 P, EU:C:2021:245); and *Merck* v *Commission* (C-614/16 P, not published, EU:C:2021:246).

IV. Assessment

59. Servier claims that the General Court was wrong to confirm the Commission's finding that the agreements concluded with Niche/Unichem, Matrix, Teva and Lupin constituted infringements of Article 101 TFEU and that the Commission could impose fines on Servier for those infringements.

60. Servier's arguments are structured into seven grounds, the first six of which concern the finding of infringements (A), whereas the seventh relates to the fines (B).

A. The finding of the infringement

1. Structure and admissibility of Servier's arguments

61. In the context of its first two grounds, Servier alleges, in general terms, that the General Court erred in law in the analysis of the anticompetitive object of the agreements (first ground) and of the potential competition between the parties (second ground).

62. Next, by its third to fifth grounds, Servier claims that such errors were made in relation to each of the agreements at issue, namely the Niche and Matrix agreements (third ground), the Teva agreement (fourth ground) and the Lupin agreement (fifth ground). In the third part of its fifth ground, Servier further submits that the General Court erred in determining the end date of the infringement constituted by the Lupin agreement.

63. By its sixth ground, Servier relies, in the alternative, on errors of law made by the General Court relating to the classification of the Niche and Matrix agreements as separate infringements.

64. First of all, the Commission contends that the first and second grounds are inadmissible in part in so far as, in those grounds, Servier criticises in an abstract, theoretical manner errors allegedly made by the General Court without referring to specific paragraphs of the judgment under appeal. In addition, Servier repeats arguments already raised before, and rejected by, the General Court without explaining what error the General Court made in rejecting them.

65. Those criticisms are justified as regards some of the arguments put forward by Servier, not just in the context of its first and second grounds but also in the context of its third, fourth and fifth grounds. By some of its arguments, Servier sets out general considerations and lists a large number of paragraphs of the judgment under appeal that are allegedly erroneous without substantiating the specific nature of the errors made by the General Court in those paragraphs. In several paragraphs of its appeal, Servier likewise simply repeats arguments already raised before the General Court and makes references to its pleadings and the many annexes thereto produced before the General Court.

66. However, as the Commission itself concedes, aside from those elaborations, which are indeed inadmissible, if the arguments raised by Servier in its various grounds are read in conjunction with one another, it is apparent that Servier links its general complaints regarding the General Court's examination of potential competition and the anticompetitive object of the agreements to the General Court's analysis of a number of aspects of its specific relationships and agreements with the generic companies concerned. In that context, Servier does identify the relevant grounds of the judgment and the errors allegedly made in those grounds.

67. Examination of that line of argument is indeed complicated by the presentation of the arguments at different points of the appeal. Thus, as regards potential competition, the second ground and the first parts of the third, fourth and fifth grounds must be read together. Similarly, in relation to the anticompetitive object of the agreements, reference must be made to the first ground and to the second parts of the third, fourth and fifth grounds. However, by adopting this approach, it is possible to identify Servier's specific criticisms regarding the judgment under appeal and, to that extent, Servier's arguments must in fact be found admissible. Accordingly, in what follows, when examining Servier's various grounds of appeal, I will examine those of its arguments which are admissible, it being noted that those arguments often lie in the grey area between the legal characterisation of facts and their assessment.

68. Having made those clarifications, consideration must first be given to Servier's arguments relating to potential competition (2), before moving on to its arguments concerning the anticompetitive object of the agreements (3), the end date of the infringement constituted by the Lupin agreement (4) and, finally, the classification of the Niche agreement and the Matrix agreement as separate infringements (5).

2. Potential competition (second ground and first parts of the third, fourth and fifth grounds)

69. Servier claims, first of all, that, when examining whether Servier and the generic companies were potential competitors at the time the agreements were concluded, the General Court made three errors. The General Court failed to take due account of the scope of the patents (a), wrongly concluded that preparatory steps taken by the generic companies attested to their genuine ability to enter the market (b) and reversed the burden of proof (c). Next, Servier seeks to address those errors relating to the assessment of its competitive relationship with each of the generic companies concerned (d).

(a) The scope of the patents in the analysis of potential competition

70. Servier submits from the outset that the General Court misconstrued the scope of the patents by disregarding patent-related obstacles in its analysis of the ability of the generic companies to enter the market swiftly. Even before a decision as to its validity and the infringing nature of a generic medicinal product, a patent that is perceived to be strong, just like interim injunctions prohibiting generic companies from entering the market, can affect such companies' ability to enter the market.

71. In that regard, it must be recalled that, in order to ascertain whether an undertaking that is party to an agreement constitutes a potential competitor on a particular market, it must be determined whether that market has barriers to entry that are insurmountable [43] and whether, in the absence of the agreement in question, there would have been real and concrete possibilities for the undertaking in question to enter that market and compete with the undertakings established in it. That assessment must be carried out having regard to the specific economic and legal context within which the agreement at issue was concluded. [44]

[43] Judgments of 20 January 2016, *Toshiba Corporation* v *Commission* (C-373/14 P, EU:C:2016:26, paragraphs 31, 32 and 34); in *Generics (UK) and Others* (paragraph 45); and in *Lundbeck* v *Commission* (paragraph 57); see also judgments of 28 June 2016, *Portugal Telecom* v *Commission* (T-208/13, EU:T:2016:368, paragraph 181), and *Telefónica* v *Commission* (T-216/13, EU:T:2016:369, paragraph 221).

[44] Judgments in *Generics (UK) and Others* (paragraphs 36, 37 and 39), and in *Lundbeck* v *Commission* (paragraph 55).

72. Therefore, when examining potential competition between a holder of patents protecting the manufacturing process of an active ingredient which has entered the public domain, on the one hand, and companies wanting to enter that market with generic medicines containing that active ingredient, on the other hand, which have concluded agreements such as those at issue in the present case, it is true that those patents, which undeniably form part of the economic and legal context concerned, cannot be disregarded. [45]

73. However, in relation to that context, account must also be taken of the fact that the presumption of the validity of a patent covering a manufacturing process for a medicinal product is not the same as a presumption of the illegality of generic versions of that medicinal product, which the patent holder considers infringe the relevant patent. Disputes on that point, as well as concerning the validity of the process patents and the infringing nature of the generic medicines, that is to say, whether they have been manufactured according to processes still protected by patents, are, on the contrary, commonplace, and even constitute evidence of the existence of a potential competitive relationship between the parties. [46]

74. It follows that, in such circumstances, the existence of a patent which protects the manufacturing process of an active ingredient that is in the public domain cannot, as such, be regarded as an insurmountable barrier to entry to the market in generic medicinal products containing that active ingredient. [47]

75. The examination of the existence of potential competition between the holder of such a patent and companies wanting to enter the market with generics, which have concluded agreements such as those at issue in the present case, must specifically focus on the question whether, notwithstanding the existence of the patent rights in question, those companies had real and concrete possibilities of entering the market when the agreements were concluded. The existence of such possibilities can be demonstrated by a body of consistent evidence that includes, inter alia, the preparatory steps taken by the generic companies and the perception of the situation by them and by the patent holder. [48]

76. However, contrary to Servier's claim, in the present case, the General Court duly carried out such an examination in paragraph 432 et seq. (regarding Niche/Unichem), paragraph 579 et seq. (regarding Teva) and paragraph 718 et seq. (regarding Lupin) of the judgment under appeal. The General Court closely examined whether those companies had real and concrete possibilities of entering the market despite the obstacles formed not only by Servier's patents but also by obstacles of a technical nature, related to the development of their products, and of a regulatory kind, connected with obtaining marketing authorisation for those products.

45 See judgment in *Generics (UK) and Others* (paragraph 50), and my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 83).

46 See judgment in *Generics (UK) and Others* (paragraphs 48, 49, 51 and 52), and my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 67 to 85).

47 Judgments in *Generics (UK) and Others* (paragraph 46), and in *Lundbeck* v *Commission* (paragraph 58).

48 Judgments in *Generics (UK) and Others* (paragraphs 42 to 44, 46, 50 and 55 to 57), and in *Lundbeck* v *Commission* (paragraphs 57, 74 to 76 and 88); see also my Opinions in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 83 and 86 to 88), and in *Lundbeck* v *Commission* (C-591/16 P, EU:C:2020:428, points 59, 78 and 79).

(b) Analysis of the real and concrete possibilities of generic companies entering the market despite the presence of obstacles

77. It is apparent from the foregoing that the General Court did not, as Servier claims, simply apply the test of a mere intention to enter the market purely hypothetically at an unspecified time. On the contrary, far from considering purely hypothetical possibilities of entering the market taken out of context, the General Court examined in detail whether the actual steps taken by the generic companies demonstrated that they had real and concrete possibilities of entering the market despite the existence of Servier's patents. As part of that examination, the General Court relied on objective factors, the substance of which Servier does not call into question, such as, inter alia, the investments already made, the steps taken in order to obtain marketing authorisation and the contracts concluded with commercial partners.

78. The various criticisms made by Servier in that connection do not reveal errors of law made by the General Court during that examination.

(1) The presence of an agreement excluding potential entrants from the market

79. To begin with, contrary to Servier's claim, the Court has explicitly acknowledged that, in a situation such as that at issue, the conclusion by operators of an agreement that has the object of excluding one of them from the market constitutes not only a strong indication but 'the strongest evidence' that a competitive relationship existed between them. A further such indication is the fact that a manufacturer of originator medicines makes transfers of value to a generic company in exchange for the postponement of the latter's market entry. That intention discloses the perception of the manufacturer of originator medicines of the risk that the generic company concerned presents to its commercial interests, that perception being relevant to the assessment of the existence of potential competition.[49]

80. This is only logical since those factors duly substantiate the fact that the generic company concerned has real and concrete possibilities of entering the market and is not faced with insurmountable barriers. It is in fact implausible that, if the generic company were unlikely to enter the market and did not therefore constitute a threat to the manufacturer of originator medicinal products, that manufacturer would conclude with it an agreement intended to exclude it from the market in return for a payment. Therefore, when assessing the existence of a potential competitive relationship between economic operators, such indications must be taken into account at the same stage of the examination and on the same basis as the generic companies' real and concrete possibilities of entering the market and the absence of insurmountable barriers. All those factors, taken together, in fact form a body of evidence upon which the Commission can rely to demonstrate the existence of potential competition between operators, one of whom is already established on a market which the others are preparing to enter.

81. The General Court's finding in paragraph 450 of the judgment under appeal that Servier's conclusion of the contested agreements with the generic companies was a relevant factor in assessing the potential competition between those operators is therefore not vitiated by any error.

[49] Judgments in *Generics (UK) and Others* (paragraphs 55 to 57); in *Lundbeck* v *Commission* (paragraphs 57 and 78); and of 20 January 2016, *Toshiba Corporation* v *Commission* (C-373/14 P, EU:C:2016:26, paragraphs 33 and 34).

(2) The preparatory steps taken by the generic companies and their intention to overcome obstacles

82. Next, contrary to Servier's allegations, the existence of real and concrete possibilities of entering the market is demonstrated by the fact that, when the agreements were concluded, the generic companies had taken sufficient preparatory steps to enable them to enter the market within such a period of time as would impose competitive pressure on the manufacturer of originator medicines. Such steps permit the conclusion that such companies have a firm intention and an inherent ability to enter the market in a medicinal product containing an active ingredient that is in the public domain, even where there are process patents held by the manufacturer of originator medicines. [50]

83. As the General Court correctly recalled in paragraphs 384, 444, 458 and 728 of the judgment under appeal, in that context, an operator's intention to enter the market is a factor capable of substantiating the finding that it has the capacity to do so. [51] Accordingly, Servier cannot claim that the General Court erred in its assessment of the generic companies' perception of patent risks. In addition, it is clear from those paragraphs and from paragraph 445 et seq. and paragraph 729 et seq. of the judgment under appeal that the General Court found that, even if the evidence furnished by the Commission with a view to demonstrating that the generic companies were confident of the favourable outcome of the patent litigation had to be set aside, the technical steps taken and litigation introduced by those companies were nevertheless testament to their intention to enter the market.

84. Contrary to Servier's submissions, the General Court was right to find that such steps show that those companies were by no means discouraged by the various patent-related, regulatory and technical obstacles to market entry and, on the contrary, firmly intended to overcome them.

(3) The presence of multiple obstacles

85. Servier claims, however, that the General Court erred in law by examining the patent-related, technical, regulatory and financial difficulties faced by the generic companies, and more specifically Niche and Matrix, separately and not taken as whole. Even if each difficulty had not been insurmountable individually, that did not mean that those companies had the ability to overcome all those difficulties.

86. In the Commission's view, that argument was not raised at first instance and is therefore inadmissible. However, in so far as that argument is an amplification of an argument already put forward before the General Court and criticises the latter's application of Article 101 TFEU, Servier may rely on it on appeal. [52]

87. Nevertheless, on its merits, that argument cannot succeed.

88. Thus, the General Court carried out, in paragraph 442 et seq. (regarding Niche/Unichem), paragraph 589 et seq. (regarding Teva) and paragraph 726 et seq. (regarding Lupin) of the judgment under appeal a careful and detailed examination of the various patent-related, technical, regulatory and financial obstacles which, according to Servier, those companies faced

50 Judgments in *Generics (UK) and Others* (paragraphs 43 and 44), and in *Lundbeck* v *Commission* (paragraph 57).

51 Judgment in *Lundbeck* v *Commission* (paragraphs 74 and 75).

52 Judgments of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 25), and of 10 April 2014, *Areva and Others* v *Commission* (C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 114).

when preparing to enter the market with their products. In the course of that examination, the General Court found that the constant steps taken by the companies to confront those difficulties demonstrated that the difficulties were not insurmountable obstacles rendering such market entry impossible.

89. In addition, in so doing, the General Court relied on a significant body of facts which Servier has not called into question.

90. In those circumstances, Servier cannot criticise the General Court for having failed also to examine the various obstacles as a whole.

91. As the Commission rightly claims, Servier does not explain why or how those obstacles, taken as a whole, could have proved insurmountable, whereas according to the General Court's analysis, which is free from errors of law, the generic companies were prepared to overcome them on an individual basis. Furthermore, nor does Servier explain what specifically such an examination should have involved or how it would have been different from the examination carried out by the General Court.

92. Moreover, the Commission is right when it claims that it specifically adopted a 'holistic' approach, demonstrating how the generic companies, and Niche in particular, had taken steps in relation to patents (through litigation), technical matters (resolution of technical obstacles), regulatory issues (exchanges with national authorities in order to obtain market authorisations) and financial questions (contact with the parent company seeking its support). Furthermore, the General Court not only examined the merits of the facts thus adduced by the Commission, but also analysed the interdependencies between the various issues, for example rejecting, in paragraph 494 of the judgment under appeal, Servier's claims that Niche's financial difficulties prevented it from contending with the risks of legal costs and damages inherent in patent litigation.

93. The complaint based on the lack of an overall analysis of the obstacles to market entry faced by the generic companies must therefore also be rejected.

(c) The allocation of the burden of proof

94. Servier claims that the General Court, having satisfied itself that steps had been taken to establish the generic companies' real and concrete possibilities of entering the market, required that Servier, in order to rebut that finding, adduce evidence that the market entry of those companies met with insurmountable obstacles. This is, however, akin to requiring negative proof (*probatio diabolica*). In that way, the General Court reversed the burden of proof and infringed the principle that the burden of proving the existence of generic companies' real and concrete possibilities of entering the market rests with the Commission.

95. This argument is entirely baseless.

96. As the General Court rightly acknowledged in paragraph 386 of the judgment under appeal, it is true that the burden of proving the existence of real and concrete possibilities of a competitor entering the market rests with the Commission. However, as the General Court also correctly found in that paragraph, if the Commission has gathered a body of consistent evidence attesting to steps being taken to produce and market the product at issue within a sufficiently short period of time to form a constraint on the operator established on the market, it has, in the absence of

evidence to the contrary concerning technical, regulatory, commercial or financial difficulties, sufficiently established the existence of such possibilities in the circumstances of the case in question.

97. Contrary to Servier's view, such allocation of the burden of proof is entirely consistent with the principles firmly established in the case-law of the Court in relation to infringements of EU competition law. It does follow from that case-law that it is for 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. [53] To that end, it must gather sufficiently precise and consistent evidence as a basis for the firm belief that the alleged infringement took place. [54] However, if the Commission gathers such evidence, it is for the operators concerned to plead that the evidence adduced by the Commission is insufficient to establish the constituent elements of the infringement. [55]

98. Accordingly, although – in accordance with those principles – the legal burden of proof falls either on the Commission or on the undertaking concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged. [56]

99. In the present case, it follows specifically from the examination of Servier's arguments carried out in points 70 to 93 and 108 to 117 of this Opinion that the General Court did not err when it confirmed that the Commission had established to the requisite legal standard that, when the agreements were concluded, the generic companies had real and concrete possibilities of entering the market. The General Court was therefore right to confirm that, in those circumstances, it fell to Servier to adduce evidence capable of invalidating that finding. [57]

100. On closer examination, the argument put forward by Servier here stems primarily from a confusion between the concepts of actual and potential competition. Thus, Servier misunderstands the fact that, in order to establish the existence of potential competition, the Commission need only demonstrate that the generic companies had real and concrete possibilities of entering the market within such a period of time as would impose competitive pressure on the manufacturer of originator medicines. There is, however, no requirement whatsoever that it also demonstrate with certainty that the steps taken by the generic companies will actually be successful and that those companies will in fact enter the market concerned. [58]

53 Judgments of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraph 58), and of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 71).

54 See, to that effect, judgments of 28 March 1984, *Compagnie royale asturienne des mines and Rheinzink* v *Commission* (29/83 and 30/83, EU:C:1984:130, paragraph 20), and of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission* (C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 127).

55 See, to that effect, judgments of 6 January 2004, *BAI and Commission* v *Bayer* (C-2/01 P and C-3/01 P, EU:C:2004:2, paragraph 63); 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, paragraphs 135 to 140); and of 27 January 2021, *The Goldman Sachs Group* v *Commission* (C-595/18 P, EU:C:2021:73, paragraph 92). See also judgment of 16 June 2015, *FSL and Others* v *Commission* (T-655/11, EU:T:2015:383, paragraph 181 and the case-law cited).

56 Judgments of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 83); of 1 July 2010, *Knauf Gips* v *Commission* (C-407/08 P, EU:C:2010:389, paragraph 80); and of 18 January 2017, *Toshiba* v *Commission* (C-623/15 P, not published, EU:C:2017:21, paragraph 52).

57 Judgment in *Lundbeck* v *Commission* (paragraphs 78 and 79).

58 Judgments in *Generics (UK) and Others* (paragraph 38), and in *Lundbeck* v *Commission* (paragraphs 63, 83 and 84).

101. In the same vein, contrary to Servier's claim, the Commission is not required to demonstrate that the steps taken by a generic company to enter the market will necessarily succeed 'in the short term'. What matters is that those steps attest to the possibility of entering the market within such a time period as would impose competitive pressure. Whilst such steps continue to be taken, for example in exchanges with the regulatory authority to obtain marketing authorisation or efforts made to overcome technical difficulties relating to aspects of the generic product, they attest to the possibility of entry within such a period of time as would exert competitive pressure. This is a fortiori the case where the existence of the steps is confronted, when examining the body of evidence indicating that potential competition exists, with evidence pointing to the perception by the manufacturer of the originator medicinal product of a threat posed by the generic companies, such as the fact that that manufacturer seeks to conclude agreements with them to postpone their market entry. [59]

102. Accordingly, Servier cannot claim that the General Court erred when it endorsed, in paragraph 481 of the judgment under appeal, the Commission's refusal to grant the request made by Servier for the correspondence between Niche or its partners and the national regulatory authorities concerned to be produced. It is wrong to claim that the Commission should have assessed Niche's chances of successfully overcoming the regulatory obstacles associated with obtaining marketing authorisation by putting questions to those authorities.

103. The Commission is not required to assess the chances of success or the probable outcome of a marketing authorisation procedure initiated before the national authorities by a generic company. It is sufficient for it to note concrete steps taken by such a company (submission of an application for marketing authorisation, correspondence with the regulatory authority concerned) to obtain marketing authorisation within such a period of time as would impose competitive pressure on the manufacturer of originator medicines. [60] In that connection, a delay in obtaining marketing authorisation by no means demonstrates that the generic company is no longer a source of potential competition, particularly if that company takes, as did the companies concerned in the present case, steps to resolve the difficulties which caused the delay (see point 109 of this Opinion).

104. In that context, the argument based on the fact that the generic companies, and not Servier, are best placed to report on any difficulties which they faced, in particular in their applications for marketing authorisations, is likewise incapable of establishing a reversal of the burden of proof to Servier's detriment. The argument to that effect is also based on the incorrect premiss that, in order to demonstrate that potential competition exists, it must be demonstrated with certainty that the steps taken by the generic companies would have been successful, and that it is sufficient to point to difficulties or delays in that context in order to invalidate the finding that potential competition exists.

105. As I have just shown, and contrary to Servier's claim, as long as the generic companies continue their approaches to the regulatory authorities and do not abandon them because of any difficulties, they continue to prove their firm intention and their inherent ability to enter the market. Therefore, the correspondence between the generic companies and the regulatory authorities, assuming it were to point to any difficulties, could not have invalidated the finding that potential competition existed.

59 See points 75 and 79 to 81 of this Opinion.

60 Judgment in *Generics (UK) and Others* (paragraph 44).

106. Moreover, and in any event, it follows from paragraph 481 of the judgment under appeal that, during the administrative procedure before the Commission, Servier had access to the table summarising the content of those exchanges produced by Niche, from which it was apparent that the problems identified by the national regulatory authorities did not prevent Niche from providing responses or the marketing authorisation procedure from continuing.

107. Therefore, the argument alleging a reversal of the burden of proof and the infringement of the right to good administration must also be rejected.

(d) The additional arguments concerning each of the generic companies involved

108. In the light of the foregoing considerations, the additional arguments raised by Servier concerning the status of each of the generic companies involved as a potential competitor similarly do not indicate that the General Court was wrong to find that, when the agreements were concluded, those companies had taken sufficient preparatory steps to enable them to enter the market within such a period of time as would impose competitive pressure on Servier.

(1) Niche/Unichem and Matrix

109. First, contrary to Servier's claim, the General Court rightly considered that the steps taken by Niche and Matrix to overcome technical difficulties by making changes to Matrix's process and the form of its product, to which reference is made in paragraphs 446 and 447 of the judgment under appeal, far from demonstrating that Servier's patents were insurmountable obstacles, attested, on the contrary, to Niche's and Matrix's firm intention and inherent ability to enter the market despite the existence of those patents. The same goes for the advanced stage of the efforts made to develop the generic medicinal product and the active participation in the procedure for the grant of marketing authorisation (paragraphs 459 to 480 of the judgment under appeal). In that context, delays in the marketing authorisation procedure in no way invalidate Niche's and Matrix's status as potential competitors since, as I have just observed in points 100 to 103 of this Opinion, there is no requirement to demonstrate that the steps to obtain marketing authorisation will be finalised in due course or be successful in order to classify companies taking such steps as potential competitors.

110. Second, contrary to Servier's claim, the General Court's considerations in paragraph 446 of the judgment under appeal do not point to any distortion. Thus, the steps taken by Niche mentioned in that paragraph, the substance of which is not questioned by Servier, attest to Niche's determination to overcome the obstacles associated with Servier's patents and to 'open the door' to market entry by obtaining a declaration of non-infringement, an annulment or an invalidation of the 947 patent. Contrary to what Servier alleges, the General Court did not address in that paragraph the question whether Niche was acting 'in good faith'. Nor did the General Court consider the evidence adduced by Servier in that regard (Niche's refusal to provide a detailed description of its manufacturing process, to allow its factories to be inspected or to provide a sample of its product). Regardless of the fact that such matters cannot be examined for the first time at the appeal stage, it must be observed in any event that they do not call into question the findings made by the General Court in that paragraph or indicate any distortion.

(2) Teva

111. First of all, Servier's criticism that the General Court wrongly imposed on it the burden of demonstrating that Teva's entry to the market met with insurmountable obstacles in paragraph 589 et seq. of the judgment under appeal cannot be accepted. As in the case of the other generic companies, the General Court in fact found, following a detailed examination of the evidence produced by Servier, that that evidence was incapable of calling into question the Commission's finding that the steps taken by Teva attested to its intention and ability to enter the market.

112. In addition, nor did the General Court err, as Servier claims, in finding, in paragraph 590 et seq. of the judgment under appeal, that the risk of an interim injunction had not affected Teva's real and concrete possibilities of entering the market, since the General Court pointed to evidence attesting to Teva's willingness to take on that risk. Moreover, Servier simply makes general reference to its arguments before the General Court in this regard, without demonstrating an error on the part of the General Court. In any event, as the Court of Justice has held, the existence of injunctions by no means precludes the existence of potential competition, since injunctions are interim measures that in no way prejudge the merits of an infringement action.[61]

113. Similarly, contrary to Servier's claim, the General Court's reasoning set out in paragraphs 601 to 603 of the judgment under appeal, namely that delays in marketing authorisation procedures could not suffice to rule Teva out as a potential competitor whilst it was making efforts to overcome the difficulties encountered, does not indicate any error for the reasons already stated in points 100 to 103 and 109 of this Opinion. Furthermore, Servier merely refers to its application and the annexes thereto at first instance to claim that the evidence adduced by it before the General Court established that those difficulties affected Teva's real and concrete possibilities of entering the market, without providing any explanations in relation to that evidence or demonstrating an error by the General Court in the assessment of the evidence.

114. Next, as for the distortions allegedly committed by the General Court when examining the technical problems encountered by Teva's product, no such distortions are apparent in the light of either Servier's claims or the paragraphs of the judgment referred to in those claims. Thus, first, Servier submits that, in paragraphs 586 and 609 to 612 of the judgment under appeal, the General Court distorted the evidence showing that Teva did not have viable stocks of perindopril, without pointing to any evidence that has allegedly been distorted. Second, Servier alleges that the General Court distorted the email sent by Teva to Hetero on 15 October 2007, that is to say, after the conclusion of the Teva agreement, an email in which Teva stated that it was not going to launch its product. However, it is specifically that resolution not to do so that was provided for in that agreement.[62] Therefore, the General Court's analysis that the email in question was intended to implement the agreement does not appear to be vitiated by any distortion.

61 Judgment in *Generics (UK) and Others* (paragraph 53).

62 See point 37 of this Opinion.

115. Lastly, contrary to Servier's criticisms, in paragraph 610 of the judgment under appeal the General Court did not refuse to take account of evidence postdating the agreement, but rather simply considered, rightly, that an exchange reflecting Teva's perception of the competitive situation following the conclusion of the agreement cannot establish that Teva had abandoned the marketing of its product when that agreement was concluded. [63]

(3) Lupin

116. As regards the assessment of Lupin's status as a potential competitor, Servier refers in the main merely to its general complaints regarding potential competition, which have already been examined in points 70 to 84 of this Opinion.

117. Servier otherwise argues that the General Court was wrong to consider that Lupin had real and concrete possibilities of marketing its product throughout the European Union, since it was present only in the United Kingdom and the establishment of partnerships remained theoretical and speculative. However, the General Court noted negotiations between Lupin and potential commercial partners in that regard, which constituted concrete steps attesting to Lupin's intention and ability to enter the market. [64] In that context, paragraph 745 of the judgment under appeal does not contain any distortion of Servier's argument alleging that Lupin met with insurmountable commercial obstacles, because this is precisely what Servier continues to allege in the context of this appeal and what the General Court examined and refuted in paragraph 745 et seq. of the judgment under appeal.

(e) Conclusion

118. It follows from the foregoing considerations that Servier's arguments relating to potential competition, which it raises in the context of its second ground and the first parts of its third, fourth and fifth grounds, must be rejected in their entirety.

3. The classification of the agreements as restrictions of competition by object (first ground and second parts of the third, fourth and fifth grounds)

119. In the context of its first ground and the second parts of its third, fourth and fifth grounds, Servier submits that the General Court erred endorsing the Commission's finding that the contested agreements constituted restrictions of competition by object.

120. In that regard, first, the General Court failed to take due account of the lack of experience with agreements such as those at issue and of the fact that, for that reason, a restriction of competition was not easily identifiable (a). Second, it was impossible to conclude that the agreements had an anticompetitive object given their positive, or at the very least ambivalent, effects (b). Third and finally, the General Court erred in focusing overly on the payments or other inducements given by Servier to the generic companies (c).

63 See, to that effect, judgment in *Lundbeck* v *Commission* (paragraph 67 et seq.).

64 See point 82 of this Opinion and the case-law cited.

(a) Experience and the 'easily identifiable' nature of a restriction of competition

121. First of all, Servier claims, referring in particular to the Opinion of Advocate General Wahl in *CB* v *Commission*,[65] that the judgment under appeal is vitiated by a first series of errors in that it accepts the classification of the contested agreements as restrictions by object, notwithstanding the lack of experience acquired and of economics, and even though the alleged restriction of competition was not easily identifiable.

122. Thus, the novelty of the questions raised by the settlement agreements is demonstrated by multiple factors, such as the reference for a preliminary ruling in the case of *Generics (UK) and Others*. Similarly, the fact that it took the Commission several hundreds of pages to articulate its reasoning is proof in particular of the fact that the settlement agreements are difficult to identify as restrictions of competition. The General Court itself acknowledged in paragraph 1666 of the judgment under appeal that the unlawful nature of the agreements at issue might not have been evident to an outside observer such as the Commission or specialist lawyers.

123. That line of argument cannot however succeed since, as the Court has already explicitly declared, there is no requirement whatsoever that the same type of agreements has already been censured by the Commission in order for them to be regarded as restrictions of competition by object, even if they occur in a specific context such as that of intellectual property rights.[66] Case-law does not require that an agreement be prima facie or undoubtedly sufficiently harmful to competition, without a detailed examination of its content, its purpose and the legal and economic context in which it occurs, in order to be regarded as a restriction of competition by object for the purpose of Article 101 TFEU.[67]

(b) The payments and alleged 'positive' or 'ambivalent' effects of the agreements

124. By its next series of arguments, Servier claims, first, that the General Court erred in classifying the contested agreements as restrictions of competition by object even though those agreements had positive, or at the very least ambivalent, effects on competition.

125. Second, Servier submits that the General Court wrongly concluded that the agreements constituted such restrictions by object because they provided for payments or other inducements made to the generic companies in exchange for non-challenge clauses covering Servier's patents and non-marketing clauses in respect of those companies' products. In so doing, the General Court disregarded the patent-related context of the agreements and confused the concepts of a commercial limitation and a restriction of competition.

126. It should be recalled that it follows from the judgments in *Generics (UK) and Others*[68] and *Lundbeck* v *Commission*[69] that settlement agreements such as those concerned in the present case constitute restrictions of competition by object

– if it is clear from all the information available that the net gain from the transfer of value by the manufacturer of originator medicines in favour of the manufacturer of generic medicines can

65 C-67/13 P, EU:C:2014:1958, point 56.

66 Judgment in *Lundbeck* v *Commission* (paragraph 129 et seq.).

67 See my Opinion in *Lundbeck* v *Commission* (C-591/16 P, EU:C:2020:428, points 156 and 157 and the case-law cited).

68 Judgment in *Generics (UK) and Others* (paragraph 111).

69 Judgment in *Lundbeck* v *Commission* (paragraphs 114, 115 and 137).

have no other explanation than the commercial interest of the parties to the agreement not to engage in competition on the merits;

– unless the settlement agreement concerned is accompanied by proven procompetitive effects capable of giving rise to a reasonable doubt that it causes a sufficient degree of harm to competition.

127. In the light of those principles, Servier's arguments relating to the payments (1) and to the alleged 'positive' or 'ambivalent' effects of the contested agreements (2) cannot succeed.

(1) The payments

128. It follows that Servier's argument that a transfer of value by the originator manufacturer in favour of a generic company under a patent dispute settlement agreement cannot be decisive in classifying such an agreement as a restriction of competition by object must be rejected.

129. The patent-related background to such agreements and the public interest in the extrajudicial settlement of patent disputes in no way alter the fact that those agreements are anticompetitive if the transfers of value from the manufacturer of originator medicines to the generic company can have no other explanation than the commercial interest of those operators in not competing with one another. In that context, there is no requirement, as Servier claims, that the amount of those transfers of value equates to the expected profits of the generic companies. [70]

130. Contrary to Servier's claim, in the present case, the General Court did therefore apply the correct test to determine whether the contested agreements had an anticompetitive object. The General Court thus explained, in essence, in paragraphs 263 to 273, and in particular in paragraphs 265 and 272, of the judgment under appeal that a generic company had to be regarded as having been induced by a payment to agree to the non-marketing and non-challenge clauses if the payment that it receives is not justified by a quid pro quo other than that of it refraining from competing with the patent holder.

131. In the latter respect, the General Court stated, in paragraphs 277 to 280 of the judgment under appeal, that a 'reverse' payment made by the originator manufacturer to the generic company could be regarded as justified if it covers the costs inherent in the settlement of the dispute, for example litigation expenses incurred by the generic company in the context of the patent dispute, provided that the amounts of those expenses are established by the parties and not excessive.

132. The General Court also considered, in paragraphs 798 to 810, and in particular paragraphs 804 and 806, of the judgment under appeal, the linking of a patent dispute settlement agreement containing non-marketing and non-challenge clauses to a commercial agreement entailing the transfer of an asset representing an economic value from the generic company to the originator manufacturer. In the present case, the Lupin agreement took the form of such a linked arrangement. [71]

70 Judgments in *Generics (UK) and Others* (paragraph 94), and in *Lundbeck* v *Commission* (paragraph 115).

71 See points 41 and 42 of this Opinion.

133. The General Court explained that, given such a contractual arrangement, it is necessary to consider whether the payment made by the originator manufacturer to the generic company exceeds the normal economic value of the asset traded, that is to say, the value which that asset would have represented in the context of a transaction carried out at arm's length. In the General Court's view, an unjustified payment to the generic company can be found to exist if the amount of the payment made by the originator manufacturer in its favour exceeds the normal economic value of the asset traded. Such a payment may be regarded as an inducement to agree to the obligation not to compete under the settlement agreement linked to the commercial agreement if the unjustified part of the payment is significant enough to constitute an inducement.

134. The analytical framework thus established by the General Court is perfectly suited to the analysis of agreements such as those at issue here. That framework corresponds, in essence, to that confirmed by the Court of Justice in the judgments in *Generics (UK) and Others* and *Lundbeck* v *Commission*. The Court of Justice also stated in those judgments that, in order to assess whether transfers of value contained in a settlement agreement, such as those at issue here, can have no other explanation than the commercial interest of the parties to that agreement not to engage in competition, it is important to take into consideration all the transfers of value made between the parties, whether they were pecuniary or non-pecuniary. According to the Court, in so doing, it is necessary to determine whether the net gain arising from the transfers of value by the manufacturer of originator medicines in favour of the generic company may be justified by the existence of any quid pro quo from that company. [72]

135. It follows that the complaint alleging that the General Court analysed the payments incorrectly must be rejected.

(2) The alleged 'positive' or 'ambivalent' effects of the agreements

136. As regards the alleged 'positive' or 'ambivalent' effects of the contested agreements, Servier claims, in the first place, that the harmful nature of 'pay for delay' agreements lies in the delay in market entry. However, in the present case, there was no delay in entry to the market following the invalidation of the 947 patent by the EPO.

137. Since the proceedings challenging the 947 patent before the EPO were continued, despite the agreements, by opponents who did not conclude an agreement with Servier prohibiting such continuation, the withdrawal of the generic companies which concluded such agreements could not have had the object of preventing or delaying the challenging of the patent.

138. However, as the General Court rightly noted, in particular in paragraph 644 of the judgment under appeal, that argument is based on circumstances which were hypothetical and not foreseeable at the time of the conclusion of the agreements and which cannot be taken into account in assessing whether an agreement is restrictive of competition by object.

139. In addition, as the Commission rightly observes, that argument cannot succeed since it in fact confuses the inherent harmfulness of a market exclusion agreement in exchange for payment with the possibility of such an agreement not producing significant actual effects on competition at a later stage, on account of circumstances outside the control of the parties, for example if the patent is annulled following an action brought by a third party.

[72] Judgments in *Generics (UK) and Others* (paragraphs 90 to 92), and in *Lundbeck* v *Commission* (paragraphs 115 and 134).

140. As I explained in my Opinion in *Generics (UK) and Others*,[73] in order to analyse the anticompetitive object of a patent dispute settlement agreement, it is important to examine whether, by concluding that agreement, the parties substituted practical cooperation between them for the risks of competition. If that is the case, the situation created by the agreements is not the result of normal competition, but the result of a concerted practice by which the parties eliminated the risks of such competition. The question whether the patent-related situation would necessarily have been different without the agreement on account of a subsequent change in that situation is thus not a decisive factor in assessing the ability of the agreement to restrict competition.

141. In assessing that ability to restrict competition, it is immaterial whether the generic manufacturers could or could not have entered the market in the absence of the agreement on account of a change in the patent situation (which, by definition, was unforeseen when the agreement was concluded). It is, however, crucial to ascertain whether the non-entry of generics to the market is the result of normal competition or an anticompetitive concerted practice.[74]

142. In the second place, Servier claims that, in particular, the Teva and Lupin agreements had procompetitive effects by virtue of some of their clauses. Those claims must be analysed, as the General Court did, having regard to the specific clauses of the agreements concerned.

(c) Examination of the object of restricting competition of the contested agreements

143. In the light of the foregoing considerations, it is now necessary to examine the arguments by which Servier seeks to demonstrate that the General Court erred in classifying the agreements concluded with Niche/Unichem and Matrix (1), Teva (2) and Lupin (3) as infringements of competition by object.

(1) The Niche and Matrix agreements

144. Servier claims that the General Court erred in holding that the payment made by Servier to Niche and Matrix could have no other explanation than their interest in not competing with each other and that it was the real reason for their settlement agreements. More specifically, Servier argues that the General Court erred in not accepting that its payment was the quid pro quo for costs incurred by Niche and Matrix, such as, inter alia, compensation that they risked having to pay to third-party distributors.

145. As I have set out in point 34 above, under the Niche agreement, Servier paid GBP 11.8 million to Niche/Unichem. Under the Matrix agreement, it paid GBP 11.8 million to Matrix. In addition, under the agreement concluded on the same day between Niche and Biogaran, Biogaran paid GBP 2.5 million to Niche.

146. Turning, first of all, to the agreement concluded by Servier with Niche, the General Court examined, in paragraph 527 et seq. of the judgment under appeal, whether the payment made by Servier to Niche was justified by something other than the inducement for Niche to agree to the

[73] C-307/18, EU:C:2020:28, point 126 et seq.

[74] See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 124 to 128 and 176).

non-marketing and non-challenge clauses contained in the agreement. In so doing, the General Court analysed whether the amount paid by Servier to Niche could be explained by costs inherent in the settlement.

147. In that regard, the General Court considered, first, in paragraphs 536 and 537 of the judgment under appeal, that the costs claimed in that respect by Niche and Servier were first and foremost the costs of developing Niche's perindopril and the compensation payable to its customers. The General Court took the view that such costs were not inherent in the settlement of the patent dispute. Second, the General Court found, in paragraph 538 of the judgment under appeal, that the legal costs claimed by Niche and Servier could not be inherent in the settlement agreement because they related to a period prior to the litigation between Niche and Servier.

148. In paragraph 539 of the judgment under appeal, the General Court stated, in addition, that even if the alleged amounts of GBP 1.1 million in legal costs and costs of developing the product and compensating clients, valued respectively at GBP 1.2 million and GBP 1.3 million by the Commission in recital 1336 of the decision at issue, were to be regarded as justified, their total amount of GBP 3.6 million would still be significantly lower than the sum of GBP 11.8 million paid by Servier to Niche.

149. With regard, next, to the agreement between Niche and Biogaran, the General Court observed, in paragraphs 542 to 544 of the judgment under appeal, that the payment made by Biogaran to Niche had constituted an additional inducement for the latter to agree to the restrictive clauses in the Niche agreement.

150. Finally, as for the Matrix agreement, the General Court found, in paragraph 546 of the judgment under appeal, that the parties had not adduced any evidence capable of justifying the amount of GBP 11.8 million paid by Servier to Matrix.

151. First of all, it must be observed that, in the context of this appeal, Servier does not rely on any evidence capable of demonstrating that the General Court's conclusion set out in the previous point in relation to the Matrix agreement is incorrect. Servier simply relies, in general and vague terms, on Matrix's risk of being liable to pay compensation. In such circumstances, its complaint concerning the allegedly incorrect classification of the payment made by it to Matrix as an inducement for the latter to agree to the commitment not to compete must be rejected.

152. Next, similarly, Servier does not rely on any evidence capable of calling into question the General Court's conclusion, set out in point 149 above, that Biogaran's payment to Niche constituted an additional inducement for the latter to agree to its commitment not to compete.

153. With regard, finally, to the payment of GBP 11.8 million made by Servier to Niche, none of the evidence produced by Servier in the context of this appeal is capable of demonstrating that the General Court's conclusion that that payment was justified solely by Niche's commitment not to compete is vitiated by errors.

154. Thus, the argument that the General Court erred in considering that the costs of developing Niche's perindopril and the compensation payable to third parties could justify Servier's payment is ineffective. As I have stated in point 148 above, the General Court found that even if those costs (and the alleged legal costs) were to be deducted from the sum of GBP 11.8 million paid by Servier, there would still be an amount of GBP 8.2 million for which there is no explanation other than the commitment made by Niche not to compete.

155. In that context, Servier's argument that paragraph 537 of the judgment under appeal is vitiated by a failure to state reasons and a distortion of the facts in that it rejects the higher amounts of estimates of potential compensation alleged by Servier must be rejected. The General Court adequately explained that it did not accept those amounts because they were mere claims. Similarly, it is unclear how the General Court distorted the letter to which Servier refers, according to which one undertaking was seeking an amount of compensation far greater than the amount accepted by the Commission, even though Servier itself acknowledges that that was simply a claim.

156. For the sake of completeness, I note that the General Court's finding in paragraphs 280, 531 and 537 of the judgment under appeal that the costs of developing Niche's product and any compensation payable to third parties cannot be regarded as being inherent in the settlement, and therefore their reimbursement by Servier to Niche cannot be justified, does not appear vitiated by any error.

157. As Servier itself acknowledges, the compensation paid to third parties because of the non-supply of Niche's product could have been owed even without the settlement with Servier. However, it appears implausible that Servier would have agreed to pay those costs to Niche if the latter had decided, independently and without being induced to do so by Servier, not to market that product because it was convinced of the strength of Servier's patents.

158. It is true, as Servier states, that a generic company which decides, following an independent assessment of the patent risk which it faces, to settle a pending patent dispute may wish to guard itself against the financial consequences of such a settlement. However, in such a situation, there is no reasonable economic reason that would prompt the originator manufacturer to agree to compensate that company for those consequences that are the result of its own choice, unless it is to provide the company with an inducement to conclude the settlement for which there is no quid pro quo other than the commitment not to engage in competition.

159. It is important to distinguish what gave rise to Niche's obligation to compensate third parties from what prompted Servier to reimburse those costs incurred by Niche. It is indeed true that *Niche's obligation to compensate third parties* for a failure to supply could arise if Niche were to decide independently not to supply them, and could therefore be justified other than by the intention of Niche and Servier not to compete with one another. However, *the fact that Servier reimburses those costs to Niche* can have no 'justification' other than the commitment not to compete, since those costs are not inherent in the settlement and do not correspond to any other quid pro quo offered by Niche to Servier. The same reasoning holds true vis-à-vis the costs of developing Niche's product.

160. Accordingly, those product development costs and costs of compensating third parties in case of non-supply are not a priori costs which, if reimbursed by the originator manufacturer, can be regarded as justified under a settlement such as that at issue. [75]

161. Finally, Servier's argument that the General Court should have assessed whether the amount paid corresponded to more than 10 years' sales and more than 20 years' gross profit must be rejected for the reason already set out in point 129 above. Similarly, the argument that Niche

[75] With regard to reimbursements of costs which may be justified, see judgment in *Generics (UK) and Others* (paragraphs 84 to 92).

accepted the payment because of the difficulties it was facing cannot succeed. An agreement does not escape the application of Article 101 TFEU because its conclusion is a rational and profitable solution for the parties economically and commercially.[76]

162. It follows that Servier's arguments relating to the Niche and Matrix agreements must be rejected.

(2) The Teva agreement

163. As stated in points 36 to 38 above, under the Teva agreement, Teva was not to challenge Servier's patents before the UK courts or to sell its own perindopril in that country, in return for a payment of GBP 5 million by Servier. At a later date, Servier could opt either to supply Teva with generic perindopril for distribution by the latter, or pay it liquidated damages in the case of non-supply. Teva did not have the option of terminating the agreement in the case of non-supply. Servier subsequently exercised that non-supply option and paid Teva liquidated damages of GBP 500 000 per month for a certain period; the final amount of those damages came to GBP 5.5 million. In total, Servier therefore paid GBP 10.5 million to Teva under the Teva agreement.

164. In paragraphs 646 to 698 of the judgment under appeal, the General Court took the view that Servier's arguments disputing the competition-restricting nature of the Teva agreement could not be accepted.

165. Servier now claims that the General Court misconstrued the objectives and ambivalent effects of that agreement (i) and was wrong to find that the payments made by Servier to Teva constituted reverse payments (ii).

(i) The objectives and alleged 'ambivalent' effects of the Teva agreement

166. Servier claims that the General Court misconstrued the primary objective of the Teva agreement, which was to conclude a supply agreement enabling Teva to enter the market with the first wave of generics and a more commercially appealing product, and allowing Servier to benefit from a leading distributor in the United Kingdom. In those circumstances, the clauses of the settlement could not be regarded as harmful to competition.

167. As the Commission rightly criticises, by its arguments Servier is attempting to 'compartmentalise' the different clauses of the Teva agreement to make them appear, taken separately, as neutral from the point of view of competition. However, Servier does not produce any evidence capable of calling into question the findings by which the General Court established that, viewed as a whole, that agreement did indeed have the object of obtaining a commitment from Teva not to compete, a commitment to Servier's advantage, in return for payment, whereas Servier's possible supply of perindopril to Teva was not only hypothetical but nor was it capable of giving rise to procompetitive effects.

168. It must be observed that the evidence produced by Servier in the context of these appeal proceedings, in so far as it can be understood as intended to criticise the General Court's legal characterisation of the facts and not just to obtain a new assessment of those facts, is incapable of showing that those findings by the General Court are incorrect.

[76] See judgment of 8 September 2016, *Lundbeck* v *Commission* (T-472/13, EU:T:2016:449, paragraph 380 and the case-law cited).

– *The alleged 'ambivalent' or 'procompetitive' effects*

169. In paragraphs 667 to 671 of the judgment under appeal, the General Court found that the alleged potential effects of the Teva agreement cannot be regarded as non-restrictive of competition, or indeed procompetitive. Servier had claimed in that regard that the EPO's future decision as to the validity of the 947 patent was, by definition, unknown to the parties. In its view, the Teva agreement had procompetitive effects by allowing Teva to enter the market whatever the conclusion reached by the decision. However, the General Court found that, regardless of the outcome of the EPO's subsequent decision, which was unforeseeable at the time of the agreement, none of the options provided for in the Teva agreement was capable of leading to a situation that could be categorised as 'procompetitive'. That agreement would still have prevented Teva from entering the market with its product or a third party's product, and Teva's entry with the product supplied by Servier would not have created a competitive situation between Teva and Servier.

170. Contrary to Servier's claim, that assessment by the General Court is not vitiated by errors. The Court of Justice has already had occasion to find that a controlled entry of a generic company to the market with a limited quantity of products, resulting from a concerted practice with the originator manufacturer organised under an agreement preventing that company's independent market entry, cannot be regarded as procompetitive.[77] Contrary to what Servier alleges, if, in such a situation, the quantities of products to be supplied by the originator manufacturer to the generic company are limited (as was the case here[78]), that company has no interest in competing on price.[79]

171. In addition, the Court has already found that the parties to an agreement, such as that at issue in the present case, cannot rely on any future developments in terms of patent law, which are unknown when the agreement is concluded, which would determine the harmfulness of that agreement in terms of competition law.[80] As I have observed in points 139 to 141 above, it is important to examine whether, by concluding that agreement, the parties substituted practical cooperation between them for the risks of competition, whereas the question whether the situation in relation to patents would necessarily have been different in the absence of the agreement is not crucial.[81]

– *The alleged non-harmful nature of the clauses of the Teva agreement*

172. With regard to the non-challenge clause, the harmful nature of which is disputed by Servier, the General Court noted, in paragraphs 646 to 653 of the judgment under appeal, that the fact that that clause did not prevent Teva from continuing the proceedings before the EPO did not mean that it was non-restrictive. That finding is correct since that clause prevented Teva from arguing before the UK courts that its product was non-infringing and prevented its reliance before those courts, as an incidental plea, on the non-validity of Servier's patents. In addition, for the reason set out in the previous point, any future developments in terms of patents, such as, in the present case, those that may result from the continuation of the proceedings before the EPO, are not decisive in the analysis of whether an agreement has the object of restricting competition.

77 Judgment in *Generics (UK) and Others* (paragraphs 107 to 110); see also my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 168 to 172).

78 See paragraph 655 of the judgment under appeal and recital 1614 of the decision at issue.

79 See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 169).

80 See, to that effect, judgment in *Generics (UK) and Others* (paragraphs 119 and 120).

81 See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 124 to 128 and 176).

173. As for the exclusive purchase and non-marketing clauses, the harmful nature of which is also questioned by Servier, the General Court was able to find, without committing any errors, in paragraphs 654 to 666 of the judgment under appeal, that those clauses had been correctly analysed by the Commission as one single obligation not to compete. In accordance with those clauses, Servier could opt, entirely at its discretion, either to supply perindopril to Teva or to pay it liquidated damages in case of failure to supply. By virtue of the exclusive purchase obligation, Teva could not purchase from other suppliers even in the event of non-supply by Servier.

174. As the Commission rightly states, the result of those provisions was that Servier held 'the key to open the door to the market for Teva'. However, it was clear that Servier had no intention to do so and that it would supply its product to Teva for distribution only if a third party were successful in opening that door by entering the market. In that case, Servier wanted to safeguard its market shares via the distribution of its own generic product by the 'friendly' generic company Teva. [82]

175. Contrary to Servier's claims, the General Court did not err in holding, in paragraph 666 of the judgment under appeal, that the fact that the Teva agreement related only to perindopril erbumine did not mean that that agreement was not anticompetitive. The General Court rightly considered that, even if Teva could have entered the market with perindopril composed of a salt other than erbumine during the period covered by the agreement, the fact remains that that agreement prevented it from competing with Servier using perindopril erbumine and restricted competition in that respect. In addition, the product that Teva was considering marketing when the agreement was concluded was specifically perindopril erbumine, as it developed an alternative salt only later.

(ii) The payments

176. With regard to the payments made under the Teva agreement, Servier claims, first, that the General Court erred in the classification of the liquidated damages which it paid to Teva.

177. In paragraphs 684 to 686 of the judgment under appeal, the General Court found that the liquidated damages paid by Servier to Teva on account of non-supply, the final amount of which came to GBP 5.5 million, represented a payment made to Teva in exchange for its commitment not to compete with Servier. That payment was the quid pro quo for Teva not entering the market, as provided for in the exclusive purchase and non-termination clauses.

178. Servier does not put forward any evidence capable of invalidating those considerations, as it does not point to any other quid pro quo which it received from Teva in exchange for that payment. In those circumstances, the General Court was justified in considering that the only explanation for that payment was the commercial interest of the parties to the agreement not to engage in competition on the merits. The fact that that payment took the form of damages for non-supply payable only in the event of non-supply is immaterial in that regard.

179. Second, Servier submits that the General Court was wrong to classify the initial payment of GBP 5 million made by Servier to Teva as a reverse payment. The goal of that payment was to contribute to the costs associated with Teva's termination of its agreements with an API supplier and a supplier of finished formulations, the costs of destroying existing stocks of the Teva product and legal costs. In addition, in Servier's view, the amount was justified because it would avoid a dispute and secure the supply agreement with Teva.

[82] Recital 1561 of the decision at issue.

180. That argument is ineffective.

181. There is no need to determine whether a payment from an originator manufacturer to a generic company, which corresponds to the costs of destroying the latter's product and its compensation of third parties, can be regarded as justified in the context of an agreement such as that at issue. For the reasons already set out in points 156 to 160 above, this is doubtful in and of itself. As the Commission rightly stated in recital 1599 of the decision at issue, to which reference is made in paragraphs 680 and 689 of the judgment under appeal, those costs do not correspond to any marketable value received by Servier from Teva.

182. However, in the present case, the General Court observed, in paragraphs 687 to 698 of the judgment under appeal, that Teva had not in any event communicated any figure related to the costs for which it was allegedly compensated by the initial amount of GBP 5 million paid by Servier to Teva. Thus, the General Court considered that, even if account had to be taken of an assessment by the Commission of the costs liable, according to Teva, to constitute costs for which Servier was required to provide compensation under the settlement, including the value of the stock to be destroyed, those costs represented in total less than 40% of the initial amount.

183. Servier has not produced, before the General Court or the Court of Justice, any evidence capable of calling those findings into question or otherwise justifying the initial amount paid to Teva.

184. It follows from the foregoing considerations that the complaints by which Servier criticises the classification of the Teva agreement as a restriction of competition by object must be rejected.

(3) The Lupin agreement

185. According to Servier, the General Court also erred in classifying the Lupin agreement as a restriction of competition by object. First, the General Court wrongly concluded that the payment made by Servier to Lupin can be explained only by the parties' intention not to engage in competition (i). Second, the General Court was wrong to hold that the clauses of the Lupin agreement were harmful and misinterpreted the scope of that agreement (ii).

(i) The payment

186. It is apparent from the unchallenged findings in the judgment under appeal and the decision at issue that Servier and Lupin concluded two agreements on the same day in the form of a single agreement. The first was a settlement agreement containing clauses on the non-marketing of generic perindopril and the non-challenge of Servier's patents by Lupin; the second was a technology transfer agreement by which Servier purchased from Lupin three patent applications filed by the latter. Under that second agreement, Servier paid Lupin EUR 40 million. [83]

187. In paragraphs 805 to 828 of the judgment under appeal, the General Court conducted a careful and detailed analysis of the potential economic value of those patent applications in the light of all the parties' arguments in that regard. On completion of that analysis, it came to the conclusion that it was not possible to identify any economic value whatsoever of those applications.

[83] See points 40 to 42 of this Opinion.

188. Thus, the General Court found, inter alia, that Lupin had not transferred patents but mere patent applications and had given no assurance that a patent would be granted, that it would be valid or that any product or process claimed would be non-infringing (paragraphs 805 and 818); that the amount paid was greater than the investments made by another comparable generic company for the purposes of developing its own perindopril (paragraph 817); that Servier had not adduced any specific evidence to show that the acquisition of Lupin's patent applications for EUR 40 million could reasonably be regarded as a profitable investment or, at the very least, as being such as to generate income for it capable of compensating for the high cost of acquiring them (paragraph 820); that Servier's reference to other transactions comparable to the transfer agreement concluded with Lupin was irrelevant, in particular since Servier itself had been party to those transactions, some of which had also been classified as infringements of competition law by the Commission (paragraph 821); and that the opinion of an intellectual property consultant produced by Servier was worded in too general terms and had only limited probative value (paragraph 822).

189. The General Court therefore concluded, in essence, in paragraph 827 of the judgment under appeal, that the only quid pro quo which could explain the value transfer of EUR 40 million made by Servier to Lupin under the transfer agreement was the commitment made by Lupin not to compete under the settlement agreement concluded on the same day.

190. In the context of this appeal, Servier does not produce any evidence capable of demonstrating that that conclusion is vitiated by errors.

191. First, Servier claims that the General Court could not classify the payment of EUR 40 million as a reverse payment, because Servier had demonstrated its interest in the patent applications and submitted examples of transactions concluded on similar terms and an expert's opinion.

192. However, by those arguments, Servier simply repeats the arguments already raised by it at first instance without substantiating the nature of the errors allegedly committed by the General Court, which is inadmissible on appeal. In any event, the General Court could find, without committing any errors, in paragraphs 821 to 823 of the judgment under appeal, that that evidence produced by Servier did not make it possible to establish objectively any economic value whatsoever held by the patent applications purchased by Servier from Lupin for a sum of EUR 40 million.

193. Second, Servier's criticism of the General Court's finding in paragraph 816 of the judgment under appeal, namely that that amount exceeded the profits that Lupin could expect from its independent market entry during the first two to three years of marketing, is ineffective. The General Court did not rely on that finding to demonstrate the lack of proof that the patent applications transferred had any economic value, but rather on all the evidence set out in point 188 above. The comparison with Lupin's expected profits was only an additional factor confirming that the payment made by Servier to Lupin was high.

194. It follows that the General Court was right to conclude, in particular in paragraph 827 of the judgment under appeal, that the payment made by Servier to Lupin constituted an inducement not to engage in competition because it was apparent from the evidence examined that that payment could not be explained by the economic value of the patent applications transferred by Lupin to Servier.

195. The fact that, in that context, the General Court used the concepts of a transaction concluded at arm's length (or not) and of an 'inducive' payment, rather than the terminology used by the Court of Justice in the judgment in *Generics (UK) and Others* ('net gain' from the respective transfers of value), in no way changes the fact that, in essence, the General Court did indeed conduct the same test as that advocated by the Court of Justice in that judgment. That test consists in determining whether the transfer of value from Servier to Lupin could be explained by something other than those parties' interest in not engaging in competition. [84] Accordingly, seeking to find differences relating to the substance of that test between the judgment in *Generics (UK) and Others* and the judgment under appeal on the basis of minor differences in terminology is tantamount to demonstrating excessive formalism and playing with words.

196. In the present case, it is clear from paragraph 806 of the judgment under appeal that the concept of a 'transaction concluded at arm's length' allowed the General Court to determine, by examining the evidence summarised in point 188 above, whether the transfer of value made by Servier to Lupin corresponded to any economic value whatsoever of the patent applications transferred. This does not mean that the Commission is always required to have recourse to that concept when determining whether a transfer of value has a quid pro quo other than a commitment not to compete.

197. It is true that, as I have already stated in point 134 above, in its judgments in *Generics (UK) and Others* and *Lundbeck* v *Commission*, the Court set out that, in order to assess transfers of value made under a settlement agreement, it is important to take into consideration all the transfers of value made between the parties, whether they were pecuniary or non-pecuniary. According to the Court, in so doing, it is necessary to assess whether the gain arising from the transfers of value by the manufacturer of originator medicines in favour of the generic company may be justified by the existence of any quid pro quo by that company. [85]

198. However, the General Court cannot be criticised, in the present case, for having failed to put a figure to the net positive gain from the transfer of value made by Servier to Lupin, after deduction of the supposed value of the patent applications transferred by Lupin to Servier in return for that transfer.

199. It follows from the evidence taken into account by the General Court, as summarised in point 188 above, which has not been called into question by Servier, that the General Court found that Servier had failed to demonstrate that the patent applications purchased from Lupin had any economic value whatsoever that could have been deduced from the EUR 40 million transferred by Servier to Lupin in that respect.

200. However, even assuming that such patent applications must be deemed necessarily to have an economic value which has to be deducted from the amount paid by Servier to Lupin, if only the value corresponding to the investments made by Lupin to develop the technology covered by those applications, it must be recalled that the General Court considered, in paragraph 817 of the judgment under appeal, that the amount of EUR 40 million transferred to Lupin was greater than the investments made by another comparable generic company for the purposes of developing its own perindopril.

84 See again, in this respect, points 133 and 134 of this Opinion.

85 Judgments in *Generics (UK) and Others* (paragraphs 90 to 92), and in *Lundbeck* v *Commission* (paragraphs 115 and 134).

201. In that regard, the General Court cites recital 1962 of the decision at issue, which refers to the cost of developing Krka's perindopril, amounting to some EUR 1 to 4 million. Accordingly, even assuming that that amount has to be deducted from the amount transferred by Servier to Lupin, which actually echoes, in essence, the General Court's line of reasoning in paragraph 817 of the judgment under appeal, the net gain from that transfer would still come to at least EUR 36 million, for which there is no explanation other than Servier's acquisition of the competitive threat represented by Lupin.

202. That finding cannot be invalidated by the fact that paragraphs 59 to 61 of the judgment under appeal mention technology acquisition agreements relating, inter alia, to the purchase of a patent application and the related know-how by Servier for an amount of approximately EUR 13 million. In the absence of any information about the value of the patent applications concerned by the Lupin agreement, the view cannot be taken that they necessarily had a value of that magnitude. Similarly, the amount of 50 million United States dollars (USD) mentioned in paragraph 61 of the judgment under appeal relates merely to a memorandum of understanding for the acquisition of technology which was ultimately not concluded, and therefore it cannot be used in general terms as a guide to assessing the value of patent applications. In the light of the evidence summarised in point 188 above and the principles governing the burden of proof,[86] the General Court could therefore find, without erring in that regard, that it was not established that the net gain from the amount transferred by Servier to Lupin, even after deduction of the supposed value of the cost of developing the technology covered by Lupin's patents, was justified by any other quid pro quo from Lupin than that which consisted in Lupin's commitment not to engage in competition.

203. It follows that the complaint based on the incorrect assessment of the payment in the context of the Lupin agreement must be rejected.

(ii) The clauses of the Lupin agreement

204. In the first place, Servier claims that the General Court could not classify as anticompetitive the clause in the Lupin agreement providing that Lupin is not to challenge Servier's patents, since that clause did not prevent the continuation of the challenge to the 947 patent before the EPO by other opponents. That argument must be rejected, *mutatis mutandis*, for the same reasons as those already set out in points 171 and 172 above.

205. In the second place, Servier submits that nor could the General Court consider that the non-marketing clause relating to Lupin's products was anticompetitive, because it allowed, as the General Court itself acknowledged, Lupin's early entry to the market subject to certain conditions.

206. By this argument, Servier is attempting to call into question the General Court's assessment of the facts, in particular as regards the latter's interpretation of the clauses of the Lupin agreement.[87] However, even if the argument in question could be understood as relating to the General Court's legal characterisation of the facts, it would be bound to fail.

86 See points 97 and 98 of this Opinion and the case-law cited.

87 The interpretation of those clauses falls within the scope of the assessment of the facts, which is a matter for the General Court: see judgment of 29 October 2015, *Commission* v *ANKO* (C-78/14 P, EU:C:2015:732, paragraph 23).

207. By its claims, Servier appears to wish to show that the General Court erred in failing to recognise that the proven procompetitive effects of the Lupin agreement, which it itself noted, called into question the classification of that agreement as restrictive of competition by its object.

208. However, in paragraphs 830 to 857 of the judgment under appeal, the General Court took the view, following a careful analysis of the clauses of the Lupin agreement, that, even assuming that that agreement could be interpreted as allowing Lupin to enter the market, with its own products, at an earlier stage as compared with the foreseeable duration of the validity of the 947 patent, the hypothetical nature of the events that would allow such an early entry prevented any finding that the restrictive effect of the non-marketing clause was neutralised (paragraphs 849 to 851 and 856). Lupin's early entry (assuming it were permitted by the agreement under certain circumstances) was dependent, in any event, on a third party putting a generic product on the market, that is to say, a fact both outside the control of the parties to the contract and uncertain (paragraph 857). Servier does not question the facts upon which the General Court based these findings, and those findings do not reveal any distortion.

209. Servier's complaint alleging a distortion of the exchanges between Servier and Lupin concerning Sandoz's entry to the market (paragraphs 852 to 854 of the judgment under appeal) must be rejected. It is clear from reading the extract of that exchange contained in paragraph 853 of the judgment under appeal that the General Court in no way distorted that document by finding that it revealed Lupin's uncertainties as to its ability to enter the French market early without infringing the agreement. In addition, it follows from the summary contained in the preceding paragraph that that complaint is ineffective. The General Court found that, even assuming that the clauses of the agreement allowed an early entry, the circumstances that would make such entry possible were hypothetical and outside the parties' control.

210. In those circumstances, the General Court did not err in finding that the non-marketing clause was incapable of calling into question the classification of the Lupin agreement as restrictive of competition by object. As I have stated in point 126 above, only the presence of proven procompetitive effects capable of giving rise to a reasonable doubt that an agreement causes a sufficient degree of harm to competition is capable of calling such a classification into question. However, the General Court found in paragraph 857 of the judgment under appeal, in the light of the evidence summarised in point 208 above, that Lupin's early entry to the market (assuming it were permitted by the clauses of the agreement) was the result not of a clear choice of those parties but of hypothetical and uncertain circumstances. The General Court was therefore right to find that the parties could not rely on them in order to establish that the agreement is non-restrictive of competition.

211. Servier's argument that the General Court should have analysed the likelihood of the different scenarios occurring cannot invalidate that finding. As I have already observed in points 139 to 141 and 171 above, in the context of assessing whether an agreement such as the Lupin agreement is restrictive of competition, the Commission is not required to analyse likely future scenarios in relation to patent law.

212. In the third place, nor can Servier rely on either the alleged procompetitive nature of its commitment to supply products to Lupin or of the licences allegedly granted free of charge to Lupin to its other patents with a view to arguing alleged errors by the General Court in the classification of the clauses of the Lupin agreement. In the context of these appeal proceedings, Servier simply contests the General Court's findings in that regard, as set out in paragraphs 858 to 863 of the judgment under appeal, without producing any evidence capable of invalidating

those findings. In those circumstances, Servier does not properly call into question the General Court's conclusion that both the possibility of supply and the possibility of holding licences to other patents (assuming they were provided for in the clauses of the agreement) were nevertheless dependent equally on future hypothetical conditions being met and on the early market entry referred to in point 208 above.

213. Lastly, in the fourth and final place, Servier's argument that the General Court erred in the assessment of the scope of the Lupin agreement likewise cannot succeed. The question of whether the General Court was right to find, in paragraphs 870 to 877 of the judgment under appeal, that the scope of the Lupin agreement exceeded the scope of the 947 patent, which Servier contests, is not decisive. As the General Court found, in essence, in paragraph 878 of the judgment under appeal, even assuming that the scope of that agreement did not exceed that of the patent, that did not mean that the agreement was not anticompetitive. While the conclusion by the holder of a patent with a party allegedly infringing that patent of a settlement agreement that does not exceed the scope and duration of remaining validity of the patent does indeed constitute an expression of the intellectual property right of its holder, which permits that holder, inter alia, to oppose any infringement, the fact remains that that patent does not permit its holder to enter into contracts that are contrary to Article 101 TFEU. [88]

214. It follows that none of Servier's arguments contesting the classification of the Lupin agreement as a restriction of competition by object can be accepted.

(d) Conclusion

215. It follows from the foregoing considerations that Servier's arguments contesting the classification of the contested agreements as restrictions of competition by object must be rejected in their entirety.

4. The end date of the infringement constituted by the Lupin agreement (third part of the fifth ground)

216. Servier claims that the General Court erred in determining the end date of the infringement constituted by the Lupin agreement in certain Member States.

217. In recital 3136 of the decision at issue, the Commission explained that, in the present case, the end of the infringements was determined by the date from which the generic companies parties to the contested agreements were able to engage in competitive behaviour on the different markets concerned.

218. It follows from recital 2127 and from the table reproduced in recital 3134 of the decision at issue that the Commission found that, in respect of the EU markets, the infringement constituted by the Lupin agreement was established for the period from the conclusion of that agreement on 30 January 2007 [89] until 6 May 2009, the date on which the EPO annulled the 947 patent. However,

88 Judgments in *Generics (UK) and Others* (paragraph 97), and in *Lundbeck* v *Commission* (paragraph 121).

89 See point 40 of this Opinion. In recital 2127 of the decision at issue, the Commission did however consider that the infringement had started on a later date in Malta and Italy.

the Commission considered that the infringement had ceased earlier in certain countries, in particular, as far as is relevant to Servier's arguments in this ground,[90] in France, on 16 September 2008, the date on which Sandoz entered the market.[91]

219. However, as is clear from recital 410 of the decision at issue, Sandoz also entered the market of other Member States before 6 May 2009, namely, as far as is relevant to Servier's arguments in the context of this ground,[92] in Ireland in June 2008, in Belgium in July 2008, in Hungary in December 2008 and in the Czech Republic in January 2009.

220. Accordingly, as stated in paragraph 891 of the judgment under appeal, Servier argued before the General Court that the Commission should have concluded that the infringement constituted by the Lupin agreement had also ceased in Ireland, Belgium, Hungary and the Czech Republic when Sandoz entered the markets of those Member States. That argument was however rejected by the General Court.

221. In these proceedings, Server claims that the General Court erred in so doing. It substituted its own – and contradictory – reasons for the Commission's reasoning, but failed to explain why the Commission was justified in using the date of Sandoz's entry to the market as the end of the infringement in France, but not in Ireland, Belgium, Hungary or the Czech Republic.

222. The General Court considered, in paragraph 892 et seq. of the judgment under appeal, that it was necessary to determine whether the Commission had been wrong to conclude that the infringement had continued beyond the dates of Sandoz's entry in the Member States concerned. In that regard, the General Court found that Sandoz's generic product did not contain any of the alpha crystals protected by the 947 patent. It further held that it could follow from a reading of Clause 1.6 in conjunction with Clause 4.1(c) of the Lupin agreement[93] that that agreement allowed Lupin to enter the market with its own products once a generic product had entered the market without being met by an application for an injunction from Servier.

223. The General Court considered, however, that there was uncertainty as to whether that interpretation of the agreement was correct and whether the non-marketing clause contained therein allowed Lupin to enter the market if a product such as Sandoz's product entered the market. The General Court therefore concluded that, given that uncertainty, Lupin could fear that that clause would still prohibit it from entering in the market in such circumstances, particularly since Servier could still apply for an injunction, even in respect of a non-infringing product.

224. In the General Court's view, those uncertainties for Lupin concerning its ability to enter the market following Sandoz's entry were established, as far as the French market was concerned, by an exchange of letters between Lupin and Servier mentioned in paragraph 853 of the judgment

90 The Commission also took the view that the infringement had ceased earlier in the United Kingdom, on 6 July 2007, the date of the annulment of the 947 patent in the United Kingdom (point 26 of this Opinion), and in the Netherlands, on 12 December 2007, the date of Apotex's entry at risk to the market (point 27 of this Opinion, which refers to recital 193 et seq. of the decision at issue, according to which that entry took place on 13 December 2007).

91 See point 28 of this Opinion.

92 Sandoz also entered the market in the Netherlands and the United Kingdom in May 2008; however, in those countries, the infringement was, in any event, deemed to have ended on that date (see footnote 90 to this Opinion).

93 Summarised in paragraph 54 of the judgment under appeal and reproduced in recital 1038 of the decision at issue.

under appeal.[94] It follows from that exchange that Lupin's continued application of the non-marketing clause on the French market seems to have ended, at the earliest, at the start of April 2009.

225. The General Court concluded from that fact that, a fortiori, Servier had not adduced any evidence to show that, before 6 May 2009, Servier and Lupin considered that the non-marketing clause was no longer in force on the other four markets which Sandoz had entered. According to the General Court, the fact that that clause thus remained in force on account of the uncertainties linked to the ambiguity of the agreement was sufficient to allow the Commission to find that the consensus between Servier and Lupin, and thus the infringement, continued despite Sandoz's market entries on those four markets.

226. However, as Servier rightly claims, the ambiguity and uncertainties as to the application of the agreement following Sandoz's entry to the markets concerned, which allowed the view to be taken that the infringement on those markets had continued beyond that market entry, were not given as the reason for that finding in the decision. The General Court did therefore in fact substitute its own reasoning for that of the Commission, which constitutes an error of law.[95]

227. Furthermore, as Servier also rightly states, that reason, which the General Court bases in particular on an exchange between Servier and Lupin relating to the French market (see point 224 above), contradicts the finding made in recital 2127 of the decision, according to which the infringement constituted by the Lupin agreement ended on the French market following Sandoz's entry to that market.[96]

228. It follows that not only did the General Court substitute its own reasoning for that of the decision at issue but, in addition, its reasoning is also contradictory and does not make it possible to understand why the Commission used, in that decision, the date of Sandoz's market entry as the end of the infringement in France, but not in Ireland, Belgium, Hungary or the Czech Republic. It is therefore impossible to assess whether the considerations in that regard are well founded, and therefore the judgment under appeal is vitiated by a further failure to state reasons.[97]

229. The third part of the fifth ground is therefore well founded and, pursuant to the first sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the judgment under appeal must be quashed in part for failure to state reasons in so far as it rejected Servier's application for annulment of the decision at issue because it uses 6 May 2009 as the end date of the infringement constituted by the Lupin agreement in respect of Ireland, Belgium, Hungary and the Czech Republic.

230. In accordance with the second sentence of the first paragraph of Article 61 of that statute, the Court may itself, in those circumstances, give final judgment in the matter, where the state of the proceedings so permits. This is the case here, since it is apparent from examination of the decision at issue that that decision is likewise vitiated by a failure to state reasons as regards why

94 Mention has previously been made of this exchange in point 209 of this Opinion.

95 Judgment of 6 October 2021, *Sigma Alimentos Exterior* v *Commission* (C-50/19 P, EU:C:2021:792, paragraph 63).

96 This is true without prejudice to the merits of the General Court's interpretation of the content of the exchange itself (see point 209 of this Opinion).

97 See, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 63), and of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 130).

the Commission used the date of Sandoz's market entry as the end date of the infringement constituted by the Lupin agreement in France, but not in the other four countries in which Sandoz entered the market before 6 May 2009.

231. Furthermore, neither the decision at issue nor the explanations provided by the Commission in its pleadings and at the hearing in these appeal proceedings provide any clarification in this regard.

232. The Commission refers to recital 1039 of the decision at issue, according to which Clause 4.1(c) of the Lupin agreement had to be interpreted as meaning that Lupin was authorised to market its own perindopril in a particular jurisdiction, inter alia, if and when an independent third party sold perindopril and Servier did not apply for an interim injunction to prevent such sales.

233. The Commission states, without providing any reasons, that, in view of that interpretation, the non-marketing clause continued to apply even after Sandoz's entry to the market in Ireland, Belgium, Hungary and the Czech Republic, but not in France. In the latter respect, the Commission refers to recital 2327 of the decision at issue, which notes that, in France, Servier could not block Sandoz's entry on the basis of the 947 patent because Sandoz's product could not infringe that patent.

234. However, it is still not possible, on the basis of that statement, to understand why Servier could have blocked Sandoz's entry in the other four Member States concerned by relying on that patent, even though the product with which Sandoz entered those markets was discernibly the same as that marketed in France. At the hearing, the Commission repeated the explanation that that difference lay in the fact that, in France, Sandoz's entry opened the market to competition, whereas that was not the case in the other countries. However, that explanation was not substantiated in the decision at issue, in the Commission's pleadings or at the hearing.

235. It follows that the decision at issue must be annulled in part in that it fails to provide a statement of reasons as regards the end dates used for the infringement constituted by the Lupin agreement as regards Ireland, Belgium, Hungary and the Czech Republic.

236. The consequences of that partial annulment for the amount of the fine imposed on Servier in respect of the Lupin agreement are set out in point 282 et seq. below, in the part of this Opinion devoted to the fines.

5. The classification of the Niche agreement, on the one hand, and the Matrix agreement, on the other hand, as separate infringements (sixth ground)

237. In the context of its sixth ground, Servier claims that the General Court erred in law in confirming, in paragraph 1293 et seq. of the judgment under appeal, the classification of the agreements concluded by Servier with Niche/Unichem, on the one hand, and Matrix, on the other hand, as separate infringements. According to Servier, the General Court should have recognised that those agreements constituted a single infringement of Article 101 TFEU.

238. It follows from case-law that an infringement of Article 101 TFEU may result not only from an isolated act but also from a series of acts if those acts form part of an overall plan as a result of their identical object, which distorts the normal pattern of competition and pursues a single

economic aim.[98] The condition relating to a 'single objective' requires that it be ascertained whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the conduct implemented by other undertakings does not have an identical anticompetitive object or effect and, consequently, does not form part of an 'overall plan' as a result of its identical object distorting the normal pattern of competition within the internal market.[99]

239. It is important to clarify that, as is apparent from the case-law cited in the previous point, the question whether different instances of anticompetitive conduct should be classified as separate infringements or a single infringement is a question of law linked to the legal characterisation of the elements that make up the infringement, the observance of which is guaranteed by the Courts of the European Union.[100] As the General Court acknowledged in paragraph 1256 et seq. of the judgment under appeal, the parties concerned must therefore be able to challenge that classification. This is especially important if such a challenge may have an impact on the Commission's exercise of its power of assessment when determining fines.

240. Similarly, as has been explained, in essence, by Advocate General Pitruzzella, it is not possible to determine in the abstract whether the classification of several forms of conduct as separate infringements is more favourable for the undertakings concerned than their classification as a single infringement, since this depends on the circumstances of each specific case. The Commission cannot, therefore, at its discretion and for reasons of expediency, choose at will to classify instances of conduct as separate infringements rather than as a single infringement or vice versa. On the contrary, the Commission is required to demonstrate, subject to review by the EU judicature, that the criteria established for classifying conduct in one way or the other are satisfied.[101]

241. That being said, it must however be observed that, in the present case, the evidence produced by Servier does not show that the General Court erred in endorsing the Commission's finding that the Niche and Matrix agreements did not constitute a single infringement but in fact two separate infringements of Article 101 TFEU.

242. According to Servier, those agreements, which were signed on the same day by the same representative for Niche and Matrix and which sought to prevent the market entry of the product developed jointly by them, pursued an identical objective, were complementary and gave rise to coordination between the conduct of Niche and Matrix vis-à-vis Servier.

243. In paragraph 1296 et seq. of the judgment under appeal, the General Court considered that it was indeed undeniable that Servier pursued an identical objective with the Niche and Matrix agreements, namely definitively to settle the ongoing dispute and to avoid any future litigation

98 See to that effect, judgments of 8 July 1999, *Commission* v *Anic Partecipazioni* (C-49/92 P, EU:C:1999:356, paragraphs 81 to 83); 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 258); and of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 248).

99 Judgment of 16 June 2022, *Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea* v *Commission* (C-700/19 P, EU:C:2022:484, paragraph 107 and the case-law cited).

100 See, to that effect, judgment of 16 June 2022, *Sony Corporation and Sony Electronics* v *Commission* (C-697/19 P, EU:C:2022:478, paragraph 67).

101 Opinion of Advocate General Pitruzzella in *Sony Corporation and Sony Electronics* v *Commission*, *Sony Optiarc and Sony Optiarc America* v *Commission*, *Quanta Storage* v *Commission* and *Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea* v *Commission* (C-697/19 P to C-700/19 P, EU:C:2021:452, point 100 et seq.); see also judgment of 16 September 2013, *Masco and Others* v *Commission* (T-378/10, EU:T:2013:469, paragraph 57); see, moreover, to that effect, judgments of 27 February 2014, *InnoLux* v *Commission* (T-91/11, EU:T:2014:92, paragraph 138), and *LG Display and LG Display Taiwan* v *Commission* (T-128/11, EU:T:2014:88, paragraph 224).

concerning the Niche/Matrix product and to eliminate that product as a source of potential competition in return for payment. However, the General Court found that that fact alone could not establish that there had also been a common plan between Niche and Matrix when they signed their respective agreements with Servier. For several infringements to be classified as a single infringement, all those infringements must pursue the same overall objective. [102]

244. After examining the content of the Niche and Matrix agreements and the circumstances surrounding their signature, the General Court found that nor did those elements show that Niche and Matrix were pursuing a common plan with those agreements.

245. The evidence adduced by Servier in these appeal proceedings is incapable of demonstrating that that finding is erroneous.

246. Servier claims that, when analysing whether there was a common plan between Niche and Matrix, the General Court gave too much weight to the subjective intention of those companies, whereas classification as a single infringement can be based only on objective criteria.

247. Servier refers in this regard to paragraph 246 of the judgment in *Siemens* v *Commission*, [103] in which the General Court found that the classification of a series of agreements as a single infringement could not depend on a subjective intention of the parties to participate in such a single infringement, but had rather to be based on objective factors, including the common objective of those agreements. However, contrary to Servier's claim, the examination whether such a common objective exists does in fact have a subjective dimension relating to the intention and the motivation of the parties, which concerns whether those parties intended, by concluding the agreements at issue, to contribute to achieving a common economic objective.

248. In other words, in order to find there to be a single infringement, it does not, admittedly, have to be established that the various parties participating in that infringement intended to engage in common anticompetitive conduct. However, it does follow from the case-law cited in point 238 above that it must be established that those parties intended to contribute, by engaging in that conduct, to a common objective and the achievement of a single economic goal. The proof of such intention can, in turn, be based on any evidence capable of showing that the purpose of the conduct in question (here: the Niche and Matrix agreements) was to implement such a common objective and such a single economic goal.

249. Thus, for example, in the case relating to bathrooms invoked by Servier, the General Court in fact found there to be a single infringement despite the involvement of various complementary product sub-groups for a bathroom installation. The General Court was specifically able to arrive at that finding in that case because the practices at issue pursued the overall plan and the single objective of coordinating, within the same distribution system, the price increases that the parties to the concerted practice charged to the wholesalers, who were their common customer base. [104]

250. However, in the present case, the General Court specifically found, relying on evidence not called into question by Servier, that the content of the Niche and Matrix agreements and the circumstances that surrounded their conclusion did not show that, by those agreements, Niche and Matrix intended to implement such a common objective and such a single economic goal.

[102] See the case-law cited in point 238 of this Opinion.

[103] Judgment of 3 March 2011 (T-110/07, EU:T:2011:68).

[104] Judgment of 16 September 2013, *Masco and Others* v *Commission* (T-378/10, EU:T:2013:469, paragraph 59 et seq.).

Furthermore, nor does Servier state what such an objective or such a goal could have been. As the General Court found, there can indeed be no doubt that, *before* the conclusion of their respective agreements with Servier, Niche and Matrix were pursuing the common objective of placing on the market the generic perindopril manufactured by Matrix and marketed by Niche.

251. However, it does not appear possible to determine any common objective which those companies could have subsequently pursued by signing their respective agreements with Servier. As the General Court stated, different unchallenged evidence in the file shows that Matrix, which was informed of the ongoing negotiations between Servier and Niche only two days before signing its own agreement with Servier, rather than pursuing any common plan with Niche seized the opportunity offered by Servier. This is confirmed by the fact that Matrix's participation in the negotiations with Servier primarily concerned the amount of the transfer of value.

252. Furthermore, nor is it possible to understand why abandoning their common plans to develop and market a generic version of perindopril could in turn have constituted a new 'common project' for Niche and Matrix, since abandoning plans cannot be a project or an objective per se. It thus in fact appears that Niche and Matrix each in turn seized the opportunity offered by Servier to obtain a quite significant transfer of value of greater commercial advantage to them than pursuing their own market entry plans. [105]

253. Accordingly, nor can it be concluded on the basis of Servier's argument that the Niche and Matrix agreements shared the common goal of settling the dispute with Servier and avoiding future litigation with Servier concerning their product that those agreements constituted a single infringement of Article 101 TFEU. Thus, even if each of those agreements did in fact pursue that aim separately, their common objective in that regard is unclear. As I have just demonstrated, the mere fact that the dispute with Servier concerned the product developed jointly by Niche and Matrix cannot establish such a common objective.

254. It follows from the foregoing that the sixth ground must be rejected.

B. The fines

255. With regard to the fines imposed on Servier for the conclusion of the contested agreements, it is necessary to examine, first, the errors of law invoked by Servier in the context of its seventh ground (1). Next, the consequences of upholding the third part of the fifth ground relating to the end dates of the infringement constituted by the Lupin agreement must be determined in order to recalculate the fine imposed on Servier in that respect (2).

1. The errors of law relating to the fines invoked by Servier (seventh ground)

256. In the context of its seventh ground, Servier claims that the General Court erred, first, because it did not annul the fine set by the Commission in the light of the principle that offences and penalties must be defined by law. Second, the General Court took insufficient account of the principle of proportionality and failed to censure the Commission's assessment of the gravity of the infringements.

[105] See points 144 to 162 of this Opinion.

257. Before dealing with those arguments, it must be recalled that the General Court's exercise of the unlimited jurisdiction conferred on it by Article 261 TFEU is reviewed by the Court of Justice only in relation to manifest errors.[106] Such errors may be found to exist, in the first place, to the extent that the General Court has failed to take into account the extent of its powers in the context of its unlimited jurisdiction,[107] in the second place, when it has given insufficient consideration to all the relevant facts[108] and, in the third place, when it has applied incorrect legal criteria,[109] in particular in the light of the principles of equal treatment[110] and proportionality.[111]

258. It follows that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings. Accordingly, only where the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, does it have to find that the General Court erred in law.[112]

(a) The principle that offences and penalties must be defined by law

259. According to Servier, the General Court erred in not accepting its argument that imposing penalties in respect of the contested agreements infringed the principle that offences and penalties must be defined by law. The issues raised by those agreements were so novel and complex that it could not be foreseen that the agreements constituted infringements. The General Court acknowledged such unforeseeability in paragraph 1666 of the judgment under appeal, but failed to draw any conclusion from that fact, meaning that the judgment under appeal is vitiated by a failure to state reasons.

260. This line of argument cannot succeed.

261. It is true that it follows from case-law that, while the principle that offences and penalties must be defined by law, now enshrined in Article 49 of the Charter of Fundamental Rights of the European Union, cannot be interpreted as precluding the gradual clarification of the rules on criminal liability, that principle does however preclude the retroactive application of a judicial

106 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 365).

107 See, in this regard, my Opinions in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* (C-105/04 P, EU:C:2005:751, point 137), and in *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:248, point 190); see, in the same vein, judgments of 18 July 2013, *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraphs 155 and 156), and of 24 October 2013, *Kone and Others* v *Commission* (C-510/11 P, not published, EU:C:2013:696, paragraphs 40 and 42).

108 Judgments of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraph 128); of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 244 and 303); and of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 125).

109 Judgments of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraph 128); of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 244 and 303); and of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 125).

110 Judgments of 16 November 2000, *Weig* v *Commission* (C-280/98 P, EU:C:2000:627, paragraphs 63 and 68), and of 16 November 2000, *Sarrió* v *Commission* (C-291/98 P, EU:C:2000:631, paragraphs 97 and 99).

111 Judgments of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 126), and of 18 July 2013, *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraph 165).

112 Judgments of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraph 129); of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 245); of 30 May 2013, *Quinn Barlo and Others* v *Commission* (C-70/12 P, not published, EU:C:2013:351, paragraph 57); and of 26 January 2017, *Villeroy & Boch Austria* v *Commission* (C-626/13 P, EU:C:2017:54, paragraph 86).

interpretation of a rule establishing an offence, the result of which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation adopted at that time in the case-law on the legal provision at issue. [113]

262. However, it must be observed that the General Court did not make any error in applying the criterion of foreseeability thus established in the circumstances of the present case and in finding that, here, the principle that offences and penalties must be defined by law did not preclude the contested agreements from being penalised on the basis of Article 101 TFEU.

263. Thus, it is apparent from the considerations of the General Court already examined above that it was right to find that the contested agreements had the object of inducing the generic companies to refrain from entering the market independently during the agreed periods, by means of transfers of value from Servier that had no quid pro quo other than them refraining from such entry.

264. In order to arrive at that finding, the General Court applied a simple and clear methodology, consisting in examining whether the transfers of value made by Servier to the generic companies in accordance with the settlement agreements or the agreements linked to them were inherent in the settlement of disputes, that is to say, whether they could be explained by something, and had a quid pro quo for Servier, other than the generic companies' commitment not to engage in competition. Such methodology is a logical necessity when assessing transfers of value between undertakings which conclude an agreement under which one of them is required to refrain from entering the market. [114]

265. In applying that methodology, the General Court found, without making any error, that the transfers of value made by Servier to the generic companies had no quid pro quo other than those companies refraining from entering the market. The General Court could therefore rightly conclude that it had been agreed in the contested agreements that Servier would pay the generic companies not to enter the market, and therefore the agreements are market exclusion agreements.

266. In those circumstances, the General Court did not err in finding, in paragraphs 1661 to 1666 of the judgment under appeal, that, as a party to those agreements, Servier could not be unaware that they could be caught by the prohibition laid down in Article 101 TFEU. It is perfectly clear from a literal reading of that provision that agreements between competitors intended to exclude certain competitors from the market are unlawful.

267. The complexity of the contested agreements and their context, to which Servier draws attention, cannot call that assessment into question.

268. As the General Court acknowledged, in essence, in paragraphs 1661, 1666 and 1667 of the judgment under appeal, such complexity could indeed explain the length of the decision at issue, since the unlawful nature of the agreements at issue might not have been evident to an outside observer. However, this has no bearing on the fact that, when analysing those agreements for the purpose of implementing competition law, the Commission applied simple and well-established principles. In accordance with those principles, agreements must be classified as restrictions of

[113] Judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 217 and 218), and of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraph 41).

[114] See, in this regard, points 129 to 134 and 195 of this Opinion.

competition by object when it is apparent from their examination – as complex as that might be – that the transfers of value made by one economic operator to another economic operator can only be explained by the commercial interest of those operators not to engage in competition on the merits. [115]

269. It follows from the foregoing that the General Court did not err in finding that Servier could not be unaware that, if the only quid pro quo for the transfers of value made by it in favour of the generic companies consisted in those companies refraining from entering the market, agreements providing for such transfers were restrictive of competition, regardless of whether or not there was a complex background to those agreements in terms of patent law.

270. The complaint alleging infringement of the principle that offences and penalties must be defined by law must therefore be rejected.

(b) The principle of proportionality and the assessment of the gravity of the infringements

271. Servier further claims that the judgment under appeal is vitiated by errors because the General Court dismissed its pleas in law concerning the proportionality of the fines and the assessment of the gravity of the infringements at issue.

272. According to Servier, in order to assess the proportionality of the fines imposed on Servier, the General Court should have taken into account the complexity and the novelty of the issues raised by the contested agreements and the non-secret nature of those agreements as well as the relevant patent rights and the small size of Servier's market shares.

273. Those factors cannot, however, reveal errors made by the General Court when assessing the proportionality of the fines in the light of the gravity of the infringements concerned.

274. First, the General Court found, in essence, in paragraph 1786 et seq. of the judgment under appeal, that, since the anticompetitive objective of the agreements at issue and the foreseeability of that objective for Servier were established, the background to the agreements in relation to patents, just like whether or not they were secret, was immaterial for the purpose of assessing their gravity and incapable of calling into question the proportionality of the fines imposed by the Commission.

275. In so doing, the General took due account of all the relevant elements and did not err in their assessment. As I have already observed in points 267 and 268 above, Servier cannot rely on the patent-related context or the alleged complexity of that context to contest the inherently anticompetitive nature of the contested agreements.

276. In that context, contrary to what Servier alleges, it is wholly irrelevant whether or not the patent in question is fictitious. It is established that even a genuine patent does not give its holder the right to guard against actions seeking to contest the patent's validity by making payments to its competitors. [116]

[115] See, in this regard, judgments in *Generics (UK) and Others* (paragraphs 87 and 88), and in *Lundbeck* v *Commission* (paragraphs 114 and 167).

[116] See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 113 and 114 and the case-law cited).

277. Second, Servier claims that the General Court erred in refusing to take account of the small size of Servier's market shares for the purpose of calculating the fines. Thus, the General Court found, in paragraphs 1602 and 1603 of the judgment under appeal, in the context of its examination of the relevant product market for the purpose of applying Article 102 TFEU, that the Commission erred in defining that market and that its calculation of Servier's market shares was therefore necessarily incorrect. However, in paragraph 1954 of the judgment under appeal, the General Court refused to take account of that finding for the purpose of calculating the fines, even though it found that Servier's market shares were indeed smaller than they had been found to be by the Commission.

278. However, notwithstanding whether the General Court was right to find that the Commission incorrectly defined the product market for the purpose of applying Article 102 TFEU, an issue which is not addressed in this appeal,[117] it must be held, in any event, that the General Court did not err in considering, in paragraph 1954 of the judgment under appeal, that the fines imposed on Servier were not disproportionate irrespective of the accepted size of Servier's market shares.

279. In so doing, the General Court, inter alia, referred to the account taken by the Commission of the fact that Servier had committed several infringements, which albeit separate related to the same product and, to a large extent, the same geographic areas and the same periods. As the General Court noted in paragraph 1951 of the judgment under appeal, in that context, the Commission decided, in order to avoid a potentially disproportionate result, to limit, in respect of each infringement, the proportion of the value of sales made by Servier taken into account in order to determine the basic amount of the fine. The Commission thus applied a correction which led to an average reduction of 54.5% in the overall values of the sales relating to the various infringements of Article 101 TFEU (recital 3128 of the decision at issue).

280. Third and finally, Servier's claim that the fines should have been reduced because the agreements censured allegedly did not trigger any delay in market entry must likewise be rejected. As I have stated in points 139 to 141, 171 and 211 above, from the perspective of competition law, what matters is not whether, in the absence of the agreements, the generic companies would have entered the market earlier on account of future developments in terms of patents, which were unknown when the agreements were concluded and are outside the parties' control. The crucial issue is whether the possibility of such entry was eliminated following a substitution by the parties of practical cooperation between them for the risks of normal competition. Reliance on developments in terms of patents that occurred after the conclusion of an agreement and unconnected with that agreement amounts to a confusion of the inherently harmful nature of a market exclusion agreement in return for payment and its capacity to produce restrictive effects when it is concluded with the possibility of such an agreement not producing any actual significant effects on competition at a later stage, on account of circumstances outside the control of the parties, for example if the patent is annulled as a result of an action brought by a third party.

281. It follows from the foregoing that the complaint alleging errors by the General Court in assessing the gravity of the infringements and the proportionality of the fines must also be rejected, as must the ground relating to the General Court's alleged errors in assessing the fines in its entirety.

[117] See, in this respect, my Opinion delivered today in parallel Case C-176/19 P, *Commission* v *Servier and Others*.

2. The fine imposed on Servier in respect of the Lupin agreement (third part of the fifth ground)

282. It follows from the observations in points 229 and 235 of this Opinion that the third part of the fifth ground must be upheld, and that the judgment under appeal must be set aside and the decision at issue annulled in so far as they found that the end date of the infringement constituted by the Lupin agreement had to be set as 6 May 2009 in relation to Ireland, Belgium, Hungary and the Czech Republic.

283. In its pleadings and the form of order sought by it,[118] Servier claims that the Court should adjust the end date of the infringement constituted by the Lupin agreement in those countries to the dates on which Sandoz entered the market, namely, according to recital 410 of the decision at issue, June 2008 for Ireland, July 2008 for Belgium, December 2008 for Hungary and January 2009 for the Czech Republic.

284. However, in view of the inadequate statement of reasons provided in the decision at issue concerning the end of the infringement constituted by the Lupin agreement in those countries, it is impossible for the EU judicature to ascertain whether the Commission correctly determined the end dates of the infringement in that decision. Similarly, nor is it possible to determine whether any other end dates of that infringement are well founded.

285. Accordingly, the Court cannot determine the end dates of the infringement constituted by the Lupin agreement for the four countries concerned and adjust the fine accordingly, as Servier requests. In those circumstances, the fine imposed on Servier by the decision at issue must be annulled in part in so far as it was imposed for the commission of that infringement in those countries.

286. To that end, it is important to recall that, in the present case, it is apparent from recital 3063 of the decision at issue that the Commission applied the methodology established in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003.[119] [120]

287. In addition, it follows from recital 3119 et seq. of the decision at issue that the Commission imposed a fine on Servier in respect of each of the five contested agreements, which were understood to be five separate infringements of Article 101 TFEU, and one fine in respect of the infringement of Article 102 TFEU. As for the five fines imposed in respect of the contested agreements, the Commission first of all, in accordance with the methodology in the Guidelines on the method of setting fines, determined a basic amount, corresponding to the sum of a variable amount and (where appropriate) an additional amount. The variable amount corresponds to an adjusted proportion of the value of sales of the goods concerned to which the respective infringements relate, multiplied by the duration of those infringements. Since, in the present case, the Commission did not apply aggravating or mitigating circumstances, or other modifying factors, the final amounts of the fines correspond to the basic amounts.

118 See point 53 of this Opinion.

119 Council Regulation 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).

120 OJ 2006 C 210, p. 2.

288. Finally, it follows from recital 3124 et seq. and Article 7 of the decision at issue, and from a table produced by the Commission before the General Court, that the Commission made that calculation for each Member State concerned by each of the respective agreements and then added the amounts thus obtained in order to set the amounts of the fines imposed in respect of each of the agreements.[121] The amount of the fine imposed on Servier in respect of the infringement constituted by the Lupin agreement for all the countries concerned by that infringement comes to EUR 37 102 100 (Article 7(5)(b) of the decision at issue).

289. In order to take account of the partial annulment of the decision at issue in accordance with the foregoing considerations, the fine imposed on Servier must therefore be annulled in so far as it was imposed for the infringement constituted by the Lupin agreement in Ireland, Belgium, Hungary and the Czech Republic, which corresponds to a total of EUR [*confidential*].

290. The table below shows how that amount is obtained.

	Adjusted Value of Sales	Variable Amount	Duration	Final Amount
IE	[*confidential*]	11%	2.25	[*confidential*]
BE	[*confidential*]	11%	2.25	[*confidential*]
HU	[*confidential*]	11%	2.25	[*confidential*]
CZ	[*confidential*]	11%	2.25	[*confidential*]
Total IE + BE + HU + CZ				[*confidential*]
Total for all countries concerned by Lupin agreement				37 102 100

291. Thereafter, it will be for the Commission, pursuant to Article 266 TFEU, to take the necessary measures to comply with the judgment annulling the decision at issue. Where, as in the present case, the annulment of the contested decision is based on a procedural defect, such as the failure to state adequate reasons, and the Courts of the European Union do not themselves rule on the substance of the infringement or on the penalty, the institution which adopted the act that has been annulled may reopen the procedure at the stage at which the irregularity identified was committed and exercise its power to impose penalties anew.[122]

[121] See Annex G.1, produced by the Commission in reply to a question put by the General Court on 28 June 2016. See also the table produced by Servier in Annex P.03 to its appeal, which is based on the method of calculation used by the Commission in the abovementioned Annex G.1. Using that method of calculation, the final amount of the fine imposed in respect of the Lupin agreement for each Member State is obtained as follows: ((Adjusted Value of Sales × Variable Amount) × Duration) + (Value of Sales × Additional Amount) (the additional amount being set at 0 in the case of the Lupin agreement; see recital 3139 of the decision at issue). The amounts thus obtained for each Member State are then added together for each of the agreements.

[122] Judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 60 to 62 and 693 to 695), and of 24 September 2019, *Printeos and Others* v *Commission* (T-466/17, EU:T:2019:671, paragraphs 56 to 58).

3. Conclusion relating to the fines

292. It follows from those considerations that the fine imposed on Servier in respect of the Lupin agreement must be annulled and Servier's arguments relating to the fines must be otherwise rejected, and therefore the remainder of the fines as determined by the Commission and the General Court remains unchanged.

C. Interim conclusion

293. In accordance with the findings made in points 229, 235 and 289 of this Opinion, further to the third part of the fifth ground being upheld, first, point 5 of the operative part of the judgment under appeal should be set aside in so far as it rejects Servier's application for annulment of the decision at issue because it uses 6 May 2009 as the end date of the infringement constituted by the Lupin agreement for Ireland, Belgium, Hungary and the Czech Republic and sets the fine imposed on Servier for that infringement accordingly.

294. Next, Article 5(b) and Article 7(5)(b) of the decision at issue must be annulled in so far as they set the end date of the infringement committed by Servier with the Lupin agreement for Ireland, Belgium, Hungary and the Czech Republic as 6 May 2009 and take that date into account for the calculation of the fine imposed on Servier in respect of that infringement. [123]

295. Finally, since none of the other grounds relied on by Servier can succeed, the appeal must be dismissed as to the remainder.

V. Costs

296. Pursuant to Article 184(2) of its Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

297. First of all, under Article 138(3) of the Rules of Procedure, which is applicable to appeal proceedings pursuant to Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the light of the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

298. In the present case, Servier has been successful in relation to the third part of its fifth ground, relating to the end date of the infringement constituted by the Lupin agreement in Ireland, Belgium, Hungary and the Czech Republic, and the Court may give final judgment and annul the decision at issue in that respect. However, Servier has been unsuccessful as regards the remainder of its arguments raised in its total of seven grounds.

299. With regard to the costs related to the proceedings at first instance, it is important to point out that they are concerned by these appeal proceedings only in so far as they relate to the pleas in law at first instance that are at issue in these appeal proceedings.

[123] This is without prejudice to the consequences of this annulment for the finding of the infringement constituted by the Lupin agreement in respect of Lupin (judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 49 et seq.).

300. In the light of those circumstances, it appears justified that Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS bear, jointly and severally, their own costs and four fifths of the Commission's costs related to the appeal proceedings and to the proceedings at first instance, in so far as the latter costs relate to the pleas in law concerned by these appeal proceedings. In turn, the Commission is to bear one fifth of its own costs related to the appeal proceedings and to the proceedings at first instance, in so far as the latter costs relate to the pleas in law concerned by these appeal proceedings.

301. Next, in accordance with Article 184(4) of its Rules of Procedure, the Court may decide that an intervener at first instance who has participated in the written or oral part of the proceedings before the Court is to bear its own costs. Since the EFPIA participated in the written part of these appeal proceedings, it should therefore be ordered to bear its own costs related to the appeal proceedings.

302. Finally, it follows from Article 140(1) in conjunction with Article 184(1) of the Rules of Procedure that Member States which have intervened in the proceedings are to bear their own costs. The United Kingdom should therefore be ordered to bear its own costs related to the appeal proceedings.

VI. Conclusion

303. On the basis of the foregoing considerations, I propose that the Court rule as follows:

(1) Point 5 of the operative part of the judgment of the General Court of 12 December 2018, *Servier and Others* v *Commission* (T-691/14, EU:T:2018:922), is set aside in so far as it rejects the application 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)), because that decision uses 6 May 2009 as the end date of the infringement referred to in Article 5(b) thereof in respect of Ireland, Belgium, Hungary and the Czech Republic, and sets the fine imposed by Article 7(5)(b) thereof on Servier SAS and Les Laboratoires Servier SAS accordingly.

(2) Point 6 of the operative part of the judgment of 12 December 2018, *Servier and Others* v *Commission* (T-691/14, EU:T:2018:922), is set aside in so far as it concerns the costs incurred by Servier SAS, Servier Laboratories Ltd, Les Laboratoires Servier SAS and the European Commission at first instance in relation to the pleas of law at first instance concerned by these appeal proceedings.

(3) Article 5(b) and Article 7(5)(b) of Decision C(2014) 4955 final are annulled in so far as they use 6 May 2009 as the end date of the infringement referred to in Article 5(b) thereof in respect of Ireland, Belgium, Hungary and the Czech Republic, and set the fine imposed by Article 7(5)(b) on Servier SAS and Les Laboratoires Servier SAS accordingly.

(4) The fine imposed by the Commission under Article 7(5)(b) of Decision C(2014) 4955 final on Servier SAS and Les Laboratoires Servier SAS is annulled in so far as it was imposed for the commission of the infringement referred to in Article 5(b) thereof in Ireland, Belgium, Hungary and the Czech Republic.

(5) The appeal is dismissed as to the remainder.

(6) Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS are to bear, jointly and severally, their own costs and four fifths of the costs of the Commission related to the proceedings at first instance, in so far as those costs relate to the pleas in law at first instance concerned by these appeal proceedings.

(7) Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS are to bear, jointly and severally, their own costs and four fifths of the costs of the Commission related to the appeal proceedings.

(8) The Commission is to bear one fifth of its own costs relating to the proceedings at first instance, in so far as those costs are related to the pleas in law at first instance concerned by these appeal proceedings.

(9) The Commission is to bear one fifth of its own costs related to the appeal proceedings.

(10) The European Federation of Pharmaceutical Industries and Associations and the United Kingdom of Great Britain and Northern Ireland are to bear their own costs related to the appeal proceedings.